KEY POINTS

- The end of the Brexit transition period on 31 December 2021 marked a period of momentous change in the field of private international law, with the UK departing from long standing regimes covering the allocation of jurisdiction, the enforcement of judgments and governing law.
- From 1 January 2021 the UK is no longer bound by the Brussels Recast Regulation and the Lugano Convention (although the UK government has applied to re-join this Convention as an independent sovereign state). These changes mean (amongst other things) that English jurisdiction clauses and English judgments will no longer benefit from recognition in the EU/Switzerland, Iceland and Norway under the Brussels/Lugano regimes.
- On 1 January 2021 the UK re-joined the 2005 Hague Convention on Choice of Court Agreements as an independent sovereign state. Under this regime, English *exclusive* jurisdiction clauses and resulting judgments will be recognised in other contracting states; currently this includes all EU member states, Singapore, Mexico and Montenegro.
- The selection of English law is likely to continue to be a popular choice for commercial parties.
- However it has been suggested that financial parties may consider adapting their disputes clauses to mutually *exclusive* English jurisdiction clauses (rather than asymmetric jurisdiction clauses) so as to benefit from enforcement under the Hague Convention where a borrower has assets in the EU (or other Hague jurisdiction).
- Where enforcement is a priority and the borrower has assets in a non-Hague jurisdiction, finance parties may consider a pure arbitration clause to be a more suitable disputes clause. As to whether finance parties will include an English jurisdiction clause with an option (exercisable only by the finance parties) to arbitrate disputes, this is more doubtful given uncertainties about the enforceability of such clauses in a number of jurisdictions. Finally, other jurisdictions may also seek to attract this litigation business.
- Of course, selecting the most appropriate disputes clause on any transaction will require an assessment of the nature of the particular transaction and the parties' negotiating objectives and relative bargaining power. Local law advice may be required.

Author Sarah Garvey

Brexit and dispute resolution clauses: the options for finance parties

The extended debate about the impact of Brexit on the popularity of English law and English jurisdiction clauses in international commercial contracts intensified as the Brexit transition period came to an end at 11pm on 31 December 2020. The UK-EU's new trade deal, struck on 24 December 2020, did not cover arrangements on civil justice and so, from 1 January 2021, amongst other changes in this area, the UK is now no longer bound by two core instruments in the field of private international law: the Recast Brussels Regulation and the Lugano Convention.[1] These instruments concern the allocation of jurisdiction and the enforcement of judgments in the EU and, in relation to the Lugano Convention, in Switzerland, Iceland and Norway. In a further development, on 1 January 2021, the UK formally re-joined another international convention dealing with the allocation of jurisdiction and the enforcement of judgments, the 2005 Hague Convention on Choice of Court Agreements (the Hague Convention), as an independent sovereign state.

The relative insulation of arbitration from these changes in the private international law landscape is striking and potentially attractive to finance parties seeking greater legal certainty in relation to enforcement risk. By contrast to the status of English jurisdiction clauses and judgments, the position of arbitration clauses with a London seat in commercial contracts and the enforcement of resulting arbitral awards in the EU is largely unaffected by Brexit. As discussed further in this article, this is because these matters are governed by a separate international treaty, the New York Convention on the Recognition and Enforcement of Arbitral Awards 1958 (NYC), which the UK acceded to as an independent sovereign state in 1975.[2]

Against this backdrop, it is helpful to assess whether the traditional English law/English courts selection in cross border commercial contracts will retain its allure, or whether other options offer advantages.

As discussed briefly below, the selection of English governing law seems likely to remain popular with commercial parties. However, as we explore below, we may see change in relation to English jurisdiction clauses. Commercial parties may increasingly select an *exclusive jurisdiction clause*, so as to fall within scope of the Hague Convention. Another variation under discussion is for parties to include English law and English jurisdiction clauses but also to provide a right for one party, usually a lender in financing documents, to elect (usually within a specified time frame) for a dispute to be referred instead to an arbitral tribunal for resolution. This article assesses whether this hybrid option (often referred to as an *asymmetric arbitration clause*) will see an increase in popularity following the end

of the Brexit transition period or whether other options, such as an exclusive English jurisdiction clause or a pure arbitration clause, may prove more popular. Of course, other courts may seek to win a share of this litigation business, but this more radical option is outside the scope of this article.

CONTINUING DOMINANCE OF ENGLISH LAW?

The designation of English law to govern the rights and obligations of parties to a commercial contract (and any non-contractual obligations arising in relation to it) and the identification of the English courts as the forum to resolve any disputes arising under the contract, have been dominant choices in international commercial contracts, in particular in financial contracts, for decades.

English law is a popular choice for commercial contracts globally because the starting point under English law is that party autonomy prevails – the parties can allocate commercial and legal risk between themselves and English law will, save in very narrow circumstances, give effect to what they have agreed. There is also a significant body of precedent under English law, built up over hundreds of years, providing a high degree of legal certainty. Philip Wood QC (Hon), recognising English law's contribution to the development of international commerce, has described English law as "an international utility".[4]

Will this change following Brexit? Anecdotal evidence suggests that, save in limited circumstances, for example where there are regulatory or political drivers in play, English law will continue to be a popular choice in commercial contracts notwithstanding Brexit. English contract law is largely unaffected by EU law and many of the reasons commercial parties select English law remain valid post Brexit.

Further, the approach taken by the English courts and EU member state courts to governing law clauses will not change significantly. The UK government has transposed existing EU law on the governing law of contracts and non-contractual obligations in cross border matters (Rome I and Rome II) into domestic UK law.[5] Moreover EU member state courts will continue to give effect to English governing law clauses today in almost exactly the same way as they did before the transition period came to an end as the rules regarding the application of a chosen law in Rome I and Rome II apply whether or not that chosen law is law of a member state.

English law is a popular choice for the governing law of contracts under which parties agree to arbitrate disputes. In 2019 the LCIA reported that English law overwhelmingly remained the most frequently chosen law, governing 81% of arbitrations administered pursuant to the LCIA Rules. This amounted to 281 out of the 346 arbitrations that took place under LCIA rules. By comparison, the second most popular choice of law was that of Mexico, which governed just 3% (or 10) of the arbitrations. English law was also the most popular law in ICC arbitrations during the same period. Further, the approach taken by arbitral tribunals to governing law clauses is unaffected by Brexit. Under s 46 of the UK Arbitration Act 1996, the tribunal must apply the parties' chosen law. The LCIA adopts the same rule in Art 22.3 of its arbitration rules.

Given this analysis and the likely continued popularity of English law in commercial contracts, the remainder of this article focuses on the impact of Brexit on dispute resolution clauses.

IMPORTANCE OF DISPUTE RESOLUTION CLAUSES AND THE POPULARITY OF ENGLISH COURTS

Forum selection clauses are critical in commercial contracts because where a party fights its battles can have an impact on the length and cost of any proceedings, the outcome of those proceedings and the enforceability of any resulting decision (whether a court judgment or arbitral award). The English courts have historically proved popular with commercial parties because they have significant experience in dealing with disputes arising under complex commercial agreements and have a reputation for upholding the rule of law, for making legally accurate, reliable and commercial decisions and for procedural fairness.

Further, in this context both the Brussels Recast Regulation and Lugano Convention are underpinned by the core principle of party autonomy. Before the end of the Brexit transition period, this helped provide legal certainty when selecting an English jurisdiction clause. If commercial parties submitted to the jurisdiction of the English courts in their contract, subject to well defined exceptions, the courts in the EU member states (and the courts in Switzerland, Iceland and Norway) would be required to decline jurisdiction over a matter if a party sought to initiate a claim in breach of such an English jurisdiction clause.

Finally, beyond the EU, the English courts have been popular because English judgments have historically been considered to have "good currency" globally, ie they are relatively easy to enforce in many other jurisdictions around the world, whether under historic reciprocal arrangements (as is the case with many Commonwealth jurisdictions), more recent treaties, in particular the Hague Convention, EU instruments or national

The Hague Convention is a framework of rules intended to provide clarity and certainty to parties engaged in cross-border trade by requiring Contracting state courts to recognise *exclusive* jurisdiction clauses and to enforce related judgments. There are subject matter exclusions. The UK joined this Convention by virtue of its EU membership when the EU signed up to this Convention in 2015 and, as a result, its participation in that capacity came to an end at the end of the Brexit transition period. However, the UK immediately re-joined as an independent sovereign state on 1 January 2021. It is generally understood that asymmetric jurisdiction clauses are not *exclusive jurisdiction* clauses for the purposes of the Hague Convention, despite the fact that such clauses require one party or group of parties (commonly the Obligors in a financing context) to litigate only in the specified courts, but this is a continuing topic of debate.[3]

law. Of particular note in this context is that prior to 31 December 2020, English judgments in civil and commercial matters were enforceable in the EU under the Recast Brussels Regulation and in Switzerland, Iceland and Norway under the Lugano Convention essentially as if they were a national judgment.

It is this final attribute, the ease of enforcement of an English judgment in EU member states, that has been an area of particular focus in the Brexit debate on forum selection.

ENFORCEMENT: A KEY CONSIDERATION?

It is worth pausing to reflect on the significance of this debate on enforcement to make two observations.

First, the risk assessment on enforcement is perhaps more accurately framed as being in relation to *potential* enforcement, rather than actual enforcement. Very few transactions end up in formal disputes and very few formal disputes go all the way to trial. Even when disputes do go to trial, once judgment is obtained, enforcement actions rarely follow – judgment debtors are more likely either to pay up, tip into insolvency or seek a compromise, than face enforcement action against their assets.

Second, the debate on enforcement risk has historically taken place in the context of a discussion as to whether to include an arbitration clause rather than a jurisdiction clause, so as to benefit from the possibility of wide enforceability under the NYC. If parties are concerned about enforcement in a jurisdiction outside the EU that does not commonly recognise English judgments, arbitration may be a suitable alternative. This analysis is unlikely to change post Brexit.

As readers will be aware, one of the widely recognised advantages of selecting arbitration as the dispute resolution mechanism in a commercial contract over court resolution[6] is that a resulting arbitration award could benefit from wide enforceability under the NYC. More than 160 countries are now party to the NYC. Significantly, in many important trading jurisdictions, in particular in emerging markets, it is considered to be easier to enforce an arbitral award than an English court judgment. For example, in Russia, the People's Republic of China (PRC) and the United Arab Emirates (UAE), and a number of other important emerging market jurisdictions, there have been concerns expressed about the potential recognition of English court judgments by local courts. Many of these jurisdictions including Russia, the PRC and the UAE, are now signatories to the NYC, making arbitration a more attractive option to many commercial parties.

Over the last 15 years or so, in English law financing documents, where borrowers have assets located in jurisdictions where local courts might not recognise an English court judgment, but would enforce arbitral awards under the NYC, it has become increasingly common for lenders to include an arbitration clause with a London seat, rather than an English jurisdiction clause, on the basis that enforcement of an English arbitration award in those jurisdictions should be more straightforward. This allows parties to use the English legal infrastructure, enjoy the certainty of English law and the oversight of the English courts of the arbitration process, but retain the benefits on enforcement of the NYC. Data from arbitral institutions reflects this trend[7].

THE IMPACT OF BREXIT: CHANGING ENFORCEMENT LANDSCAPE

As noted above, from 1 January 2021, unless the Hague Convention applies, commercial parties can no longer rely on treaty-based recognition of their English jurisdiction clauses and enforcement of their English judgments across the EU (and Switzerland, Iceland and Norway). Switzerland, Iceland and Norway are not parties to the Hague Convention and so this alternative regime does not apply to these jurisdictions. Save in relation to Norway these matters will depend on the applicable national law and so there are likely to be variations. The position under national law is discussed further below.

The position in relation to Norway is different. In October 2020 the UK and Norway signed an agreement by which they agreed to revive an old reciprocal enforcement regime and to continue to recognise judgments from each other's courts under that regime.[8]

RECOGNITION OF ENGLISH JURISDICTION CLAUSES AND THE ENFORCEMENT OF ENGLISH JUDGMENTS IN THE EU UNDER APPLICABLE NATIONAL LAWS

In 2019 Allen & Overy LLP published a survey based on findings from colleagues and relationship firms across EU member states where respondents were asked to comment on whether their courts would respect exclusive and asymmetric English jurisdiction clauses following Brexit and whether they would recognise and enforce judgments given pursuant to those clauses.[9] In each case, respondents were asked to assume that no multi-lateral enforcement Convention applied.

The responses with regard to exclusive jurisdiction clauses and related judgments were positive: they indicated that English exclusive jurisdictions would be recognised and related judgments enforced in the majority of cases in 25 of the 27 EU member states under applicable national law. The two exceptions were Denmark and Finland.

The responses in relation to asymmetric jurisdiction clauses and resulting judgments were less clear, with a number of respondents noting potential difficulties with such clauses, in particular those highlighted in the well-known 2012 French Supreme Court decision of *Mme X v Rothschild* which declared an asymmetric jurisdiction clause "potestative" and unenforceable. This decision was explored in detail in an earlier publication.[10]

The findings of this survey in relation to asymmetric clauses are interesting not least because these clauses have continued to be popular in financing contracts, notwithstanding the *Mme X v Rothschild* 2012 decision and their uncertain status under some EU member state laws. Of course, asymmetric jurisdiction clauses are valid under English law, as many judgments have underlined (for example, *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd and another* (2013)).

Asymmetric or one-way clauses: Historically, financial parties have sought to limit borrowers to bringing proceedings against them in one chosen jurisdiction (usually the English or New York courts) whilst at the same time retaining maximum flexibility regarding enforcement options for themselves, by providing they have the right to bring proceedings before any court of competent jurisdiction. In more recent years, this "hybrid" clause has been developed in some cases to provide finance parties with a further alternative, namely, an option (exercisable only by themselves) to refer a dispute to arbitration. There are different variations to these clauses but commonly with such a clause a borrower can only refer a dispute to, say, the English courts, but lenders may bring proceedings in the English courts or any other court of competent jurisdiction, or may elect to refer a dispute to arbitration.

Although a matter of speculation, the continued popularity of asymmetric jurisdiction clauses in finance contracts maybe the result of a number of factors including a desire to maintain flexibility, a view that the decision in *Mme X v Rothschild* was wrongly decided or just not wishing to depart from the status quo.

MOVE TO *EXCLUSIVE* ENGLISH JURISDICTION CLAUSES: THE PULL OF THE HAGUE CONVENTION?

Given the various changes to the position in relation to the recognition of English jurisdiction clauses and judgments in EU member states and Switzerland and Iceland, it is unsurprising that many commercial parties are now considering whether they need to update their dispute resolution clauses.

The most likely change to disputes clauses in financing contracts is for parties who are concerned about potential enforcement risks under asymmetric jurisdiction clauses to switch from an asymmetric English jurisdiction clause and instead include an *exclusive* English jurisdiction clause where the borrowers have assets in Hague Convention jurisdictions (ie EU 27 jurisdictions, Singapore, Mexico or Montenegro). By making this change, parties will be able to take advantage of the recognition and enforcement regime under the Hague Convention.[11] It is also a relatively minor amendment; the English courts remain the specified jurisdiction of choice, with finance parties simply abandoning an option to litigate disputes under an English law contract before the courts of another jurisdiction. Unsurprisingly, this is an option that is very rarely exercised in practice meaning finance parties are probably not "giving up" very much in reality.

POTENTIAL SWITCH TO AN OPTIONAL ARBITRATION CLAUSE?

It has been suggested that one option for disputes clauses following Brexit is for finance parties to include an optional arbitration clause in their contracts,[12] so that they can elect to arbitrate disputes if there are particular concerns about the enforcement of an English judgment in a particular EU jurisdiction (or in Switzerland, Norway or Iceland) and instead have the reassurance of relying on enforcement of an arbitral award under the NYC. It has been suggested this option provides finance parties with maximum flexibility about dispute resolution and allows them to make an assessment as to the most suitable forum at the time the dispute arises, rather than at the time the transaction documents are being drafted. This flexibility might be attractive where there are a group of lenders with differing policy approaches to dispute resolution as it avoids the need to reach a final decision on forum at the transaction stage. The same may be true where there are multiple borrowers with assets in many different jurisdictions.

However, such an option is not without complications. Whilst optional arbitral clauses are permissible as a matter of English law (see, for example, *NB Three Shipping v Harebell Shipping Limited* (2004)), the courts of some jurisdictions may refuse to enforce such a clause, or any judgment/award made pursuant to such a clause, either on public policy grounds (for example, on the basis of perceived unfairness) or on the basis it is a conditional agreement and so somehow contrary to Art II NYC (or indeed for other reasons). For example, in 2012, a London arbitration clause with a unilateral option to litigate contained in an English law governed contract was found to be invalid by the Russian Supreme Arbitrazh Court.[13]

Optional arbitration clauses, like asymmetric jurisdiction clauses, are also untested in many jurisdictions meaning there is uncertainty as to the approach likely to be taken by the courts in those jurisdictions. Interestingly, in France, notwithstanding the *Mme X v Rothschild* decision, such optional arbitration clauses have been upheld.[14]

Given this uncertainty it seems unlikely that optional arbitration clauses will be a popular alternative to an English jurisdiction clause for finance parties.

CONCLUSION

The end of the Brexit transition period on 31 December 2021 marked a period of momentous change in the field of private international law, with the UK departing from long standing private international law regimes covering the allocation of jurisdiction, the enforcement of judgments and governing law.

While English law is likely to remain the governing law of choice in finance contracts, where an enforcement risk has been identified, lenders may consider adapting their disputes clauses (traditionally asymmetric English jurisdiction clauses in the EU context) to make them purely *exclusive* English jurisdiction clauses, so as to take advantage of the enforcement possibilities under the Hague Convention. However if the UK re-joins the Lugano Convention in the near future, the driver for finance parties to change their disputes clauses will be must less pressing.

As to the possible inclusion of an optional arbitration clause, although valid under English law, there is doubt about the enforceability of such clauses in a number of jurisdictions and so it is not anticipated such clauses will be considered an attractive

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Sarah Garvey is Counsel at Allen& Overy LLP. Sarah is an experienced litigator focusing on cross border disputes. Sarah is Chair of the Law Society's working group on Private International Law. Email: sarah.garvey@allenovery.com

option by many lenders. Finally, as with the situation prior to Brexit, where enforcement is a priority and the borrower has assets in a non-Hague jurisdiction, lenders may consider a *pure arbitration clause* to be a more suitable disputes clause, so they can take advantage of the wide enforcement possibilities under the NYC.

Of course, selecting the most appropriate disputes clause on any transaction will require an assessment of many factors including the nature of the particular transaction, the parties' negotiating objectives and their relative bargaining power. Local law advice may be required. ■

1 Regulation (EC) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) and the convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

2 Revisions to the Brussels Recast Regulation underlined the exclusion of arbitration proceedings from the scope of the Regulation (see example Recital 12 and Art 2(d)). A discussion of the inter play between arbitration and the Regulation is outside the scope of this article.

3 See the Hartley/Dogauchi explanatory report to the Convention. Cranston J, in *obiter* comments in *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc and another* (2017) noted there are "good arguments" for asymmetric clauses falling within the scope of the Hague Convention. More recently, however, the Court of Appeal in *Etihad Airways PJSC v Lucas Flother* (2020) expressed the view, obiter, that asymmetric clauses were outside the scope of the Hague Convention.

4 *339 negotiating points for Brexit from a UK perspective* [2017] Allen & Overy Global Law Intelligence Unit 34.

5 Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I) and Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II).

6 There are other perceived advantages to arbitration over litigation. This continues to be an area of lively debate but outside the scope of this article.

7 For example, the ICC reported that in 2019, parties from India had tripled against the previous year up to 147, and that Brazil now accounted for around 5% of global parties. Chinese parties increased to 105 in 2019 from 59 in 2018 and significant growth in parties from South and East Asia and the Pacific was also noted.

8 UK/Norway: Agreement on the Continued Application and Amendment of the Convention Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters signed at London on 12 June 1961 [CS Norway No. 2/2020].

9 *Effectiveness of English jurisdiction clauses and judgments on a no-deal Brexit: An EU27 cross-border survey* (March 2019) Allen & Overy LLP.

10 *Asymmetric jurisdiction clauses and intercreditor disputes: a case of too much flexibility?* [2013] 7 JIBFL 424.

11 Given the responses to the Allen & Overy survey (see above) such clauses and resulting judgments are also likely to be enforceable under national laws as well (save for Finland and Denmark).

12 An alternative option is for parties to include an arbitration clause with an option for the parties to elect to litigate. Similar considerations apply to those outlined in this section to such an option. A further alternative is to include a *mutual* option to elect to arbitrate. However, finance parties are unlikely to allow a borrower the right to elect to arbitrate a dispute where they have already initiated court proceedings.

13 *ZAO Russian Telephone Company v Sony Ericsson Mobile Telecommunications Rus LLC*, Ref no A40-49223/2011.

14 *Société Générale SA v M. Nicolas Y. and Société Civile ICH* (2016) and *Société NJRH Management Ltd and SELARL AJ Partenaires* (2016).

Further Reading:

- Asymmetric jurisdiction clauses and intercreditor disputes: a case of too much flexibility? (2013) 7 JIBFL 424.
- Hybrid jurisdiction clauses: time for a rethink? (2016) 1 JIBFL 6.
- LexisPSL: Brexit: Dispute resolution – overview.