ALLEN & OVERY

# Brexit podcast

# English law and the English courts five years after the Brexit referendum – are they still an attractive choice?

**Wim Dejonghe**

Hi my name is Wim Dejonghe, and I am the senior partner of Allen & Overy. I'm here with Sarah Garvey and Karen Birch, counsel in our litigation practice.

This week marks the fifth anniversary of the UK's Brexit referendum. To say a lot has happened in the last five years would be an understatement. We've seen the beginning and the end of the Trump administration, Mrs May and now Mr Johnson's premiership in the UK, not to mention, of course, the ongoing global pandemic. But although a lot has changed, many of the issues identified at the time of the referendum remain unresolved. So this seemed an opportune time to revisit one of the key issues our clients have been grappling with since the referendum. That is whether English law and English courts are still an attractive option for commercial parties.

In this podcast we'd like to share our thinking on these key questions for our clients – looking at the legal positon and, just as importantly, what are we seeing in terms of market practice, and what's happening on the ground.

**So, let's start with the legal changes. Sarah, what is the position on choosing the English courts?**

**Sarah Garvey**

Thanks, Wim. I think the first point that I'd make is that the Brexit transition period has now ended – by way of reminder, that was on 31 December 2020 – and with the end of that period we now need to take a completely different approach to assessing whether EU Member State courts will respect English jurisdiction clauses and enforce English judgments. And the same is true – so the same reassessment is necessary – when we're looking at courts in Switzerland, Iceland and Norway. That's because the regimes that previously governed these arrangements and that we've all become familiar with over the past few decades – the Recast Brussels Regulation and the Lugano Convention – no longer apply where English courts have been selected in commercial contracts. I should mention that this is subject to one caveat on legacy proceedings started prior to the end of last year, the end of the transition period. In these circumstances the old EU regime continues to apply under the arrangements in the Withdrawal Agreement.

So, the current position is that if you're negotiating an exclusive English jurisdiction clause, the starting point is that you must now begin by looking to another convention – and one that's going to get a lot more prominence – that's the 2005 Hague Convention, to work out whether Member State courts will respect your English

jurisdiction clause and enforce a related judgment. If the Hague Convention applies, then in my view you can be pretty relaxed on the EU position, because the Convention requires Contracting State courts to respect exclusive jurisdiction clauses in favour of other Contracting State courts and to enforce their related judgments, subject to quite limited, standard exceptions. Importantly, the UK and all EU Member States are Hague Contracting States, as well as Singapore, Mexico and Montenegro.

So what does this all mean? It means that if you're negotiating an agreement and you include an exclusive English jurisdiction clause then the overarching position is clear; your exclusive jurisdiction clause and any related judgments will generally be respected and enforced in all EU Member States, subject to standard exceptions (and our colleagues in key Member States have confirmed this analysis). So that's really helpful. The position is not that dissimilar to the position when the UK was still an EU Member State.

I would just make a number of further observations, however. The first is, just remember that the Hague Convention covers only exclusive jurisdiction clauses, and not other types of jurisdiction clause. The second is, the Hague Convention is narrower in scope than the Recast; the Recast deals with an array of jurisdictional issues, such as what to do with parallel proceedings and what happens in relation to interim measures. The Hague doesn't cover these matters, and is focused on exclusive jurisdiction clauses and resulting judgments. The other point that I would make is that there is a geographical narrowing in that currently Iceland, Switzerland and Norway are not signatories to the Hague Convention. So, I think Hague is really useful, and enforcing English judgments pursuant to exclusive jurisdiction clauses under the Hague should be relatively straightforward, although I anticipate the process may be a little slower and more costly than under the Recast.

**Wim Dejonghe**

**Karen, are there other circumstances where Hague might not work?**

**Karen Birch**

There are. There are three main areas that have cropped up in queries we've had from clients, and they really all go back to the point that Sarah just talked about in terms of the scope of the Hague Convention being narrower than the scope of the Recast and Lugano regimes.

The first point is around timing. The Hague Convention might not apply if you're looking at a legacy agreement rather than an agreement that you're negotiating now. And that's because the Hague Convention only applies to contracts signed after the Convention entered into force in the state that you've chosen in your clause. So for the UK, that would be October 2015 at the earliest. But there is some debate about the effect of the UK leaving and rejoining the Convention at the end of the transition period – and particularly whether that resets the clock so that only agreements entered into after the first of January this year are going to be covered. Now, that's not the UK's position (the Government has specifically legislated on this) and it's not my view either – I don't think that is the right reading of the Convention – but it's certainly where the EU Commission has come out. The EU Commission obviously isn't the Court of Justice, but I think at this stage it's unclear where Member State courts or the Court of Justice might come out on this point.

The second point is that there are some types of dispute that fall outside the scope of the Hague Convention and there are some grounds on which Contracting State courts can refuse enforcement even when you are within the scope of the Convention. One example of that is that Contracting State courts are able to refuse enforcement if it would be manifestly incompatible with their public policy to enforce. But although it's important to be aware of those exceptions, they are pretty narrow in practice, and so they're not likely to be an issue in most of the transactions that our clients are going to be dealing with.

The one last point is a really technical one. There has been some debate about Article 26 of the Hague Convention which seems to allow EU law – so, EU jurisdictional rules – to take priority over the Hague Convention in some cases. I won't go into detail because, as I say, it's a pretty technical point, but I just wanted to flag a few key points. The first one is that this provision – the bit of Article 26 the parties are worried about – doesn't impact the enforcement of English judgments under the Hague Convention. So, if you're worried about enforcement of an English judgment under Hague, you don't need to think about Article 26. Where the argument is really focused is more around whether Article 26 might allow Member State courts to ignore an English jurisdiction clause and take jurisdiction themselves over a matter when there might be an EU law basis for them doing so. So, for example, if the defendant to the proceedings is domiciled in the relevant Member State. Now, we've discussed this at some length with our colleagues in the EU and, although they can't entirely discount the risk, they do think there are good arguments that Article 26 isn't going to be an issue in practice. There are a number of reasons for that, but I think the main reason is that, in their view, Member State courts are going to be very reluctant to ignore a jurisdiction clause where that has been agreed between sophisticated commercial parties. It would completely undermine the principle of party autonomy, which is a key principle of EU law in this area.

**Wim Dejonghe**

**What if you've chosen an asymmetric or non-exclusive jurisdiction clause, or if Hague doesn't apply for one of the reasons you've just mentioned?**

**Karen Birch**

If Hague doesn't apply – and I think, as you say, the most likely scenario would be where you want to include an asymmetric clause in your agreement – then you're going to need to look at the conflicts of laws rules in the Member States you're dealing with to work out whether your clause is going to be respected and whether ultimately your English judgment is going to be enforced. In some Member States that's going to involve looking directly at the domestic conflicts of laws regime. In others you might actually be able to look at historic bilateral or multilateral enforcement treaties with the UK, because there is an argument that in some jurisdictions those treaties might be seen to have revived now that the EU regime has fallen away.

We've discussed this question with colleagues and relationship firms across the EU – so, what is the position if you're outside the scope of the Hague regime – and I think in the majority of cases the expectation is that Member State courts are going to continue to respect *exclusive* English jurisdiction clauses and enforce related judgments even when you are outside the scope of the Hague Convention.

There were just a few jurisdictions where the position was a bit more uncertain and two that appear to be more problematic – Denmark and Finland – so you do just need to bear those jurisdictions in mind when you're thinking about this issue, but overall the position on exclusive clauses is pretty reassuring.

If you look at *asymmetric* clauses, the position is more mixed, and, as I say, you're most likely to be in a scenario where you're dealing with an asymmetric clause if you're thinking about the Hague Convention not applying. In about 18 of the 27 EU jurisdictions that we've looked at, the message is that the position is either unclear or problematic on asymmetric clauses, and in most cases, that is because these clauses just haven't been tested in many Member State jurisdictions. I think this point largely reflects the wider uncertainty about the effectiveness of asymmetric clauses both within the EU and elsewhere, and that's an uncertainty that arises almost irrespective of Brexit.

Just one final point: I think it's worth bearing in mind that this analysis might change if the UK is allowed to sign up to the Lugano Convention, but we are very much up in the air on that point at the moment.

**Wim Dejonghe**

**Can you both share your thoughts on where we are on the Lugano Convention?**

**Sarah Garvey**

Of course. Before actually answering that question I thought it would be helpful just perhaps to put this in context. The Lugano Convention mirrors the EU regime essentially but applies also to Switzerland, Iceland and Norway. So it isn't an entirely intra-EU instrument. And if the UK was permitted to rejoin Lugano then, as Karen has indicated, concerns around English jurisdiction clauses and judgments would largely fall away.

The UK was a party to the Convention as an EU Member State and it reapplied in April 2020 to rejoin in an independent capacity. This process requires the consent of all Contracting States, and Switzerland, Iceland and Norway have given their consent, but we are waiting for the EU to confirm their position.

Now many of you may have seen in the press that the European Commission has recommended early in May 2021 that the EU rejects the UK's application to rejoin because it says participation in the Convention is something that comes with being a member of the single market: it calls it a 'flanking measure' of the single market. The UK being outside that market means, it says, that the UK should not be permitted to rejoin; but obviously that's just the Commission's view.

**Karen Birch**

Although the Commission's position is pretty unhelpful on this point the decision ultimately is down to the Member States. And we've heard that a number of Member States are broadly supportive of the UK rejoining, I think the Netherlands is one example, with France being an example of a jurisdiction that is against the UK signing up. But where we are at the moment is that it isn't yet clear whether we've got sufficient numbers to meet the qualified majority voting requirement that we'd need to meet for

consent to be given on the EU side. And there's another potential wrinkle to that question because some commentators have been suggesting that the Commission could essentially torpedo the UK's request for consent by just not putting forward a proposal for the Member States to vote on – so even if there were in fact a qualified majority in favour, it might not be possible to get the vote over the line and so it might be that consent still isn't forthcoming.

Added to that, we're recording this podcast at a time where UK-EU relations are at a pretty low ebb. And I think that combination of the politics and logistical issues as well as the legal points means we are not likely to get Lugano over the line in the short term at least. Whether we see it happen in the longer term I think is likely to turn on where we end up on the relationship more generally and also on how the consequences of the UK not being party to the Lugano Convention start to play out in practice – so for example whether consumers in the EU begin to suffer negative consequences from the fact that they are no longer protected from proceedings being brought against them in the UK.

**Wim Dejonghe**

**And what about governing law?**

**Karen Birch**

The position on governing law is quite straightforward – the UK has onshored the EU regimes on governing law, so the English courts are now essentially applying a domestic equivalent of the Rome I and Rome II regimes when they're looking at whether to give effect to governing law clauses.

And of course EU Member States courts are continuing to apply the EU versions of Rome I and Rome II. And those regimes both require Member States courts to give effect to governing law clauses irrespective of whether the parties have chosen the law of a Member State. So you've essentially got a level playing field on governing law, whether you've chosen New York law, English law, the law of a Member State or any other law in your agreement.

I think this means that on both sides of the Channel, the courts are taking exactly the same approach as they did before the end of the transition period when it comes to giving effect to governing law clauses. So not much has changed on that front.

**Wim Dejonghe**

**How have markets reacted? What are you both seeing on deals?**

**Sarah Garvey**

Well, interestingly we have seen slightly different approaches in different markets.

On banking transactions, so in the financial markets, where asymmetric jurisdiction clauses have been market standard, we've mostly seen parties stick with English law, so no change on that front – they like English law. But where we have seen a shift is where there may be enforcement concerns, and here we've seen a shift to exclusive English jurisdiction clauses, moving away from asymmetric jurisdiction clauses on transactions. This is no doubt because clients are seeking to bring themselves squarely within the scope of the Hague Convention. I should also note that last year the UK Court of Appeal indicated in their view that asymmetric clauses were not within the scope of the Hague Convention. So that accords with this general market shift.

I think this move makes a lot of sense if there is an enforcement concern. In fact, it's quite rare that lenders will want to use the flexibility offered by an asymmetric jurisdiction clause in practice on an English law deal; they won't be particularly keen on going to another court to have a dispute under English law determined, so there's not really much point at the negotiation stage of sticking with an asymmetric clause when an exclusive English jurisdiction clause will actually give them more certainty on recognition of that clause and enforcement in the EU.

**Karen Birch**

Moving on to look at debt and equity capital markets transactions – there I think we've also seen parties sticking with English law in most cases but we have seen a slightly different approach in terms of jurisdiction clauses, because in this market we've seen parties holding off on moving away from asymmetric English jurisdiction clauses, maintaining the status quo from before the end of the transition period. And I think that's because parties are waiting to see what happens on the Lugano Convention. As to why that's a slightly different approach to the approach taken in the banking context, I think there's more reluctance to move probably because arrangers or underwriters are worried about being sued by noteholders or shareholders outside England and they want to make sure that they can, if that does happen, join the issuers in to those proceedings – so in other words they can see realistic scenarios where they might want to rely on the flexibility that an asymmetric jurisdiction clause gives you. And as Sarah said, it's much harder to identify those scenarios in the banking context. Now, given the decision on Lugano has been pushed back, we might see that practice starts to shift over the next few months, but I think it is a bit too early to tell at this point. And when parties are thinking about a shift, it really is a question of weighing up whether the flexibility of being able to litigate in other jurisdictions is actually more important to you than the enforcement benefits that you'd get if you fell within the scope of the Hague Convention.

On derivatives deals, the standard jurisdiction clauses in both the 1992 and 2002 ISDA Master Agreements operate as non-exclusive clauses where English law has been chosen, although the 2002 Master Agreement is slightly more permissive in terms of where you might bring proceedings. Because these clauses are non-exclusive, the Hague Convention doesn't apply. Even before Brexit was on the horizon we did see parties increasingly moving away from those standard clauses in favour of exclusive English jurisdiction clauses, really to increase their legal certainty on where they can sue and, more importantly, where they might be sued. And now we've also seen ISDA itself publishing Hague-compliant exclusive clauses. I think this is just a trend we may well see accelerating over the next few years.

Just one note on transactions in the retail market – the analysis there has been a bit more complex because you're dealing with consumer considerations and a slightly different approach being taken to consumers from a UK law perspective post-transition.

**Sarah Garvey**

Thanks Karen – and one other market – on long term commercial agreements (so for example joint ventures with a nexus with multiple European jurisdictions) we are seeing a number of questions being asked about whether it is still appropriate to provide for English law and the exclusive jurisdiction of the English courts. However, at least in my experience, in most cases we've had these questions but we haven't seen these questions translate into a notable change of approach. So there's no real change in that particular market.

That's not to say we haven't seen any shift away from English courts or indeed English law. And I personally would just highlight two scenarios where I think we have seen moves, but interestingly, they're not driven I think, by legal imperatives.

The first is where there are regulatory or political drivers pushing towards some shift. And I think we've seen in particular certain financial institutions that seem to have come under quite intense pressure internally to revisit the selection of English law and English courts. So that's one area.

The other is where we've seen clients shift contracts from a UK entity to another group entity based in the EU as part of their overall Brexit reorganisation. On deals where the counterparty is in the same EU jurisdiction so the deal essentially becomes entirely domestic – in those situations we have seen clients, parties, look to select local law and local courts more frequently. So we are seeing a change.

Now this isn't really a market trend, but one of the things that we have seen, over the last couple of years, is the rise of other courts seeking to compete with the English courts for commercial disputes work. And we've seen that competition being perhaps more vigorous, more active recently. I would just flag three particular examples:

– The Singapore International Commercial Court which was actually launched back in 2015 – it does continue to market itself as a key destination for commercial disputes. Interestingly we've seen a number of high profile English judges, retired English judges, now sitting on that bench, so Singapore continues to compete for commercial disputes work.

– We've also seen several European centres now pitching for this international litigation business and doing so more vigorously. Some have actually flexed their rules to ensure they become a more attractive proposition – for example by allowing certain statements to be filed in English in some examples.

– And then the other point I would make is that arbitration specialists have been talking about an increase in the selection of London seated arbitration under English law. Where parties want to continue to contract under English law but, for whatever reason, are unwilling to choose the English courts to resolve their disputes, you can see why a London seated arbitration may be a sensible compromise. I think we are mostly familiar with the advantages and disadvantages of arbitration over court litigation, but I think the flexibility offered by arbitration perhaps is appealing, and we might see this particular trend accelerate over the next few years particularly amongst corporate clients. But we'll just have to wait and see if this happens.

So I think, stepping back from all of this, it's actually really good for a consumer of legal services to have this increased competition – it does keep everyone on their toes. And what we've certainly seen with the English courts is they have put forward various new initiatives in recent months and years, for example in relation to blockchain disputes and also their handling of the Covid pandemic and the very early and easy switch to virtual trials for commercial matters. I think these are all efforts by the English courts to maintain their primacy in the global disputes market.

**Wim Dejonghe**

**Can you both share your thoughts on what clients should be thinking about if they do want to change laws or courts?**

**Karen Birch**

If I take this point first perhaps, from my perspective, it's really about thinking beyond enforcement risk and looking in a much more rounded way at the pros and cons of changing your approach. And part of that is thinking about why it is that you might choose to litigate in the English courts in the first place.

There are lots of reasons why parties have historically chosen to litigate in England that are entirely separate from the question of whether there's an enforcement advantage in the EU. If I had to pick one example of that, I'd perhaps mention the point that you're going to be appearing before judges who have significant experience in dealing with commercial disputes – and I think really the English courts and perhaps the New York courts are pretty unique in that respect compared with other jurisdictions around the world. An illustration of that – and it's an example we've used before – is that there have been well over 100 cases on the ISDA Master Agreement in the English courts over the last ten years. That is important in itself in terms of the development of judicial expertise. But it is also important because it creates more formal legal certainty because of course those cases create binding precedent on other judges. And so you have some certainty as to where decisions in future might come out on these key commercial agreements. The other thing I would mention in favour of the English courts is the fact that there are quite limited grounds of appeal, and I think that reinforces that legal certainty but also means, importantly, you don't end up stuck in the courts for years going through rounds and rounds of appeals.

The final point I'd make on this front is a pretty obvious one, but a key driver for choosing the English courts is the fact that parties often want to choose English law as the governing law of their contracts, and they rightly see the benefits of matching their governing law and their dispute provisions and the importance of looking at those as a package. So if you're going to choose English law it makes absolute sense to choose the English courts alongside that.

**Sarah Garvey**

And on that note, there are lots of reasons why parties previously chose English law which weren't connected with the UK's EU membership. And I think most importantly for me at least is the importance of party autonomy – I think that's a really key example under English law. So if you look at case law, the courts will tend to give effect under English law to what the parties have actually agreed, what they've written down in their contract, and you rarely see cases where the courts have sought to imply for example, obligations of good faith as a matter of English law in the general commercial context, or where you see the court stepping in to override the parties' commercial terms that have been negotiated, particularly where parties are represented. So I think that general context creates a degree of legal certainty, allowing parties who choose English law to be able to broadly assess and price transaction risk. The other observation I would make on English law is, it's generally perceived to be pretty creditor friendly, which is why finance parties tend to like English law, why it's popular on those deals.

My own view is that it's important to take these advantages into account and weigh them up when you are looking at a possible move to another court or another possible forum, and move away, as Karen said, from just focusing on enforcement risk. You have to take all of these factors into the mix and certainly my own experience is that we have seen clients do this much more actively in recent months. We have been repeatedly asked for comparative law advice looking at the pros and cons of English

law and English courts as against the laws of other EU Member States and the courts of those Member States. And I think what we've seen in recent months in particular is clients really moving beyond this focus on enforcement risk and also the glossy brochures and websites, and focusing in on the realities and the substance of a choice of law and the selection of a court. They are considering, for example, what are the rules of interpretation? What are the lead times of the courts? Is there an automatic right of appeal? What are the disclosure rules?

If you are looking at courts, you've seen clients really focusing in on the question Karen raised about judicial experience, track record, and also, whether the dispute will be determined in a familiar language, in the language that your contract is actually written in. We as lawyers, we really do focus in on language and how we draft things and we try and take care of how we draft things. But if you think about language, that's a really critical point; and one point not to overlook is, well is the court, is the forum that's going to be determining your dispute, is English going to be the language used in the court proceedings, will the judge have English as a first language? And those points are important to consider, as well as other points that we've touched on about the implication of terms into a contract or even the remedies that might be issued and orders made by the court. Could the court for example seek to re-write your contract as part of its order, something that for common law lawyers, we might find a very surprising result. But these are points that parties need to focus on.

**Wim Dejonghe**

**What would your recommendations be?**

**Karen Birch**

From my perspective there isn't a one size fits all approach, but it really does come back to that point about looking holistically at the pros and cons of the different options that might be available, so that whatever you decide to do you're taking a properly informed decision.

I think if I was a client I'd really be focused on keeping things simple. So if I was used to choosing English law and the English courts, I'd want to stick with that where I can, and as we've discussed hopefully in the vast majority of cases that shouldn't be a problem. But I might want to think about opting for exclusive jurisdiction clauses rather than asymmetric clauses or other more complex clauses.

**Sarah Garvey**

I agree with that and I also agree about this move to exclusivity, to bring yourself under the Hague Convention. If there was a reason why the English courts wouldn't work under an English law contract, I think I'd probably be looking at arbitration as the next fallback rather than litigating my English law contract in a Member State court or going one step further and shifting the governing law to a Member State law as well. Again it's really this idea of simplicity, trying to keep things straightforward. I think the move to arbitration is not as radical as that wider shift.

I also don't think parties will be revisiting legacy contracts and trying to renegotiate them, or at least certainly not on a wholesale basis. I think there are real time and cost implications, because it would be a significant job in most cases. And I think also, on this idea, this focus on enforcement risk, it is always important to remember that disputes are still relatively rare and when they do arise, if you do go all the way to trial, again, not that common, and you get a judgement, it is still quite rare to enforce that judgment and go through that particular procedure. I think that quite often if a counterparty doesn't pay up, then you're more likely to be looking at an insolvency

situation; so if you're looking at legacy deals, going back to that point I think there's likely to be very few cases where you would want to revisit those. Obviously if you're opening up one aspect of a contract you may open the door to wider negotiations on that commercial deal.

**To end, I'd like to turn the tables and put a question to you Wim. What are you seeing with clients?**

**Wim Dejonghe**

Clients I've spoken to have continued to ask questions about choice of law and courts – they are being asked repeatedly to revisit and justify a selection of English law and the English courts. Something we obviously did not see before the referendum.

I did wonder whether New York courts might benefit from the upheaval in the EU. After all, English jurisdiction clauses don't now have quite as much of an enforcement advantage over New York clauses as they did before Brexit. But we haven't seen a big shift to New York jurisdiction clauses yet.

I think the jury's still out on whether there will be a bigger shift in the longer term, whether to New York or EU laws and courts. We might eventually see a shift into the EU, but I wouldn't underestimate how hard it will be for Member State courts to overcome inertia and persuade parties to take the risk on an unfamiliar law and court – and I say this as someone who grew up practising Belgian law. As Singapore has seen, if there is a shift, it's likely to happen very slowly.

There's one final point I'd add from speaking to you, Sarah and Karen, and to litigators in our other offices in Europe. You all share the view that we're likely to see more litigation over the next few years as parties start developing their litigation strategies to take advantage of this new disputes landscape. We'll all want to keep an eye on how those strategies play out in the coming months and years as well as where we get to on the Lugano Convention. So five years on, although we've made some progress, we've clearly not yet reached the end of the story.

So Sarah and Karen, thank you both very much for your time, and thank you to everyone for listening. If you have any questions or comments on the issues we've discussed today, please feel free to get in touch with Sarah or Karen directly, or your usual A&O contact.

# Contacts


**Wim Dejonghe**
Senior Partner
Tel +44 20 3088 2270
wim.dejonghe@allenovery.com

**Sarah Garvey**
Counsel
Tel +44 20 3088 3710
sarah.garvey@allenovery.com

**Karen Birch**
Counsel
Tel +44 20 3088 3737
karen.birch@allenovery.com





UK

CS2106_CDD-64818_ADD-96363