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

The UK’s proposals on post-Brexit civil judicial co-operation – common sense prevails

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Introduction

The UK Government had a busy summer Parliamentary recess, publishing a series of Brexit position papers, future partnership papers and announcements, as well as preparing for a key debate and vote on the European Union (Withdrawal) Bill.

In this article we consider the UK’s future partnership paper on civil judicial co-operation (the Judicial Co-operation Paper, available here), which has immediate relevance for parties negotiating international commercial contracts with a UK or EU27 nexus. We focus on what the Judicial Co-operation Paper means for parties negotiating English governing law and jurisdiction clauses in their contracts, although the Paper itself is broader in scope. We also discuss the implications for cross-border co-operation in the insolvency context – see our “Spotlight on cross-border insolvency” below.

In summary, the Judicial Co-operation Paper will be welcomed by commercial parties. The UK Government’s proposals accord with our views and those of many others in the legal sector on post-Brexit civil judicial co-operation. They are sensible and commercial, providing important clarity on a number of key issues and increasing legal certainty, in particular in relation to those steps that the UK is able to take unilaterally (ie without EU27 agreement). And even in those areas which are dependent on the outcome of the UK’s negotiations with the EU, it is reassuring to see that the UK Government is seeking an outcome which would maintain the highest degree of legal certainty and continuity.

Why is this Paper important?

One question that has been raised repeatedly by commercial parties considering the potential implications of Brexit on their international contracts is whether the prospect of Brexit should impact their approach to negotiating governing law and dispute resolution clauses.

In our view a choice of English law and the English courts will remain a highly attractive proposition after Brexit even if there is no agreement between the EU27 and the UK on civil judicial co-operation (see the summary of our client call on this subject, available here). However, that is not to say that some of the reasons why parties currently choose English law and the English courts will not be affected by Brexit.
The Judicial Co-operation Paper confirms that, in areas where Brexit may have an impact, the UK Government intends to take action to maintain legal certainty and continuity and ensure that the post-Brexit framework is as close as possible to the current regime. This is good news for commercial parties and should provide additional comfort that, in the vast majority of cases, there is no need to change the approach currently being taken to negotiating governing law and jurisdiction clauses on cross-border transactions.

Governing law

The UK Government’s position

The Judicial Co-operation Paper confirms that the UK Government intends to incorporate the Rome I and Rome II Regulations into domestic law. Currently all Member State courts apply these Regulations to determine the governing law of contractual and non-contractual obligations in civil and commercial matters. Both Regulations require Member State courts to respect a choice of law (subject to certain limited exceptions), irrespective of whether the chosen law is that of a Member State.

The UK does not need the agreement of the EU27 to incorporate Rome I and Rome II into domestic law and these Regulations will need only minor amendments to work effectively as UK laws.

Why does this matter?

The main reasons why parties choose English law to govern their transactions are entirely unaffected by Brexit. English law will still be certain, predictable and commercial after Brexit. In addition, absent legislative change, Member State courts will continue to apply Rome I and Rome II after Brexit – they will therefore continue to respect a choice of English law in the same way as they currently respect choices of other non-Member State governing laws, eg New York law.

Prior to the publication of the Judicial Co-operation Paper, however, it was unclear what approach the English courts would take to governing law after Brexit. The Judicial Co-operation Paper makes the position clear. The confirmation that Rome I and Rome II will be incorporated into UK law means that, absent any further legislative change and subject to any longer term divergence in judicial interpretation, there will be no material difference in the approach taken by either the English courts or EU Member State courts to governing law clauses in civil and commercial matters after Brexit, whether those clauses provide for English law, the law of an EU Member State or indeed any other governing law to apply.

Parties negotiating governing law clauses can therefore take further comfort that there is no need for them to change their current approach.

Jurisdiction and enforcement

The UK Government’s position

The UK Government has confirmed in the Judicial Co-operation Paper that it intends to continue to participate in the 2005 Hague Convention on Choice of Court Agreements (the Hague Convention) after Brexit. The Hague Convention provides a framework for the allocation of jurisdiction and enforcement of judgments where parties have agreed an exclusive jurisdiction clause in favour of a Contracting State. The Hague Convention is currently in force as between EU Member States (other than Denmark) and Mexico and Singapore. It has also been signed by a number of other States (the USA, Ukraine and, very recently, China), but it is not yet in force in these jurisdictions. The UK does not need the agreement of the EU27 to participate in the Hague Convention in its own right on Brexit.

Separately, the UK Government has also stated that it intends to seek an agreement with the EU27 that will allow continued civil judicial co-operation on a reciprocal basis which “reflects closely the substantive principles of cooperation under the current EU framework”. In the commercial context, this suggests that, among other things, the UK will seek to agree to a new regime with the EU27 closely resembling the Recast Brussels Regulation (the Recast), the EU Regulation dealing with the allocation of jurisdiction and the enforcement of judgments as between EU Member States.

The Judicial Co-operation Paper also states that the UK will seek to continue to participate in the 2007 Lugano Convention (the Lugano Convention) on Brexit. The Lugano Convention is similar to the Recast and applies as between EU Member States and Switzerland, Iceland and Norway.
Unlike the position under Rome I and II and in relation to the Hague Convention, the UK cannot act unilaterally to fully replicate the Recast and Lugano regimes on Brexit since they both require reciprocity. As such, the continuation of a reciprocal regime in this area is dependent on the UK reaching agreement with the EU27.

**Why does this matter?**

Many of the reasons why parties choose the English courts to resolve their disputes (high quality and commercially minded judges, rigorous process, primacy of the rule of law etc) will be entirely unaffected by Brexit.

However, Brexit could have an impact on the approach taken by the English courts and EU27 courts to respecting jurisdiction clauses and enforcing judgments. Currently the Recast, the Lugano Convention and the Hague Convention all require (broadly) that the courts of the States which are party to them must respect jurisdiction clauses in favour of other Member/Contracting State courts and must enforce judgments given pursuant to such clauses (although in the Hague Convention context this applies only to exclusive jurisdiction clauses). The Recast and the Lugano Convention also regulate the allocation of jurisdiction and the enforcement of judgments more widely – ie in circumstances where there is no jurisdiction clause applicable to the dispute.

Absent agreement with the EU (or, in relation to the Hague Convention, unilateral ratification by the UK), these instruments are likely to fall away on Brexit and pre-existing multilateral and bilateral instruments are unlikely to fill the gap. Whilst in many cases this will not make a significant difference to the approach taken in Member State courts in practice to English jurisdiction clauses and judgments, the analysis is complex and enforcement may be more time consuming and costly if these formal regimes are no longer in place (see our client call summary referred to above for a more detailed discussion of these complexities).

The UK Government’s confirmation that it will sign up to the Hague Convention on Brexit means that:

- exclusive jurisdiction clauses in favour of the English courts will continue to be respected by EU27 courts other than Denmark under the Hague Convention regime (subject to a potential wrinkle in circumstances where all parties to the jurisdiction clause are domiciled in a Member State);
- EU27 courts other than Denmark will be required to enforce English judgments given pursuant to exclusive jurisdiction clauses within the scope of the Hague Convention regime; and
- the English courts will be required to respect exclusive jurisdiction clauses in favour of EU27 States (other than Denmark) and to enforce related judgments.

Parties including exclusive English or EU27 jurisdiction clauses in their commercial contracts can therefore be satisfied that, in the majority of cases, a formal reciprocal regime will continue to apply as between the EU and the UK in relation to such clauses (and judgments given pursuant to such clauses).

Commercial parties can also be reassured by the UK Government’s proposals regarding the Recast and the Lugano Convention regimes – although they are dependent on reaching agreement with the EU27, the UK Government’s aims in this regard are consistent with maintaining legal certainty and continuity in this important area. A new mutual regime on jurisdiction and enforcement mirroring the current Recast and Lugano Convention regimes would be beneficial for businesses in both the EU27 and the UK. It would also benefit consumers, who have significant protections under the Recast and the Lugano Convention in terms of where they can sue and be sued, which would fall away if no new agreement is reached.

**What are the potential issues?**

Given the potential benefits of a continued reciprocal regime from both a UK and EU27 perspective, there is a clear incentive on both sides to reach agreement. However, it is not difficult to identify potential sticking points, in particular in relation to the role of the Court of Justice. Indeed, the Judicial Co-operation Paper expressly mentions the Court of Justice, noting that leaving the EU will “bring an end to the direct jurisdiction of the [Court of Justice] in the UK” but that this “will not weaken the rights of individuals, nor call into question the UK’s commitment to complying with its obligations under international agreements; where appropriate, the UK and the EU will need to ensure future civil judicial cooperation takes into account regional legal arrangements, including the fact that the
[Court of Justice] will remain the ultimate arbiter of EU law within the EU”.

There is also a practical risk that the two sides will simply run out of time to reach agreement, particularly given the many other issues to be considered.

The UK’s fallback position

The Judicial Co-operation Paper states that if a continuing reciprocal regime cannot be agreed between the UK and EU a common view should be reached on the general principles that would govern how ongoing co-operation could be “wound down”. Among other things, the UK Government proposes that existing jurisdictional rules should continue to apply to proceedings instituted prior to Brexit and that existing enforcement rules should continue to apply to judgments given prior to Brexit and judgments given in proceedings instituted prior to Brexit.

Helpfully, the Judicial Co-operation Paper also proposes that, where a choice of court has been made before Brexit, the existing regime on jurisdiction and enforcement should continue to apply where a dispute arises to which the choice of court applies, “whether before or after” Brexit.

These are sensible proposals, effectively grandfathering the existing regime in relation to all jurisdiction clauses entered into prior to Brexit. They are also broadly consistent with many of the proposals put forward on the EU side (see the EU’s position paper on this subject, available here), although some areas of divergence remain.

Conclusions on jurisdiction and enforcement

Overall, although uncertainty remains as to whether an agreement between the UK and EU27 can be reached, the Judicial Co-operation Paper should provide comfort to those negotiating or seeking to rely on jurisdiction clauses in transactions with a UK and EU27 nexus, in particular in relation to exclusive jurisdiction clauses. As such, it remains the case that in the majority of cases there should be no need for commercial parties to change their approach to negotiating jurisdiction clauses in commercial contracts.

Spotlight on cross-border insolvency

From a cross-border insolvency perspective, the Judicial Co-operation Paper is encouraging because it shows that the UK Government recognises the importance of the EU Regulation on Insolvency Proceedings (2015/848 (and its predecessor), the EIR) and confirms that its preferred option is to enter into a reciprocal arrangement with the remaining Member States which, largely, replicates the effects of the EIR post-Brexit. But, as always, the devil is in the detail.

As noted in our previous article considering the implications of Brexit for cross-border insolencies, available here, the EIR is not only the most comprehensive source of cross-border insolvency law currently applicable in England and Wales (determining jurisdiction, applicable law and recognition, as well as other procedural matters), but is arguably the most important for commercial parties in providing a clear backdrop against which they can make investment and structuring decisions. The UK Government’s preferred intention to maintain the reciprocal effects of this key regime is welcomed.

In our view, in order to maintain the current levels of certainty for commercial parties, any deal with the remaining Member States in relation to replicating the EIR should be on an ‘all or nothing’ basis. The EIR works so well today because its three key elements (jurisdiction, applicable law and recognition) are interlinked (with the choice of law safe-harbours being heavily negotiated between the existing Member States). We would have concerns if certain provisions were renegotiated or ‘cherry-picked’ in the replacement reciprocal regime. Of particular importance are the choice of law safe-harbours in relation to rights in rem, set-off arrangements and clawback actions.

If a replacement regime cannot be agreed in relation to the EIR, we would recommend against the adoption of the EIR into UK law without the reciprocal benefits of EU recognition in respect of UK insolvency proceedings. Not only will many of the provisions of the EIR (ie those referring to courts of Member States etc) need to be amended to make the EIR work as an instrument of UK domestic law but, more importantly, the EIR is predicated on the existing reciprocal framework. Requiring the UK courts to recognise EU
insolvency proceedings without the reassurance that EU courts will recognise UK proceedings would not be a good position for the UK.

As far as the English scheme of arrangement is concerned, our view is that Brexit should have little impact on the popularity of the scheme as a European restructuring tool. However, the UK Government’s intention to replicate the effects of the Recast and to continue the UK’s participation in both the Lugano Convention and the Hague Convention (as discussed in full above) is helpful as these recognition regimes could be considered (in addition to principles of private international law) when seeking recognition of an English court order sanctioning a scheme throughout the remaining Member States post-Brexit.

Conclusions

The UK Government clearly wishes to put in place a post-Brexit regime that would maintain the highest degree of legal certainty and continuity in relation to governing law, jurisdiction (including in the insolvency context) and judgments. This would benefit businesses operating in the EU27 and the UK and also UK and EU27 domiciled consumers and other individuals.

Whilst some of the UK Government’s proposals require agreement from the EU27 and are therefore subject to the vagaries of the Brexit negotiations, it is particularly helpful that others (specifically, the implementation of Rome I and Rome II into English law and accession to the Hague Convention) can be effected unilaterally. The UK Government’s considered and public stance on these issues should provide real comfort to commercial parties negotiating governing law and exclusive jurisdiction clauses in the run up to Brexit and beyond.

“Since its implementation, the EIR has helped to reduce the delays, costs and uncertainties associated with cross-border insolvencies and restructurings across the EU and so a clear indication from the UK Government that its preferred option is to replicate the EIR post-Brexit is very welcome. It takes two to tango, though, and much still depends upon the appetite of the remaining member states to continue the reciprocal regime that exists today. It is clearly to the benefit of European businesses that it does, so I hope that politics will not get in the way.”

Jennifer Marshall, Partner

“The proposals set out in the Judicial Co-operation Paper are positive, both for commercial parties and more widely. They suggest that the Government clearly recognises the important role that a continued reciprocal regime on jurisdiction and judgments can play in facilitating cross-border trade and closely mirror the views expressed by Allen & Overy and many others in the legal sector on these issues. We welcome this initiative.”

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