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

Brexit – English law and the English Courts  

Introduction

One of the key questions that commercial parties continue to raise in relation to Brexit, both at a policy level and when negotiating transactions on a day to day basis, is whether English governing law and jurisdiction clauses are still an attractive proposition.

With so much debate and speculation surrounding this topic, it is critically important for parties to fully understand the practical implications of continuing to use English governing law and jurisdiction clauses and of taking a different approach.

This overview and related podcast aim to help parties navigate through the issues arising so that they can focus on the points that really matter and make an informed decision as to the preferred approach in any particular case.

Governing law

Does it still makes sense to choose English law in contracts or should commercial parties be considering other options in light of the political negotiations?

In the vast majority of cases, it does. This is because the reasons why parties have historically included English governing law clauses in their contracts are almost entirely unaffected by Brexit. Specifically:

- English law is relatively predictable, certain and business friendly and will continue to be so after Brexit. This means that parties will continue to be held to their contractual bargains. Disclaimers and non-reliance clauses will be enforced, as will contractual rights to accelerate debts and enforce security. There will also continue to be limited scope for terms to be implied or for principles of public policy or good faith to come into play;

- English law will also continue to be flexible enough to deal with commercial and economic developments;

- Member State courts will still be required to respect and give effect to English governing law clauses in commercial contracts. Rome I and Rome II, the EU regulations on governing law, require Member State courts to respect a choice of law even if the law in question is not the law of a Member State. This means that Brexit will not make a difference to how Member State courts approach a choice of English law;

- the English courts will continue to give effect to English governing law clauses after Brexit. In fact, the UK Government has publicly confirmed that it will implement both Rome I and Rome II into domestic law on Brexit, meaning that the rules on governing law in both the EU27 and the UK should continue to be relatively closely aligned.
Are there any areas where Brexit might make a difference?

There may be some impact in terms of how English law contracts are treated from a regulatory perspective. For example, in securitisations, asset purchase agreements governed by English law might not fall within the scope of the European Central Bank’s collateral eligibility requirements for asset-backed securities after Brexit, because the relevant rules currently say that only contracts governed by the law of a Member State are eligible.

Outside the regulatory context, however, Brexit should not have a significant impact. This seems to have been supported by what we have seen in practice. Although we’ve been asked lots of questions in this area, we have not seen a significant move away from English governing law on transactions that we advise on.

What factors should parties be thinking about if they are considering changing the governing law of their contracts?

It is important to bear in mind that changing governing law is not necessarily a straightforward exercise. Prior to switching, parties should carry out a careful analysis of both the advantages and disadvantages of changing the approach. They will need to conduct a comparative law exercise.

If parties do decide to move away from English law, they should not assume that they can simply delete the reference to English law in the governing law clause and replace it with a reference to another law without this having an impact on the meaning and effect of the contract. In practice, parties will need to work out whether the meaning or effect of the contract will change if the governing law is altered and whether any amendments might be needed to ensure the agreement operates as originally intended. For example, parties will need to consider whether ‘entire agreement’ clauses have the same (or indeed any) meaning under a different system of law.

It is this granular comparative law analysis that will ensure that commercial parties are taking properly informed decisions when deciding whether to stick with English law or take a different approach.

Jurisdiction

What are the issues that commercial parties should be thinking about when negotiating a jurisdiction clause?

There are a number of different issues to consider when negotiating jurisdiction clauses. Enforcement risk is often a key factor, but in practice commercial parties often take a very nuanced approach, balancing enforcement risk against lots of other factors, such as:

- whether the chosen courts have a reputation for the quality of their commercial decision-making and whether they are transparent and predictable and uphold the rule of law – so, for example, they might ask themselves whether the judiciary is experienced in resolving technical financial disputes;
- whether those courts will be effective in determining disputes governed by the law chosen in the contract. Parties will often want to match their governing law and jurisdiction clauses so that disputes are resolved by judges who are qualified in the chosen law. As a result, if English law is chosen, parties will often consider that it would make sense to select the English courts and if French law is chosen, the French courts would be an obvious choice; and
- procedural factors, including whether the dispute will be resolved quickly and cost effectively and whether the applicable rules on disclosure and evidence are suitable for a commercial dispute.

The English courts have historically been a popular choice (and, alongside New York, almost ubiquitous in international commercial contracts) because their track record on all of these issues has been strong.

How has the prospect of Brexit impacted the analysis?

Most of the reasons why parties currently choose to litigate in the English courts are unaffected by Brexit. There is, however, one area where Brexit might make a difference and that is in relation to the approach that Member State courts
take to respecting English jurisdiction clauses and recognising and enforcing English judgments. Currently, Member State courts must respect English jurisdiction clauses and enforce English judgments under common EU rules set out in the Recast Brussels Regulation, the key EU instrument on civil jurisdiction and judgments. The same is true under the Lugano Convention, the equivalent regime applying between EU Member States and Switzerland, Iceland and Norway.

The UK Government has confirmed that it wants to reach an agreement with the EU27 on continued civil judicial co-operation post-Brexit (see further below) and also sign up to the Lugano Convention. However if, in the worst case scenario, the UK leaves the EU without an agreement that these regimes will continue to apply, then the formal obligations under the Recast and the Lugano Convention to give effect to English jurisdiction clauses and recognise and enforce English judgments will fall away (at least after any transitional period).

**How much would it matter in practice if no agreement was reached on these issues – for example if there was a hard Brexit?**

Where parties have agreed an exclusive English jurisdiction clause, parties should be able to rely on another Convention, the Hague Convention on Choice of Court Agreements. The Hague Convention is an international convention (with both EU and non-EU Contracting States) which requires Contracting States to respect exclusive jurisdiction clauses in favour of other Contracting States and to enforce related judgments.

The Convention currently applies in all EU Member States (including the UK) and also Mexico and Singapore, and the UK Government has confirmed that it is going to sign up to the Hague Convention in its own right after Brexit. It can do that unilaterally, so the agreement of the EU27 will not be required and as soon as it does so, parties to agreements containing exclusive jurisdiction clauses will in most cases have a reciprocal regime that they can rely on.

There are, however, a couple of issues in relation to the Hague Convention. First, there is a potential timing issue. If the UK leaves and immediately re-joins the Hague Convention on Brexit, will that have an impact on jurisdiction clauses agreed before the UK re-joined? There is no clear answer to this question. Second, there is a technical argument that the Recast rules take priority in certain cases where all the parties are domiciled within the EU.

Subject to these points, however, our view is that the Hague Convention should provide parties with reassurance that in most cases their exclusive English jurisdiction clauses will continue to be respected and that related English judgments will continue to be enforced in EU27 courts.

**What if the practice in a particular market is to include an asymmetric or non-exclusive English jurisdiction clause? Will that clause be respected on a hard Brexit?**

The position is more complicated where there is an asymmetric English jurisdiction clause because the Hague Convention will not apply. Member State courts would have an express power under the Recast regime to stay proceedings brought in breach of an asymmetric clause if proceedings had been brought first in England.

Beyond that, and again assuming the worst case scenario, there is no formal EU-wide legal principle requiring Member State courts to respect jurisdiction clauses in favour of non-Member States. However, it is hard to see how the courts of sophisticated jurisdictions could refuse to respect party autonomy and not give effect to freely negotiated agreements made between commercial parties of equal bargaining power.

As with governing law, there are one or two potential wrinkles in the regulatory context, including Art 46 of MiFIR, which applies to parties domiciled in non-EU Member States with equivalence under EU law who provide certain financial services into the EU. Article 46 requires those providers to ‘offer’ to resolve disputes before a court or tribunal of a Member State. It is not clear whether this rule will be relevant to the provision of services into the EU by UK financial firms after Brexit, however, and even if it is, it is unclear what in practice the requirement to make such an offer entails.

In relation to non-exclusive clauses, the position is different as there is inherent flexibility as to where proceedings are brought and the impact of Brexit is therefore likely to be more subtle and indirect.
If parties are considering switching to a different jurisdiction clause or to arbitration, it is important that they consider carefully what they will gain and what they will lose by changing their approach. In other words, as with any change in the governing law, parties should carry out a careful comparative analysis.

What is the impact on the enforcement of judgments pursuant to asymmetric or non-exclusive jurisdiction clauses?

On enforcement of judgments given pursuant to asymmetric or non-exclusive jurisdiction clauses, parties would need to look to the national law of the relevant Member State if there was a hard Brexit as the Hague Convention would not apply.

Foreign judgments from non-Member States (for example New York judgments) are enforced as a matter of national law in many Member States even where there is no formal reciprocal enforcement regime in place. As a result, it is expected that English judgments would still be 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.

However, it is undoubtedly the case that having a simplified, uniform approach of widespread and often automatic enforcement of Member State judgments across Europe is a huge benefit to judgment creditors. Enforcement in some jurisdictions may be more problematic after Brexit if no new regime is agreed and parties will lose the convenience of being able to rely on a harmonised arrangement and will need to consider the issues on a case by case basis, based on an assessment of national law in each relevant jurisdiction. Of course, in practice only a limited number of cases ever go to trial and where they do and there is a judgment, insolvency petitions are more likely than cross-border enforcement actions. And much will depend on the nature of the counterparty and where its assets are located. The potential enforcement risk in some jurisdictions may therefore concern some parties more than others.

How likely is it that the EU27 and the UK will fail to agree a new reciprocal regime?

The UK has confirmed that it intends to seek an agreement with the EU27 that will allow continued civil judicial cooperation on a reciprocal basis which “reflects closely the substantive principles of cooperation under the current EU framework” – in essence a continuation of the current regime. The Government has also confirmed that it would like to continue to participate in the Lugano Convention; however, it cannot do either of those things without the agreement of the EU27 and, in the case of Lugano, Switzerland, Iceland and Norway.

It is currently unclear what the EU27’s position is on this issue, but agreeing to a continued reciprocal regime would appear to be as beneficial to the EU27 as it is to the UK. It is widely recognised that a mutual regime on civil jurisdiction and judgments facilitates cross-border trade, which would benefit commercial parties on both sides of the Channel. And leaving aside the impact for commercial parties, there would also be a negative impact on consumers and employees both in the UK and the EU27 if the protective provisions in the Recast and Lugano regimes fall away.

For any new arrangement to be agreed, however, the difficult issue of the status of the CJEU and its judgments would need to be resolved. And there is a real practical risk that the two sides will be unable to agree on some of the other, more contentious, issues relating to the future relationship, such that any new agreement on civil justice simply falls by the wayside.

These issues should not be so acute in relation to the Lugano Convention, however. If the UK and the EU27 (and Switzerland, Iceland and Norway) could agree to the UK’s continued participation in the Lugano Convention, the courts in all of those jurisdictions would take essentially the same approach as they do today to respecting English jurisdiction clauses and enforcing English judgments. In our view there is a good chance that agreement could be reached on a continuation of this regime, as this would clearly maintain and promote legal certainty, to the benefit of both commercial and private parties in all the jurisdictions involved.

It is also worth noting that there appears to be agreement in principle on both sides that the Recast will continue to apply to legal proceedings commenced during the proposed transitional period, which is currently proposed to apply until the end of 2020.
Conclusion

In conclusion, we do not think that Brexit is a reason to move away from a choice of English law in commercial contracts because the reasons why parties currently choose English law will continue to be valid following the UK’s departure from the EU.

On jurisdiction, although the picture is more complicated, English jurisdiction clauses are likely to be respected and English judgments enforced in many core EU jurisdictions after Brexit, even if no new regime is agreed, so in the majority of cases, parties are unlikely to need to change their approach.

Where parties do wish to consider a switch, it will be important to consider the advantages and disadvantages of the change in approach and to road test how a different choice will operate in practice in the context of the agreement being negotiated, so as to avoid unintended consequences.

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