

## UK/EU: The use of English governing law and jurisdiction clauses in the wake of the UK's Brexit decision - where are we now?

*Since the UK voted to leave the EU in its referendum of June 2016, the implications for the ongoing and future use of English law and jurisdiction clauses by commercial parties in their contracts has been an issue that many have considered. In this briefing, as the UK and the EU27 look to move onto "Phase Two" discussions, we take a step back and reassess the matter in the light of other developments since the referendum result.*

### Introduction

A governing law clause and, where the parties wish to resolve their disputes by litigation (as opposed to arbitration), a jurisdiction clause form key, but distinct, provisions in a cross-border commercial contract's dispute resolution provisions.

English law is commonly chosen by parties to govern cross-border commercial contracts and any associated non-contractual claims for a range of reasons, often specific to the contract or counterparty, but also because English law is recognised as offering a high level of commerciality and predictability. Similarly, the English courts are a popular choice of venue because of their relative adjudicative attractions and London's reputation as a centre of excellence in professional services more generally.

The question that commercial parties have been keen to resolve since the UK's referendum result is whether such choices remain viable now that the UK has voted to leave the EU. Below we summarise the key issues, and recent developments, before turning to look at the practical implications.

For present purposes, we assume that the parties are seeking to conclude a cross-border commercial contract in a context within which they are generally free to make such choices. By contrast if, for example, any relevant EU law would mandate a particular choice or outcome in this field (either now, or once Brexit has occurred), then more bespoke consideration of the potential issues arising from Brexit may be needed.

### Choosing English law as a governing law

There are two points. First would Brexit compromise the continued viability of such a choice as a matter of substance? At a general level, it would seem not. Many of the advantages of English law (such as its commerciality, predictability and depth of judicial precedent) are not contingent upon EU law (although the drafting of contracts may need to consider the potential for change in the event that particular EU laws, concepts or definitions are relevant to their situation). We have considered these points in more depth in our earlier briefing note "[The impact of Brexit on the substance of English law](#)".

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The second issue is whether Brexit would compromise the *effect* that the courts will give to the parties' choice of English law. In an earlier briefing note focusing on [English governing law and jurisdiction clauses](#) we outlined why Brexit, even assuming a situation of "least certainty", would not bring any change in this respect from the perspective of the EU27 courts and how it was very unlikely to from the perspective of the English courts. Furthermore, in respect of the latter case, the UK government has in any event now confirmed, in a recent position paper in the Article 50 negotiations (see further below) its intention to retain the Rome I & Rome II Regulations in domestic law.

## Choosing the English Courts in a jurisdiction clause

Again, there are two areas to consider where a jurisdiction clause in favour of the English courts would usually be the preferred option (and assuming a "least-certainty" situation in which no alternative international agreements take the place of the current EU law arrangements applicable to the UK). The first is whether Brexit would compromise the core adjudicative attractions of the English courts. Again, these are very unlikely to be affected by Brexit; the English judiciary would not be affected, nor would England's core civil procedure rules (for more detail, see page 5 onwards of the first briefing note referred to above).

The second area concerns the wider operation of the clause (for more detail, see page 2 onwards of the second briefing note referred to above). From the perspective of its jurisdictional effectiveness matters are, again, unlikely to change that much. An English court would still accept jurisdiction on the basis of such a clause. Further, although there may be less consistency in the extent to which EU Member States would - to the extent such a clause is exclusive - decline jurisdiction, this may be offset by greater freedom on the part of the English courts to protect their jurisdiction e.g. by anti-suit injunction. By contrast, the main potential impact would be that an English court judgment would no longer be entitled to preferential enforcement under the relevant EU legislation and in the EU Member States.<sup>1</sup> Enforcement of the English judgment in those states would then have to rely on national law, which will vary in its treatment of the issue. In this field maintenance of the current status quo is not something the UK can effect unilaterally through domestic legislation, as it largely depends upon reciprocal agreements.

In recent months, both the EU27 and the UK have issued position papers (click [here](#) and [here](#) for summaries) addressing the future of the current arrangements between them in the field of jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. These appear to reveal that there is at least some common ground on the need for transitional arrangements in this sphere (i.e. preserving the situation in respect of anything done before Brexit occurs), and the existence of a degree of consensus was expressly noted in the 8 December 2017 [Joint Report from the Negotiators of the EU and the UK on Progress During Phase 1 of Negotiations under Article 50 TEU](#) (at paragraph 91). However, whether any final agreement is reached, and on what terms, is another issue and so whilst this is encouraging it cannot yet be relied upon with certainty (the European Commission has, for example, also issued a [recent Notice to Stakeholders](#) summarising many of the issues described above and

<sup>1</sup> And Switzerland, Iceland and Norway as EU law in the areas of jurisdiction and the recognition and enforcement of judgments is extended to those countries by way of the 2007 Lugano Convention (although that Convention reflects the earlier Brussels I Regulation (44/2001), rather than the Brussels I Recast (1215/2012)). In cases which fall within the much more limited scope of the Hague Convention on Choice of Court Agreements (which, in the EU, is EU law), any non-EU Hague Choice of Court Convention States (currently only Mexico and Singapore) can be added to this list.

References to "EU Member State" in this note should therefore, to save non-repetition of this point, be read as including references to all the aforementioned countries in this footnote (although, in the case of Mexico and Singapore, this should only be so read in cases to which the Hague Choice of Court Convention would otherwise apply).

encouraging parties to bear them in mind. And in its own [report to the European Council on the Article 50 negotiations](#), of 8 December 2017, the Commission notes (at page 13) that the UK & EU 27 take different positions on the important question of whether EU law on the recognition and enforcement of judgments should continue to apply in respect of the UK where a jurisdiction clause has been entered into before withdrawal, in litigation commenced after withdrawal).

Furthermore, the question of whether any *future* agreements will be concluded, to take the place of the current EU law arrangements as they apply to the UK, has not (as at the time of writing) been progressed. Whilst the UK, in its position paper mentioned above, has expressed a desire for a new bilateral arrangement with the EU27, this will require the EU27's agreement to the same. It would seem that fewer technical hurdles might stand in the way of the UK (re)acceding to the Lugano Convention (given that it exists as an "off-the shelf" solution including non-EU parties and does not require them to be bound by interpretative rulings of the CJEU), with the UK also independently ratifying the Hague Convention on Choice of Court Agreements. Whilst there would seem to be no technical reason why such solutions could not be progressed they, on the other hand, can offer no guarantees upon which reliance may be placed at this stage (the Lugano Convention would require the consent of the other Contracting States and so is subject to political will, whilst, under the Hague Convention, independent ratification of it by the UK may not bring English jurisdiction clauses, entered into whilst the UK was party to it by way of its EU membership, back within that Convention). So, whilst there still remain possible solutions, it also remains the case that none of them provide any fool-proof basis to rely upon now, nor are guaranteed to happen.

## **So where does this leave matters in relation to English jurisdiction clauses?**

So, in short, the main area of potential risk (assuming a "least-certainty" situation prevails) continues to be where the English courts have been chosen and enforcement of the resultant judgment in an EU Member State is likely to be required following Brexit.

Where this is potentially an issue for parties, and the English courts would otherwise be first choice, what should those parties do? There is no catch-all solution, as it will involve weighing up the cost/benefits of any given situation, but the kind of considerations that parties may wish to deploy are as follows.

At the outset, parties may wish to consider whether or not any further action is required at all; in some instances the desire to continue with a choice of the English courts may override any potential risk to the later enforcement of an English judgment in an EU Member State. Examples of the types of factors that may establish this may be:

- > If the expertise and predictability of the English courts as the chosen adjudicative forum are regarded as fundamental to ensuring that the particular type of contract works as intended.
- > If you are the contracting party which is more likely to be sued in the event of a breach (for example, if you are providing a service upon receipt of payments), and your preference is to be sued in England, then any "enforcement risk" is more of a problem for the other party.
- > If it is known that the counterparty has assets of a sufficient degree of permanence in territories other than an EU Member State in which it is also known that an English judgment would be readily enforceable, this alternative will mitigate any EU law related risk.

- > To the degree that the EU27/UK negotiations develop positively, this may also colour parties' cost/benefit analysis of the situation.

If, however, having considered the above, the parties do still wish to "Brexitee-proof" against any risks of post-Brexit enforcement of an English judgment in an EU Member State, then there are two principal options:

The first would be to take local advice to find out whether enforcement of an English judgment under national law is likely to be possible in the relevant jurisdiction(s) if a situation of "least-certainty" prevails.

The second, if the first results in a negative outcome, or is not a realistic step, is to consider other options for choice of forum. In particular, assuming that English law also remains the parties' choice of governing law, the most conservative of these would be an arbitration clause with its seat in London.<sup>2</sup> (Arbitration is not, however, a direct substitute for litigation; for example, it generally does not have procedures comparable to those for default/summary judgment and will not involve the dispute being decided by English judges. Whether this matters, and its weighting against the potential risks discussed above will, of course, depend on the circumstances of the contract involved).

Are there any other options which parties might consider? Might, for example, the potential risks to enforcement of an English judgment in an EU Member State be mitigated by using forum selection clauses which choose the English courts but carry additional flexibility (for example which leave open, sometimes for one party only, courts in the EU27 in which to sue, or are structured as an arbitration clause with an option for one side to litigate in England)? These are deployed in some types of contract/situation in respect of which the flexibility they offer should not, however, lead parties to forget the issues above if reliance on the choice of English courts is a likely and desired possibility in future. In other circumstances, would they bring enough benefit in mitigating these enforcement risks so as to justify a move to such clauses in situations where they are not usually seen? The answer is probably not in most circumstances; if the English courts would otherwise be first choice and, in line with the above considerations, the enforcement risks do not outweigh that choice then moving to a more complex form of clause may simply (depending upon its form) create other issues. Likewise, if "Brexitee-proofing" enforcement of an English judgment takes priority then a more straightforward response may be one of the two principal options set out above.

What about choosing an EU27 court instead of England? Again, assuming it is also the parties' desire to pick English law as their governing law this is not an entirely straightforward solution as it would involve a foreign court applying English law – in respect of which the outcome may not be predictable. There may also be further complexity created by the additional potential for any overriding mandatory provisions and public policy of the (non-English) forum to apply.<sup>3</sup> Furthermore, the comparative adjudicative abilities of the relevant court would need to be weighed in the balance. A number of EU27 jurisdictions (for example France, Germany, Belgium and the Netherlands) are taking positive steps to establish English-speaking commercial courts in order to address this, although parties may be hesitant to use these options until tried and tested. Overall, therefore, whilst the potential risks to the simplified enforcement of an English judgment in an EU Member State remain, parties may consider that at the moment, if English law is to remain the applicable law and "Brexitee-proofing" against later

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<sup>2</sup> The parties' choice of London seated arbitration and related matters under any such arbitration clause is likely to be unaffected by Brexit as arbitration law is generally regulated by national law (in England, the Arbitration Act 1996) and non-EU international instruments (the New York Convention). An arbitral award made in the UK should remain recognised and enforceable in EU Member States, and vice versa, on the basis of that Convention.

<sup>3</sup> Articles 9(2) and 21, Rome I Regulation.

enforcement of an English judgment in an EU Member State is the priority, then a better alternative remains one of the two principal options listed above.

Finally, again assuming that the parties' original preference was for English law, what about changing to use the law of an EU27 State so as better to pave the way also to use a jurisdiction clause in favour of the courts of the same EU27 State? Changing these variables could, however, have a significant effect on transactions; the one certain point being that by doing so English law and jurisdiction will not have been chosen. In many cases this course of action may not, therefore, be suitable nor, once the above considerations have been applied, be necessary. That being said, it cannot be ruled out that more basic commercial imperatives to change could overtake matters. If, for example, businesses choose to redomicile all, or some, aspects of their commercial activities to an EU27 State there may be practical pressure to localise contracts if at all possible (particularly given that, in deals otherwise wholly local to such a State and/or the EU27 generally, any non-derogable rules of the same would in any event likely apply even if choosing to litigate in England),<sup>4</sup> in which case the main focus will need to be on whether that works. Such a process may, for example, require a degree of re-education and familiarisation with concepts from other legal systems, as well as advice on whether the particular contracts concerned will operate satisfactorily under the chosen regime.

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<sup>4</sup> Articles 3(3) & 3(4), Rome I Regulation.

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