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Brexit Law – your business, the EU and the way ahead

Brexit – English law and courts: should recent developments change your approach?

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Introduction

More than two months after the EU Commission and the UK Government announced that they had reached political agreement as to the terms of the UK's withdrawal from the EU, the question of whether the UK will leave the EU pursuant to a withdrawal agreement or otherwise is more uncertain than ever before.

One thing that has become more certain, however, is the likely form of the UK's legal regime on governing law, jurisdiction and enforcement of judgments if there is a no deal Brexit, following the publication of a raft of legislative instruments over the last few months which seek to implement the UK Government's stated policy in this area, as set out in its August 2017 position paper. We have also seen the European Commission confirming the position of the EU27 on civil justice in the event of a no deal Brexit, in a notice to stakeholders published on 18 January 2019.

These developments, and in particular the steps taken by the UK on 28 December 2018 to accede to the Hague Convention on Choice of Court Agreements 2005 (the **Hague Convention**), have reignited the debate about the use of English governing law and jurisdiction clauses in commercial contracts.

This article discusses whether parties should be considering a change in their approach to including English governing law and jurisdiction clauses in commercial contracts with an EU nexus if there is a no deal Brexit. On governing law, our conclusion is that in the vast majority of cases there continues to be no need for any change in approach. On jurisdiction, the picture is (as always) more complex. Exclusive English jurisdiction clauses may become a more attractive proposition for deals entered into following a no deal Brexit, in light of the steps taken by the UK to accede to the Hague Convention, although a case by case assessment will always be required. For deals that have already been entered into or that will be entered into between now and exit day, which may fall outside the scope of the Hague Convention (either because they include asymmetric or non-exclusive jurisdiction clauses or because of a potential timing issue in relation to the application of the Hague Convention), amending or restating the clause after 1 April to take the benefit of the Hague Convention is a possibility, but is likely in our view to be disproportionate or unnecessary in many cases. Again, however, parties will always need to consider the issue on a case by case basis.[1]

Jurisdiction clauses

What has happened in the UK?

On 28 December 2018, the UK deposited its instrument of accession to the Hague Convention. The Hague Convention is an international convention which requires Contracting States (including all EU Member States) to respect exclusive jurisdiction clauses in favour of other Contracting States and to enforce related judgments.

[1] Of course if a withdrawal agreement is entered into in the terms agreed politically between the UK and the EU in November 2018 then the position is likely to be much more straightforward in the short term at least, as the current EU law regime on jurisdiction and enforcement of judgments will continue to apply for the duration of the proposed transitional period.

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Assuming there is a no deal Brexit on 29 March 2019, the effect of the UK depositing its instrument of ratification is that the Hague Convention will come into force in the UK on 1 April 2019.[2]

Also in December 2018, the UK Government published the draft Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (the **CJJ Regulations**). This instrument makes a series of amendments to the provisions of EU law on jurisdiction and judgments that will be incorporated into UK law on exit day in the event of a no deal Brexit. As the EU laws in this area are essentially dependent on there being a reciprocal relationship between the UK and the EU27 (and Switzerland, Iceland and Norway) and this relationship would fall away on a no deal Brexit, the amendments made by the CJJ Regulations are, in a number of areas, substantial. Among other things, the effect of the CJJ Regulations is to:

– revoke the Recast Brussels Regulation[3] (the formal reciprocal regime on jurisdiction and judgments which is currently applied in the EU context) in the UK in its entirety, subject to certain savings provisions in respect of ongoing matters; and

– disapply the Lugano Convention 2007 (the equivalent reciprocal regime applicable as between EU Member States and Switzerland, Iceland and Norway) in its entirety, again subject to certain savings provisions in relation to ongoing matters.

The effect of the legislative changes in the CJJ Regulations is that, other than in cases where the Hague Convention or the savings provisions apply, the English courts will revert to applying English common law rules on jurisdiction and enforcement of judgments when considering whether to give effect to jurisdiction clauses or to enforce judgments from EU27 courts or the courts of Switzerland, Iceland or Norway.

What has happened in the EU27?

The European Commission published a notice to stakeholders on 18 January 2019 discussing the application of EU rules on civil justice to the UK if there is a no deal Brexit. The notice states that EU rules on international jurisdiction will continue to apply to proceedings pending in an EU27 court on exit day involving a UK domiciled defendant but, as anticipated, it states that those rules will no longer apply in relation to proceedings involving a UK domiciled defendant initiated after exit day. Instead, proceedings initiated after that date involving a UK domiciled defendant will be governed by the national rules of the relevant Member State, save where EU instruments set jurisdictional rules with regard to third countries or where another international convention (which would include the Hague Convention) applies. The notice does not specify when or how EU jurisdictional rules should be applied to English jurisdiction clauses following a no deal Brexit.

The notice is not as clear as it could be on the position in relation to enforcement of judgments, but the broad position is that EU rules on recognition and enforcement will not generally apply to an English judgment that has not been enforced before exit day, even if the judgment was handed down before exit day or enforcement proceedings were commenced before exit day. As expected, the notice makes it clear that, where enforcement proceedings are brought after exit day, enforcement will be governed by the national law rules of the relevant Member State unless another international convention (which again would include the Hague Convention) applies.

What does this mean in practice?

1. Deals entered into after a no deal Brexit

The steps taken by the UK to accede to the Hague Convention represent good news for commercial parties who wish to include exclusive English jurisdiction clauses in their commercial contracts. Parties negotiating exclusive jurisdiction clauses following a no deal Brexit will be able to rely on the Hague Convention in the vast majority of cases to ensure that

[2] The UK's proposed accession to the Hague Convention on 1 April is conditional on there being a no deal Brexit on 29 March 2019. The UK has stated that if the withdrawal agreement agreed politically in November 2018 is ratified by the EU27 and the UK, then EU law and the Hague Convention would continue to apply to and in the UK during the proposed transition period and the UK will withdraw its instrument of accession such that, for the duration of the transition period, "the United Kingdom will be treated as a Member State of the European Union and the 2005 Hague Convention will continue to have effect accordingly".

[3] Regulation (EU) No 1215/2012.

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those clauses are respected by the courts of EU Member States and that judgments pursuant to those clauses are enforced. Parties who commonly negotiate exclusive English jurisdiction clauses in transaction documents where there is an EU nexus may therefore find their rationale for doing so is even clearer following a no deal Brexit.

As the Hague Convention only applies where an exclusive jurisdiction clause has been agreed, parties who commonly negotiate asymmetric or non-exclusive English jurisdiction clauses may wish to consider moving to an exclusive English jurisdiction clause following a no deal Brexit with a view to taking advantage of the Hague Convention.

The Hague Convention will not apply in all cases following a no deal Brexit. Most obviously, it will not apply where an asymmetric or non-exclusive jurisdiction clause has been agreed or in Switzerland, Iceland or Norway (even if an exclusive jurisdiction clause has been agreed) as these states are not currently party to the Convention. There is also some uncertainty as to the interplay between the Hague Convention and the Recast Brussels Regulation, which may conceivably impact the application of the Hague Convention in cases where all parties are domiciled in EU Member States. In cases where the Hague Convention may not apply, it would be prudent for parties to:

- take advice on the approach of relevant EU jurisdictions to respecting English jurisdiction clauses and enforcing English judgments as a matter of national law; and
- consider how significant any national law concerns are in practice and whether there are any mitigants that can be put in place to reduce those concerns. Enforcement risk in relation to English judgments may not be a significant concern where a party is:
  - fully collateralised and so unlikely to need to obtain and enforce any judgment against a counterparty's assets;
  - likely to be the judgment debtor following any proceedings and therefore unlikely to be in a position to need to enforce a judgment;
  - able to enforce against assets in England or in another jurisdiction where enforcement would not be an issue; or
  - the beneficiary of an asymmetric or non-exclusive English jurisdiction clause and willing and able to bring proceedings in an EU Member State instead of the English courts in circumstances where there is a concern about enforcing an English judgment.

If there is no issue as a matter of national law in relevant Member States in relation to respecting the proposed English jurisdiction clauses or in relation to enforcing English judgments pursuant to that clause, then there should be no need to take a different approach, even if the Hague Convention does not apply. As indicated in our previous publications in this area (see here), it is expected that English jurisdiction clauses will be respected and English judgments enforced in many key EU jurisdictions after Brexit, including France, Germany, Italy and Spain, although it could be more costly and time consuming to do so. In certain other jurisdictions, however, the position may be less helpful.[4]

Where enforcement risk is a key concern, a different approach (for example, providing that disputes should be referred to arbitration) may be necessary.

Parties' views on the use of English jurisdiction clauses may also be influenced by their views as to what might happen in the future. The UK has stated that it will seek to sign up to the Lugano Convention following a no deal Brexit. It cannot do this unilaterally as it requires the consent of the EU Member States and of Switzerland, Iceland and Norway, but if this consent is obtained and the Convention is ratified, any issues arising from a no deal Brexit in relation to English jurisdiction clauses and judgments will fall away entirely.

In summary, parties who commonly include exclusive English jurisdiction clauses in their commercial contracts can in the vast majority of cases continue to do so following a no deal Brexit. Parties who commonly use asymmetric or non-exclusive English jurisdiction clauses might wish to consider moving to an exclusive English jurisdiction clause following a no deal Brexit (or indeed taking a different approach altogether), but in many cases there will be no need for them to do so. As is always the case in relation to jurisdiction clauses, parties ultimately need to assess the issue on a case by case basis, balancing the advantages and disadvantages of each of the available options.

[4] We understand that Austria is one jurisdiction where enforcement of English judgments following a no deal Brexit may not be possible, unless the Hague Convention applied.

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2. Deals entered into now and in the run up to a no deal Brexit

The Hague Convention applies to jurisdiction clauses concluded after its entry into force in the state of the chosen court. It entered into force in the UK in its capacity as an EU Member State on 1 October 2015. On a no deal Brexit, the UK's participation in the Hague Convention in that capacity will cease at 11pm (UK time) on Friday 29 March 2019. The UK's participation in its own right will commence on Monday 1 April 2019.[5] While it is clear that the Hague Convention will not apply to jurisdiction clauses concluded prior to 1 October 2015, there is some uncertainty as to whether EU Member State courts will consider that exclusive English jurisdiction clauses entered into after that date but prior to the UK rejoining the Hague Convention in its own right would fall within its scope (whether those clauses were entered into in the gap between the UK leaving and rejoining the Convention or in the period when the UK participated in the Hague Convention in its capacity as an EU Member State). It has been suggested that EU Member States might take the view that the Hague Convention should only apply to exclusive English jurisdiction clauses entered into on or after 1 April 2019.

*Should parties provide for the restatement of **exclusive** English jurisdiction clauses to avoid any timing issue in relation to the Hague Convention?*

In order to mitigate any timing risk, parties could conceivably start including language in transaction documents providing for the restatement of their exclusive jurisdiction clauses after 1 April 2019, with a view to eliminating any potential timing issue. However, careful consideration would need to be given as to how to provide for and effect such a restatement and as to whether it is necessary or proportionate to do so. In some scenarios, such as where enforcement risk is not a significant concern (for example for one of the reasons discussed in section 1 above), a restatement may well not be necessary or proportionate, particularly given the potential practical difficulties involved in undertaking this kind of exercise.

*Should parties provide for the amendment of **asymmetric or non-exclusive** English jurisdiction clauses to exclusive English jurisdiction clauses to fall within the scope of the Hague Convention?*

Parties who generally prefer asymmetric or non-exclusive English jurisdiction clauses may wish to consider including drafting providing that those clauses will be amended to exclusive jurisdiction clauses after 1 April 2019 following a no deal Brexit, with a view to taking the benefit of the Hague Convention or to deal with cases where national law in the relevant jurisdiction would be more helpful in relation to exclusive jurisdiction clauses than it is in relation to asymmetric or non-exclusive options. They may alternatively wish to consider moving immediately to an exclusive jurisdiction clause and providing for that clause to be restated following a no deal Brexit. However, in cases where enforcement may not be a key issue (for example for the reasons discussed in section 1 above), parties may consider that such an amendment is disproportionate.

3. Legacy deals

The analysis in relation to legacy deals is essentially the same as the analysis in relation to deals entered into now and in the run up to Brexit. Parties may wish to consider restating existing exclusive English jurisdiction clauses (in particular where those clauses were entered into prior to 1 October 2015 and therefore on any analysis would be outside the scope of the Hague Convention) or amending existing asymmetric or non-exclusive jurisdiction clauses to include an exclusive clause in appropriate cases. However, taking these steps on legacy deals is likely to be a particularly time consuming and costly exercise and is likely to be unnecessary or disproportionate in the majority of cases, not least because it may give rise to other risk issues, including the risk that it could lead to requests for more wide-ranging changes to the agreed terms.

4. What will the position be in the English courts?

The analysis above focuses on how to assess and mitigate any risk arising in relation to English jurisdiction clauses and judgments in EU Member States. The position in the English courts (at least from a practical perspective) is slightly more

[5] The two day gap is an inevitable consequence of the accession mechanism under the Hague Convention, which provides that the Convention will enter into force "on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession".

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straightforward. The English courts will continue to give effect to English jurisdiction clauses following a no deal Brexit notwithstanding the revocation of the Recast Brussels Regulation and Lugano Convention, although the legal basis for doing so will change. That will be the case irrespective of whether the jurisdiction clause in question is exclusive, asymmetric or non-exclusive. And there will of course be no issue in relation to the enforcement of English judgments in the English courts.[6]

The same is broadly true in relation to jurisdiction clauses in favour of the courts of EU Member States or Switzerland, Iceland or Norway. Parties who commonly include such jurisdiction clauses in their commercial contracts do not need to change their approach following a no deal Brexit.

We may also see the revival of the anti-suit injunction, an order of the English court that restrains a party to an exclusive English jurisdiction clause from continuing proceedings brought in breach of that clause in another jurisdiction. These orders were prohibited as a matter of EU law while the UK was subject to the Recast and Lugano regimes, but may be available once again after Brexit. The consequences of failing to comply with an anti-suit injunction are onerous, so they can be a powerful means of ensuring that parties comply with their exclusive jurisdiction clause, and as indicated above may be another way of mitigating concerns about whether EU Member State courts (or the courts of Switzerland, Iceland or Norway) will respect an exclusive English jurisdiction clause under national law following a no deal Brexit.

Service of proceedings

One further area where we will see legislative change following a no deal Brexit is in relation to service of documents. The reciprocal EU law regime for serving proceedings commenced in the English courts in EU Member States and for serving proceedings commenced in EU Member State courts in the UK (the **Service Regulation**)[7] will no longer apply following a no deal Brexit and the UK Government has therefore passed an instrument revoking the application of the Service Regulation (subject to certain savings provisions) in the UK.[8] This is unlikely to have a significant impact on the approach taken by parties to negotiating English jurisdiction clauses in their commercial contracts, however, as even where the Service Regulation applies, serving proceedings in EU Member States is often not straightforward. Parties therefore routinely include process agent clauses in their agreements to avoid having to rely on the Service Regulation. The revocation of the Service Regulation in the UK simply reinforces the importance of including such clauses.[9]

Governing law clauses

The UK Government has also published a statutory instrument on governing law,[10] which provides for minor amendments to be made to both the Rome I Regulation (dealing with the governing law of contractual obligations in civil and commercial matters) and the Rome II Regulation (dealing with the governing law of non-contractual obligations in civil and commercial matters) as incorporated into English law following a no deal Brexit. The amendments are aimed at ensuring that the UK domestic versions of these instruments will operate effectively following a no deal Brexit.[11] The

6 One point of detail to note is that the UK has published a statutory instrument in relation to the application of the Hague Convention in the English courts following a no deal Brexit (the Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018). This instrument sets out the approach the English courts will take to exclusive jurisdiction clauses in the context of the Hague Convention and deals specifically with the position relating to clauses entered into while the UK was party to the Hague Convention in its capacity as an EU Member State, in its own right and in the gap in between.

7 Regulation (EU) No 1393/2007.

8 See the Service of Documents and Taking of Evidence in Civil and Commercial Matters (Revocation and Savings Provisions) (EU Exit) Regulations 2018.

9 One thing that remains unclear is whether, in cases where there is an English jurisdiction clause, the Civil Procedure Rules applied by the English courts will require parties to seek permission from the English courts to serve proceedings out of the jurisdiction or whether the current regime, where such permission is not required, will be continued. This is because the proposed amendments to the Civil Procedure Rules to deal with a no deal Brexit have not yet been published.

10 The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2018.

11 For example, amendments are made to article 3(4) of the Rome I Regulation so that, rather than providing that the choice of a non-Member State governing law will not prejudice the application of non-derogable principles of **EU law**, the UK version of Rome I will provide that the choice of a non-Member State governing law will not prejudice the application of non-derogable principles of **retained EU law.** Retained EU law is defined in the European Union (Withdrawal) Act 2018 (**EUWA**) as anything which continues to form part of domestic law by virtue of sections 2, 3, 4, 6(3) or 6(6) of the EUWA (as added to or modified from time to time). Similar amendments are also made to the onshored version of Rome II in relation to the application of non-derogable principles of EU law in the non-contractual context. Changes are also made in relation to the provisions of Rome I dealing with insurance contracts and those in Rome II which deal with non-contractual obligations arising in relation to the infringement of intellectual property rights.

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amendments are technical and should not lead to any significant change to the approach taken by the English courts in practice to contractual governing law or to the governing law of non-contractual obligations.

As a result, the position on governing law is straightforward. As discussed in our previous publications in this area, EU Member State courts will continue to respect English governing law clauses (and indeed any other governing law clauses) after Brexit in almost exactly the same way as they do today such that, in the vast majority of cases, there will be no need to take a different approach. The statutory instrument published by the UK Government on governing law confirms that the English courts will do the same thing. Parties can therefore be reassured that the English courts will continue to give effect to governing law clauses, whether those clauses provide for English law, the law of an EU Member State or the law of any other jurisdiction to be applied.

Conclusions

Recent developments in the UK have provided helpful clarity as to the approach that the English courts and (at least in some respects) the courts of EU Member States will take to English governing law and jurisdiction clauses following a no deal Brexit. The notice published by the European Commission also provides some clarity on the likely approach of the EU27 courts.

On governing law, the position is straightforward and parties should not need to change the approach they currently take, save perhaps in areas where there may be regulatory drivers for a different approach. Of course where parties do wish to move to another governing law, it will be important to consider the practical implications of doing so, such as whether consequential amendments should be made to transaction documents (including the jurisdiction clauses in those documents).

On jurisdiction, notwithstanding the potential issues discussed above, the UK Government's timely deposit of its instrument of accession to the Hague Convention should reassure parties that exclusive English jurisdiction clauses entered into after 1 April 2019 will be respected and related judgments enforced in the EU27 courts following a no deal Brexit, even though the EU regime on jurisdiction and judgments would at that point no longer apply. The position in relation to asymmetric or non-exclusive clauses will, as always, be more nuanced. There may be some cases where a change of approach, for example a move to an exclusive English jurisdiction clause, would make sense.

As for the specific points arising in relation to existing deals and deals entered into in the run up to a no deal Brexit, in many cases parties may conclude that seeking to amend or restate their transaction documents following a no deal Brexit will be unnecessary or disproportionate or that the risks outweigh the potential benefits, for the reasons discussed above. There may, however, be a minority of cases where an amendment or restatement would make sense. In cases where an amendment or restatement is proposed, parties will need to take care to ensure that the amendment or restatement is properly drafted, agreed and executed and that the proper formalities are complied with.

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Your Allen & Overy contacts

Karen Birch
Litigation – London
+44 20 3088 3737
karen.birch@allenovery.com

Sarah Garvey
Litigation & Investigations – London
+44 20 3088 3710
sarah.garvey@allenovery.com

Andrew Denny
Litigation & Investigations – London
+44 20 3088 1489
andrew.denny@allenovery.com

Mahmood Lone
Litigation & Investigations – London
+44 20 3088 4974
mahmood.lone@allenovery.com

If you would like to discuss the issues raised in this paper in more detail, please contact any of the experts above or your usual Allen & Overy contact.

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