THE DISPUTE RESOLUTION REVIEW

Eleventh Edition

Editor
Damian Taylor

THE LAWREVIEWS

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ELEVENTH EDITION

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PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 36 jurisdictions. It offers a guide to those who are faced with disputes that frequently cross international boundaries. As is often the way in law, difficult and complex problems can be solved in a number of ways, and this edition demonstrates that there are many different ways to organise and operate a legal system successfully. At the same time, common problems often submit to common solutions, and the curious practitioner is likely to discover that many of the solutions adopted abroad are not so different to those closer to home.

I wrote with hope in last year's preface that in 2019 we would have increased certainty about the future laws and procedures that will apply to cross-border litigation in the United Kingdom and across the European Union. But despite the huge volume of analysis and commentary across the legal sector, we seem to be no further forward. Instead, the UK Parliament is to vote on the proposed deal by the end of January 2019. Given the interwoven nature of UK and EU law, the next few months will be of huge importance to the legal profession in my home jurisdiction and have a long-lasting impact on how disputes (many of which are between international parties) are resolved in the United Kingdom. This edition includes an updated Brexit chapter that charts the progress (or lack thereof) made over the past year

This 11th edition follows the pattern of previous editions where leading practitioners in each jurisdiction set out an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. *The Dispute Resolution Review* is also forward-looking, and the contributors offer their views on the likely future developments in each jurisdiction. Collectively, the chapters illustrate the continually evolving legal landscape, responsive to both global and local developments.

Finally, I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in *The Dispute Resolution Review*. Their biographies start at page 573 and highlight the wealth of experience and learning from which we are fortunate enough to benefit. I would also like to thank the whole team at Law Business Research who have excelled in managing a project of this size and scope, in getting it delivered on time and in adding a professional look and finish to the contributions.

Damian Taylor
Slaughter and May
London
February 2019

Chapter 1

BREXIT

Damian Taylor and Robert Brittain[1]

I INTRODUCTION

On 23 June 2016, the people of the UK were asked whether they believed their country should remain a member of the European Union or leave. On a turnout of 72.2 per cent, a majority (51.9 per cent) voted to leave. The UK government announced it would give effect to the referendum's result by following the process set out in Article 50 of the Treaty on European Union (TEU). Accordingly, on 29 March 2017, the Prime Minister, acting with the authority of Parliament, gave the European Council formal notice of the UK's intention to withdraw from the EU. In the period since then, the UK and EU27 have been negotiating an agreement for an orderly departure. In December 2018, a final draft agreement was endorsed by the UK government and the European Council. Ratification of the agreement requires the consent of the UK Parliament and the European Parliament. At the time of writing, it is not clear whether this will happen. Even if the agreement is not concluded, however, the effect of Article 50 is that the UK will leave the EU regardless on the second anniversary of the Prime Minister's notification: 29 March 2019.[2]

This special chapter is concerned with the impact of Brexit on the procedural law that underpins dispute resolution in England. Specifically, we consider:

a the determination of governing law;
b the jurisdiction of the courts over disputes;
c the cross-border enforcement of judgments; and
d international arbitration.

Much of that law is, directly or indirectly, European in origin and will, in theory, cease to apply in and to the UK when it leaves the EU. In practice, a combination of unilateral action by the UK and transitional arrangements (agreed or unilateral) should mitigate to a significant extent the legal effects of Brexit in this area. In due course, the UK's aspiration is to conclude a new relationship agreement with the EU that would largely replicate on a permanent basis the pre-Brexit regime.

1 Damian Taylor is a partner and Robert Brittain is a professional support lawyer at Slaughter and May.

2 That outcome could be avoided in only two ways: the UK and EU27 could agree to extend the two-year period mandated by Article 50; or the UK could abandon Brexit altogether by exercising its unilateral right to revoke the notice of intention to withdraw. The former possibility would not alter the analysis in this chapter of Brexit's effects albeit it would delay them. The latter possibility is not considered in this chapter, not least because it would produce no change in the legal *status quo*.

II RELEVANT LEGAL CONSEQUENCES OF BREXIT – A SUMMARY

The foundation of the EU and its unique legal order are the various treaties entered into by the Member States. As a matter of international law, the UK is bound by these treaties for as long as it is a party to them. However, EU law only produces effects in the UK's domestic legal order because an Act of Parliament – the European Communities Act 1972 – says it does; the 1972 Act is the pipe through which EU law flows into UK law. The UK's notification under Article 50 TEU has set in train a process by which the UK will cease to be bound by the treaties, cutting off the flow of EU law at its source.

i Legislating for Brexit

Just as the UK's entry into the EU's forerunner was given domestic effect by statute, so will the UK's withdrawal. Two Acts of Parliament will be of central importance and are discussed briefly below (the first is already law; the second has not even been introduced to Parliament yet, and only will be if the withdrawal agreement is ratified).

a The European Union (Withdrawal) Act 2018 received royal assent in June 2018. On the day of the UK's exit from the EU, it will repeal the 1972 Act, dismantling the mechanism by which EU law takes automatic effect in the UK. At the same time, in order to the avoid the legal vacuum that would otherwise result from the wholesale and immediate disapplication of EU law, the 2018 Act will preserve and convert into domestic UK law all EU law as it applies to the UK at the moment before exit. However, not all of this retained EU law will function as it did while the UK was a Member State. This is particularly the case where the law in question imposes reciprocal rights and obligations on Member State courts: if the UK is no longer a Member State, it can no longer require or expect reciprocal treatment. As discussed below, the current EU regime on jurisdiction and judgments is an example of this kind of law. The 2018 Act accordingly provides Ministers with powers to amend retained EU legislation or to revoke it entirely.

b A Withdrawal Agreement Implementation Act will be needed to give effect to in UK law to any withdrawal agreement ratified by the UK and EU legislatures. One of the major functions of the withdrawal agreement would be extend the application of EU law to the UK for the duration of a transitional period, notwithstanding that the UK would have ceased to be a Member State on 29 March 2019. Accordingly, a Withdrawal Agreement Implementation Act would, among other things, suspend the revocation of provisions in the 1972 Act that give domestic effect to EU law.

ii Summary of consequences for civil justice cooperation

What does this mean for the future of EU law in the field of civil justice cooperation? Broadly, and as discussed in more detail in the following sections:

a The current EU rules for the determination of governing law will continue to apply to and in respect of the UK as they do now. Their nature and operation means they can easily be transposed into UK law and still produce the same effects in the UK and in the EU27. There should be no impact on existing English governing law clauses and no reason for commercial parties not to continue to choose English law to govern their contracts.

b The current EU rules for the determination of which country's courts have jurisdiction over a dispute and the enforcement of resulting judgments are premised on Member

State reciprocity; they cannot unilaterally be domesticated by a non-Member State and continue to produce the same effects. Alternatives are therefore required. The UK is acceding to the Hague Convention on Choice of Court Agreements, which is similar to (though less comprehensive than) the current European regime but does at least cover the 27 remaining Member States (as well as Singapore, Mexico and Montenegro). The UK has also said it wishes to accede in its own right to the Lugano Convention (which extends the basic framework of the EU regime to Iceland, Norway and Switzerland) and to negotiate with the EU27 a new post-exit agreement that replicates to the fullest extent possible the current EU regime.

iii The immediate term: deal or no deal?

If the withdrawal agreement negotiated by the UK and EU is ratified, the UK would still leave the EU on 29 March 2019 but EU law would continue to apply in and to the UK during a transitional period. That period would last until at least 31 December 2020 and, if the parties agree, could be extended for up to another two years after that. Legal proceedings started in the courts of the UK and the EU27 at any time before the end of the transition period would be subject to grandfathering provisions; the EU rules would continue to be applied to questions regarding jurisdiction and to the reciprocal enforcement of judgments across the UK and EU27. However, jurisdiction agreements with a UK element signed before the end of the transition period would not be grandfathered. That means they would not be upheld by EU27 courts in accordance with the current EU rules.

If no withdrawal agreement were to be concluded, the UK would leave the EU on 29 March 2019 and EU law would immediately cease to apply. Any mitigation of the legal consequences of this would take the form of unilateral action by each side. The UK has, for some time, been signalling a programme of proposed steps. Some mimic provisions of the draft withdrawal agreement. For instance, legal proceedings started before exit would continue, after exit, to be treated by UK courts in accordance with EU rules. But, of course, any such unilateral action by the UK could only bind courts and parties in the UK. The EU has shown little or no sign of taking equivalent action, beyond warning court users that the current rules will cease to apply and, if they wish to retain the benefit of EU rules, they need to reduce or eliminate their exposure to UK laws and courts. Whether the EU would maintain that approach in the event a no-deal Brexit comes to pass is an open question. Doubt in this area increases the importance of the one cross-border instrument in the current regime to which the UK can unilaterally accede: the Hague Convention on Choice of Court Agreements.

iv Post-exit: a new relationship agreement?

It is important not to forget that the UK's departure in March 2019 is only the start of the Brexit process. As soon as the UK leaves the bloc, whether on the basis of the withdrawal agreement or without a deal, attention will switch to the negotiation of a new relationship agreement. If the withdrawal agreement is ratified, the transition period is intended to afford the parties sufficient time to allow the negotiation of that new relationship. If there is no deal, the resulting legal 'cliff edge' would only intensify the pressure to conclude a new permanent relationship agreement

What would that new relationship look like from a civil justice cooperation perspective? The UK government has said since the summer of 2017 that it wants to replicate the effects of the current regime. The EU has, to date, been more guarded, expressing a hope for cooperation

only in the fields of family and criminal law. The parties' joint position was set out in a political declaration on the framework for a future relationship, published in November 2018 alongside the final version of the withdrawal agreement. The political declaration does not mention civil justice cooperation. However, that does not mean that there is no prospect of an agreement. The Lugano Convention is a precedent for EU civil justice cooperation with third countries, one that the UK will seek to join post-exit and use as a basis for further and deeper cooperation with the EU.

III GOVERNING LAW

i The present position

Where the laws of different countries could govern a contract or a dispute relating to a non-contractual obligation, the properly applicable law is determined according to two different EU rules, as explained below.

Contracts

The governing law of a contract is determined according to the provisions of Regulation (EC) No. 593/2008 (commonly known as the Rome I Regulation). As an EU regulation, Rome I has 'direct effect', which means that it operates in and binds Member States (including the UK) automatically, without the need for Member States to pass their own implementing legislation.

Where a contract was entered into before 17 December 2009, Rome I's predecessor, the Rome Convention, applies in the determination of its governing law. The purpose and effect of the Convention are broadly similar to Rome I, but its legal character is different and it does not have direct effect. Instead it was implemented in the UK by means of the Contracts (Applicable Law) Act 1990.

The cornerstone of Rome I (and the Rome Convention) is party autonomy: counterparties are free to choose the law they wish to govern their contractual obligations. This default rule is subject to various overriding exceptions that are intended to protect the weaker party in certain types of contracts (for example, contracts for the carriage of passengers, consumer contracts, employment contracts and insurance contracts), to respect public policy imperatives in the law of the forum and to seek to restrain forum-shopping (such that, where the parties have chosen one country's law to govern their contract but all the other elements of the situation at the time they made that choice point to a different country, certain mandatory provisions of that country's law may be applicable).

Where the parties have not made an express choice of law in their contract, Rome I sets out how it should be determined. In addition and subject to the overriding rules described in the paragraph above, various other situations are catered for. For example, in a contract for the sale of goods, the governing law shall be that of the country where the seller has his or her habitual residence. And in a contract for the provision of services, the governing law shall be that of the country in which the service provider has his or her habitual residence.

Importantly (particularly in the context of Brexit), Rome I is of 'universal application': a Member State court is bound to apply whichever law Rome I dictates should apply in the particular circumstances; it is irrelevant whether that law is or is not the law of a Member State.

Non-contractual obligations

Regulation (EC) No. 864/2007 (the Rome II Regulation) provides for the determination of the governing law of non-contractual obligations. It has been in force across the EU since 11 January 2009 in respect of events giving rise to damage since that date; like Rome I, it has direct effect in the Member States.

Rome II allows parties to agree expressly on a law to govern their non-contractual obligations. That agreement can be made either before or after the happening of an event that gives rise to damage. In the absence of such agreement, the default rule – where the non-contractual obligation is tortious – is that the applicable law shall be that of the country where the damage occurred.

Like Rome I, a court must apply whichever law the application of Rome II specifies, whether or not that law is the law of a Member State.

ii The legal effect of Brexit

The Rome Regulations (or their substance) will continue to apply in the UK post-Brexit and their application will produce the same results as pre-exit. This will happen whether or not the UK and EU conclude a withdrawal agreement. The reasons for this are as follows.

If the withdrawal agreement is signed, its terms provide for Rome I and Rome II to continue to apply as now in respect of contracts concluded before the end of the transition period.

If there is no withdrawal agreement, or alternatively after the end of the transition period, the regulations are examples of 'direct EU legislation' that will be incorporated into UK law on exit day (or after the transition period, as the case may be) by operation of Section 3 of the Withdrawal Act. The regulations will function correctly as domestic law post-exit because membership of the EU is not a precondition to their operation. The UK government has laid before Parliament secondary legislation that would make various generally minor amendments to the text of the Rome regulations to facilitate their practical operation post-exit.

Domestication of the Rome regulations is not without potential complication. Most notably, the question arises of how the English courts will in future construe their provisions. The regulations are native to EU law, the ultimate arbiter of which is the Court of Justice of the European Union (CJEU). Member State courts are obliged to interpret EU law in line with the CJEU's jurisprudence. Post-exit, however, the UK's courts will not be 'bound by any principles laid down, or any decisions made, on or after exit day by the European Court'.[3] Those decisions will instead be merely a discretionary consideration. That opens up the possibility of a divergence between EU27 and UK courts in the interpretation of an otherwise shared set of laws.

iii Practical implications

An English choice of law clause in a contract will be as valid post-Brexit as it is today.

Courts of the remaining Member States will continue to apply Rome I, which, as already noted, generally respects the choice of law made by the parties. Even where other

3 Section 6, European Union (Withdrawal) Act 2018.

rules in Rome I are engaged, they are blind to the country the laws of which their application prescribes. In short, whether or not the UK is inside or outside the EU will make no difference to the operation of Rome I.

Meanwhile, an English court is very likely to continue to uphold an English choice of law clause, because Rome I will become part of the UK's domestic law post-exit.

Moreover, the reasons for choosing English law will remain powerful. It is a highly sophisticated, commercially aware, flexible system of laws used regularly in international business relations.

IV JURISDICTION

i The current position

The Recast Brussels Regulation and the Lugano Convention

EU law underpins the current position. The principal instrument relating to jurisdiction in civil and commercial matters (as well as the enforcement of resulting judgments) is the Recast Brussels Regulation (Brussels Recast). It applies to proceedings started on or after 10 January 2015 in EU Member States. Where proceedings began before that date (but after 1 March 2002), the original Brussels Regulation (Brussels I) applies. A near-duplicate of Brussels I, the Lugano Convention 2007, applies as between the EU and three of the EFTA states: Norway, Iceland and Switzerland.

The basic rule under these instruments is that a defendant should be sued in the European state in which he or she is domiciled. This basic rule is subject to various exceptions, the most significant of which for present purposes is found only in Brussels Recast: where the parties have reached an agreement to confer jurisdiction on a specific Member State's courts, only those courts may entertain proceedings; any other Member State court in which proceedings are sought to be brought must decline to hear them.

Where the European regime does not apply (e.g., because the claim in question does not relate to a civil or commercial matter; is, like arbitration, specifically excluded from its scope; or because the defendant is resident in a state not a party to the European regime), the common law rules apply. According to these rules, the jurisdiction of the English court is founded by service of process. If a person can be served (either as of right where a person is within the jurisdiction, or with the permission of the court where the person is outside the jurisdiction), then the court may (not must – in comparison with the European regime) hear a claim against them.

The Hague Convention on Choice of Court Agreements

There is one other relevant instrument that takes effect in the UK as EU law: the Hague Convention on Choice of Court Agreements 2005. Under the terms of the convention, the courts of contracting states are bound to uphold qualifying exclusive jurisdiction agreements that nominate the courts of a contracting state. The judgments in the resulting cases are then reciprocally enforceable in contracting states. The EU acceded to the convention on behalf of the Member States. The other contracting states are Mexico, Singapore and Montenegro. Three other states have signed the convention but not yet ratified it: China, the United States and Ukraine. When or whether these states will ratify and accede to the convention is unclear.

Although the convention is a significant advance for cross-border civil judicial cooperation, there are a number of important points to be borne in mind:

a Most obviously, the convention applies only to exclusive jurisdiction agreements; these must have been concluded in civil and commercial matters (see point (b)) with a cross-border element. One-sided jurisdiction clauses (where one party is compelled to sue in one country's courts while the other party has the freedom to sue in any court that will entertain the case) are probably outside the scope of the convention (although the English court has expressed a contrary view (albeit in a non-binding context)).[4]

b The convention applies only to civil and commercial matters. That restriction also applies to Brussels Recast and the Lugano Convention, but the concept is more narrowly drawn in the convention; competition law claims, tort claims, consumer contracts and some insurance contracts are excluded from its scope.

c The convention applies only to agreements concluded after its entry into force in the state whose courts are, by the agreement, given exclusive jurisdiction. That is 1 October 2015 for Mexico and the 28 current Member States; 1 October 2016 for Singapore; and 1 August 2018 for Montenegro.

d Finally, the convention is a relatively new instrument and its provisions are, as yet, untested in the courts of contracting states.

ii Position in the event the withdrawal agreement is ratified

For the duration of the transition period, the regime outlined above will continue to apply to and in the UK. Insofar as the regime binds only Member States, plus the UK, that is straightforward. The potential problem comes for those parts of the regime that involve third countries: the Lugano Convention and the Hague Convention. The UK would be bound to uphold those instruments by virtue of the withdrawal agreement but the non-EU states, not being parties to the withdrawal agreement, could not be obliged to reciprocate and continue to treat the UK as if it were still a Member State.

After the end of the transition period, those parts of the EU law regime relating to jurisdiction would continue to be applied by UK and EU27 courts to proceedings begun before the end of transition. The withdrawal agreement does not provide for jurisdiction agreements concluded before the end of transition to be upheld post-transition in accordance with EU law. They would fall to be treated by the English courts in accordance with the common law rules (which generally seek to uphold a clearly expressed choice of forum by the parties) and in the EU27 in accordance with Brussels Recast. The EU rules do not automatically uphold a jurisdiction clause in favour of a non-Member State.

iii Position in the event there is no deal

The UK will not unilaterally domesticate Brussels Recast

The UK government has confirmed that it would not unilaterally apply the current EU law regime in the event of a no-deal departure from the EU. That is because the EU law system relies on reciprocity between Member States. A unilateral adoption of the rules by a country no longer part of the EU would have led to a lopsided regime: the English courts would have

4 *Commerzbank AG v. Liquimar Tankers Management Inc* [2017] EWHC 161 (Comm) per Cranston J at [74].

continued to behave as if the UK was a Member State, accepting jurisdiction or deferring to the jurisdiction of other Member State courts in accordance with the rules. But those other Member State courts would not have treated the UK similarly.

The UK government has laid before Parliament secondary legislation that would, in the absence of a deal, revoke Brussels Recast, Brussels I, the Lugano Convention and other instruments in the EU regime. Transitional provisions would mean UK courts continuing to apply the pre-exit EU rules to questions of jurisdiction and the recognition and enforcement of judgments in any proceedings begun before a UK, EU27 or Lugano court before exit day. Of course, these grandfathering provisions can only have effect in the UK courts; how EU27 courts would deal with pending proceedings is unknown. The EU's only comment on the question, contained in a Brexit preparedness notice published in November 2017, states simply that relevant EU law will cease to apply after exit day.[5]

The UK will accede to the Hague Convention on Choice of Court Agreements

As explained above, the UK is currently bound by the Hague Convention by virtue of its membership of the EU; it will cease to be bound when it leaves the EU. The UK government has said since 2017 that it would take steps to ensure that the UK continues to participate in the convention after Brexit. To that end, the UK deposited its instrument of accession with the relevant authority on 31 December 2018. In accordance with the convention's terms, it will enter into force for the UK in its own right on 1 April 2019. Assuming the UK leaves the EU on 29 March 2019, there will be a two-day period when the UK is not a party, in any capacity, to the convention. The UK government has sought to deal with this problem with a short piece of secondary legislation. It provides that UK courts should deem the convention to be in force for the UK during the 'gap' in coverage. The legislation also seeks to assure continuity of coverage by providing that there be no difference in the treatment of jurisdiction agreements concluded during the two distinct periods of UK adherence to the convention. However, there is no guarantee that the courts of other contracting states will adopt a similar approach.

The UK will seek to accede to the 2007 Lugano Convention

The UK government has said that it will seek to continue to participate in the Lugano Convention, an international agreement between the EU and three of the four EFTA states. That would preserve the essentials of the current regime – in other words, a reciprocal arrangement under which English and other European courts would apply a common set of jurisdictional rules.

The Lugano Convention permits a non-EU, non-EFTA state to accede to the Convention but only where it has the unanimous consent of all the other contracting parties. Obtaining that consent could be easier said than done. Even if no objection was raised by another party, as a pure matter of logistics obtaining consents could take some time.

In addition, from a substantive point of view, the Lugano Convention is a less sophisticated instrument than Brussels Recast. This is because its terms mirror Brussels Recast's immediate predecessor, Brussels I. Most significantly, that means Lugano does not

5 A presentation to the Council's Article 50 Working Party on 27 November 2018 notes that Member States should assess the impact on pending cases and that the Commission will in any event update its November 2017 preparedness notice.

accord exclusive jurisdiction agreements the primacy they now enjoy under Brussels Recast. Under Brussels I and Lugano, the rule is that the court before which a claim is first brought has the right to rule on its own jurisdiction, even where the parties had agreed that they wanted another court to have jurisdiction. That rule facilitated a litigation tactic whereby one party could frustrate or delay the claims of their counterparty by issuing proceedings pre-emptively in a court in which cases are known to move slowly. That tactic was commonly referred to as the 'Italian torpedo'. The most reliable way to thwart it was to issue proceedings in the desired court before a would-be opponent had a chance to issue in a slower jurisdiction. One unfortunate side effect of this race between the parties to issue a claim in their preferred court was to limit the scope for alternative dispute resolution and early settlement.

iv Practical implications

Should parties still be agreeing English jurisdiction clauses?

The purpose of a jurisdiction clause is to give parties certainty about which courts can or must hear disputes that arise between them; bound up in this is the need for resulting judgments to be enforceable in places where a party has material assets.

The current European regime provides a predictable and robust framework for the allocation of jurisdiction and the enforcement of judgments, but only within the states that are a party to it. Brexit poses a risk to the UK's continued participation in the current European regime, but it is important to appreciate that this risk is:

a relevant only to the extent parties have a potential nexus with other EU countries;

b mitigated within the EU (and certain other states) by actions the UK has it within its sole power to take – notably accession to the Hague Convention on Choice of Court Agreements; and

c likely subject to significant transitional arrangements in respect of arrangements entered into before the UK's formal exit in March 2019 (and perhaps up to the end of any subsequent transitional period).

Accordingly, parties negotiating a jurisdiction clause should begin by considering what it is they want their clause to achieve and where they want it to have effect. Brexit *per se* should not be a reason to avoid or amend an English jurisdiction clause. The many benefits of bringing proceedings in England – not least an impartial and expert judiciary, a well-established and transparent system of court procedure, and the deep pool of talent in the legal and associated professions – will not be affected by Brexit.

Is there any benefit in adopting a non-exclusive jurisdiction clause?

One option for parties entering into contracts now is to consider giving the English court non-exclusive jurisdiction over disputes. That would allow each party the flexibility to choose at the appropriate time whether to sue in England or to try to sue in the courts of one of the continuing Member States of the EU. The ability to sue in an EU court instead of in England might, in theory, be useful in the event that the UK is not immediately able, post-Brexit, to secure a continuation of the current regime whereby English judgments are easily enforceable across the EU.

However, a non-exclusive jurisdiction agreement carries its own risks, which might negate its perceived benefits. Such a clause should be drafted carefully by reference to the

circumstances of the case and a clear understanding of what each party wishes to achieve. Particular issues relevant in the context of the EU and Brexit, pending certainty on the shape of a post-Brexit arrangement, are as follows:

a First of all, a party can only sue in a Member State court if that court has jurisdiction under the EU rules. In other words, a jurisdiction clause that merely confers non-exclusive jurisdiction on the English courts does not, in and of itself, automatically confer a right to sue in another Member State court.

b Second, it is in the nature of a non-exclusive jurisdiction clause that parties have a choice where to start a claim. The result might be that a party is obliged to defend proceedings in a jurisdiction it might rather have avoided – the EU rules require Member State courts to defer (in the first instance, at least) to the court first seised. With the UK outside the EU, there might be greater potential to enlist the help of the English court in resisting litigation overseas, but that would also involve extra time and cost (with no guarantee of success).

c Third, in the event that a party chose to sue in England (or was unable to sue elsewhere), the fact of the non-exclusive jurisdiction clause might impair its ability easily to enforce the resulting English judgment in the EU27, Singapore, Mexico or Montenegro. These states (and the UK, post-exit) are parties to the Hague Convention by which the reciprocal enforcement of certain court judgments is facilitated; non-exclusive jurisdiction clauses fall outside the convention's scope.

In short, parties considering adopting a non-exclusive jurisdiction clause should consider carefully in which country the particular circumstances of their contract indicate they might need or be able to sue. Is the apparent flexibility enough to compensate for the risk of jurisdictional disputes and the possibility of not being able to sue in England (or another preferred jurisdiction)?

V ENFORCEMENT

i Current position

EU law underpins the current position. The regime for enforcement is contained in the instruments relating to jurisdiction, which are considered in Section IV.

Under Brussels Recast, the judgments of Member State courts can be exported relatively quickly and easily to other Member States. Assuming certain basic conditions are met, Member State courts will recognise and enforce each other's judgments as if they had been made domestically.

The process for enforcing a Member State court judgment in another Member State is essentially administrative. A judgment creditor obtains a standard form certificate from the court that gave the judgment and then serves this certificate, along with the judgment itself and translations, on the judgment debtor in another Member State. The judgment creditor can then enforce his or her judgment using all the tools available to a domestic judgment creditor in the Member State of enforcement. The process is slightly more long-winded under the Lugano Convention, but nevertheless represents a considerable saving of time over the cross-border enforcement arrangements, such as they were, that existed before the relevant EU law.

ii Position in the event the withdrawal agreement is ratified

For the duration of the transition period, the current EU enforcement regime would continue to apply to and in the UK as described above. After the end of the transition period, the regime would continue to have some application: the UK and EU27 Member States would enforce each other's post-transition judgments in accordance with current EU law, provided that they related to proceedings begun before the end of transition.

iii Options in the event there is no deal

Preserve the effect of Brussels Recast and/or accede to the Lugano Convention or accede to the Hague Convention

The UK could seek to replicate, to a greater or lesser extent, the existing regime. The points made in respect of these options in Section IV apply equally to enforcement.

Revert to reliance on pre-existing network of bilateral treaties

In the twentieth century, the UK entered into bilateral treaties for the mutual recognition and enforcement of judgments with Austria, Belgium, France, Germany, Italy, the Netherlands and Norway. These treaties (and those with certain other non-European states, mostly Commonwealth territories) are given legal effect in the UK by the Foreign Judgments (Reciprocal Enforcement Act) 1933 (the 1933 Act) and related statutory instruments.

Insofar as it relates to the European countries listed above, the 1933 Act has been superseded for nearly all purposes by the current European regime. It continues to have a residual application in respect of judgments that fall outside the scope of the European regime (for instance, where a judgment is given in a claim that is not a civil or commercial matter).

In the UK, at least, a renewed wholesale reliance on the 1933 Act to enforce judgments from the European countries mentioned above should be feasible. However, ensuring reciprocal treatment of English judgments could be more problematic. The European regime was intended to supersede previous arrangements and it is not clear whether and how other European states would enforce those historic arrangements with the UK.

There are also considerable limitations to the scope and operation of the old bilateral arrangements. As well as applying only to seven of the 31 other EU and EFTA states, the regime only applies to money judgments. It is also less creditor-friendly: before a qualifying judgment can be enforced, it must first be registered in the enforcing state's courts. Even then, there is considerable scope for a judgment's registration and enforcement to be set aside, for instance on the ground that the foreign court did not, according to the rules of the enforcing court, have jurisdiction over the judgment debtor.

iv Practical implications

Will European courts enforce English court judgments? What steps can be taken to reduce uncertainty?

Judgments obtained in the English courts up until 29 March 2019 will be fully enforceable in accordance with the current European regime. If the withdrawal agreement is signed, that deadline will be extended until 31 December 2020 (and perhaps up to two years after that, in accordance with the transition period extension provisions of the agreement). In the event of a no-deal Brexit, or after the end of the transition period if there is a deal, there is considerable incentive for EU Member States to maintain the current regime, or a version of

it, so that their local judgments continue to be easily enforceable in the UK. At the time of writing, accession by the UK to the Lugano Convention (which would require the consent of the EU, as well as Norway, Iceland and Switzerland) would go a long way towards achieving this objective.

Further and in any event, the Hague Convention, which the UK will become a party to independently of the EU on 1 April 2019, will provide another post-Brexit means by which English judgments in disputes arising from qualifying exclusive jurisdiction agreements will continue to be enforceable in Member States.

VI INTERNATIONAL ARBITRATION

i The current position

The legal framework governing international arbitrations seated in England is largely British or multilateral in origin; the role of EU law is small.

Jurisdiction

The procedural law that governs English-seated arbitrations is the Arbitration Act 1996 (the AA 1996). Section 30(1) AA 1996 provides that, unless the parties agree otherwise, an arbitral tribunal may rule on its own substantive jurisdiction.

Governing law

There are three distinct areas in which governing law will fall to be determined:

a The law of the arbitration agreement. In most cases, unless the parties have expressly provided for a particular law to apply to the arbitration agreement, the governing law will be that of the contract containing the arbitration clause. Where the contract is silent on this, the law will be that of the jurisdiction most closely connected to the seat of the place where the arbitration is to be held. (The Rome I Regulation – although it might dictate the same result as the close connection test – does not apply to arbitration.)

b The law of the arbitral process. This will be the law of the seat, and where the parties have not expressly identified a seat the court will determine it on the basis of the parties' agreement and all the relevant circumstances.

c The law of the substance of the dispute. In most cases, this will be the law that the parties have by their contract selected to govern their obligations. Where the parties have adopted institutional rules for their arbitration, these will guide the tribunal in the event that there is no express choice of law. In the absence of a set of institutional rules or other agreement between the parties, Section 46 AA 1996 states that the tribunal shall apply the law determined by the conflicts of laws rules which it considers appropriate. This affords a tribunal a wide discretion, although in most cases where the seat is London it is likely that a tribunal will apply English rules. These are in the Rome I Regulation and can be applied by a tribunal in these circumstances notwithstanding the arbitration exclusion in Rome I.

Enforcement

Cross-border enforcement (including in all the current Member States of the EU) is effected pursuant to a multilateral agreement: the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The UK is a signatory to the New York

Convention in its own right and provisions of the AA 1996 implement the Convention in UK law. Sections 101 and 102 AA 1996 provide that awards made in states that are a party to the New York Convention shall be recognised in the UK as binding on the parties and shall be enforceable by means of the mechanism set out at Section 66 AA 1996.

ii The effect of Brexit

The impact of Brexit on international arbitrations seated in England and London's position as a major international arbitration centre is likely to be minimal. The AA 1996 is a UK statute not dependent on or linked to the UK's EU membership. The New York Convention is a multilateral instrument not linked to the EU; the UK and the other Member States are signatories to the Convention in their own right. The European regime applicable to jurisdiction and enforcement expressly excludes arbitrations from its scope.

Some argue that the legislative uncertainty that could arise in some areas of the dispute resolution framework post-Brexit should make arbitration a more popular choice for commercial parties.

iii Practical implications

A return of the anti-suit injunction in Europe?

An anti-suit injunction is a device by which the English court can restrain a person over whom it has jurisdiction from bringing or continuing proceedings in a foreign court. They were classically used to prevent a party who had agreed to settle a dispute in England from breaking that promise by bringing proceedings in another country.

Anti-suit injunctions to restrain proceedings in another Member State (or signatory to the Lugano Convention) have been prohibited since 2004, when the CJEU ruled that they were inconsistent with the scheme and provisions of the Brussels Convention (the predecessor of today's Recast Brussels Regulation). Under the Convention, the CJEU explained, the courts of Member States owe each other obligations of trust; it is not for the English court to seek to deprive another state's court of its right to decide whether or not to accept jurisdiction over a claim. That is properly a decision for the courts of each state to make in accordance with the requirements of the Convention.

All other things being equal, when the UK ceases to be a member of the EU, decisions of the CJEU will cease to bind its courts. In theory, an English court could, where it had jurisdiction over a respondent, make an order restraining him from pursuing proceedings in a Member State where that would constitute a breach of some prior agreement.

However, in practice, there are several reasons why the English court may remain reluctant to grant this kind of relief:

a The UK has said it wishes to reach an agreement with the EU that substantially replicates the provisions of the European regime. It has also taken steps to accede in its own right to the Hague Convention on Choice of Court Agreements, and has signalled that it wishes to continue to participate in the Lugano Convention. Although it is unlikely that any new agreement with the EU would place the UK under the direct jurisdiction of the CJEU, the exercise of the anti-suit jurisdiction would nevertheless be inconsistent with case law and might conceivably place the UK in direct breach of whatever arrangement it negotiated with the EU.

b The English court's jurisdiction to grant an anti-suit injunction is exercised *in personam*; that is to say, it is not technically a direct interference with a foreign court's process, but rather a restraint on a person who is already within the English court's jurisdiction.

Where that person is abroad, jurisdiction might be contingent on obtaining permission from the English court to serve that person outside England. It may be difficult to persuade a court to exercise its discretion to permit service out in circumstances where that could be perceived by an EU court as an unwarranted interference with its jurisdiction. In other words, principles of comity might take the place of formerly applicable CJEU jurisprudence.

Should arbitration be the default dispute resolution choice for cross-border contracts and transactions?

The regime governing cross-border enforcement of arbitral awards is not linked to the EU and will be unaffected by Brexit. In some circumstances, arbitration could offer a more certain and more appropriate dispute resolution process.

However, it is important to recognise that an arbitration clause is not a universal panacea. Parties thinking of incorporating an arbitration clause in contracts should still weigh up the relative pros and cons of choosing arbitration, both generally and for the type of disputes that may materialise under the specific contract in question. Relevant considerations might include the limited rights of appeal generally available in arbitrations, and the ability of parties to an arbitration agreement to obtain urgent relief. Parties should also consider carefully the different arbitral institutions and rules that are available to determine that may be appropriate for their circumstances.

Should parties consider including hybrid clauses providing for arbitration as well as litigation in the English courts?

A hybrid jurisdiction clause can provide for the English courts to have jurisdiction over disputes, while also giving one party the right to elect for arbitration. (Giving both parties such a right would be impracticable and would likely lead to further disputes.)

Although superficially attractive for their apparent flexibility, such clauses may in fact do little to mitigate the risks they are designed to guard against. This is because hybrid clauses are a type of one-sided jurisdiction clause: although the English courts have upheld such clauses, courts in certain EU Member States, most notably France, have found them to be unenforceable in some circumstances.

As a result, entering into such a clause creates not only the risk that the enforcement benefit of an arbitral award will be removed, as the clause underpinning the arbitration will itself be unenforceable, but also raises the prospect of additional challenges at the jurisdiction stage by competing tribunals within the EU. In the absence of a clear indication that the courts of all potentially relevant jurisdictions will uphold such a clause, they are unlikely to be suitable.

Appendix 1

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