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Jurisdiction clauses and Brexit

There is now at least some prospect of the UK leaving the EU on 29 March 2019 without either transitional arrangements or a long term comprehensive reciprocal regime being agreed as to how English courts and those of the r.EU should co-operate in a post-Brexit world, including in relation to allocating jurisdiction between them and recognising and enforcing each other's judgments in commercial cases.

The current regime governing allocation of jurisdiction as between the courts of EU member states, and their recognition and enforcement of each other's judgments, is contained in an EU regulation known as the Recast Brussels Regulation[1]. That regulation applies throughout the EU[2] and effectively ensures that a jurisdiction clause in favour of the courts of one EU member state will be respected by the courts of all other member states, and that any judgment handed down by the courts of that member state will be readily recognised and enforced throughout the EU. It gives assurance that an English jurisdiction clause will be respected throughout the EU, and that any judgment handed down by the English courts pursuant to that clause will be readily recognised and enforced in any EU member state. Absent transitional arrangements or a longer term regime being agreed, the Recast Brussels Regulation will, however, cease to have effect in the UK immediately upon Brexit. This may, in at least some cases, lead to parallel proceedings springing up in the r.EU in breach of English jurisdiction clauses, or to English court judgments becoming less easily enforceable than is currently the case.

Various options have been mooted to replace the Recast Brussels Regulation, including in the short term having the UK re-join in its own right an international convention known as the Hague Convention[3]. That convention would then apply as between the UK and the r.EU (as well as, currently, a handful of other states). In very broad terms, it requires the courts of contracting states to give effect to *exclusive* jurisdiction clauses in favour of the courts of other contracting states, provided that the exclusive jurisdiction clause in question was *concluded after the convention entered into force for the contracting state upon which jurisdiction has been conferred*. Courts of contracting states must also recognise and enforce judgments handed down pursuant to such clauses. The Hague Convention will therefore provide a partial replacement for the Recast Brussels Regulation, but only on a forward-looking basis for exclusive English jurisdiction clauses concluded after it has come into force for the UK as a standalone state (currently scheduled to take place on 1 April 2019).

[1] Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).
[2] Denmark has opted out of the Recast Regulation but its provisions nonetheless apply as between it and other EU member states by virtue of the 2005 EU/Denmark Agreement.
[3] 2005 Hague Convention on Choice of Court Agreements.

It is therefore now important to give close attention to the dispute resolution mechanism included in any new contracts with an EU element. There will never be any one size fits all "perfect" solution, given the current uncertainties as to how Brexit will ultimately pan out, but the key options and some of their pros and cons are set out below.

● EXCLUSIVE JURISDICTION TO THE ENGLISH COURTS:

A clause of this type is intended to prevent the parties from bringing proceedings anywhere other than the English courts, thereby ensuring that they will benefit from the independence and quality of the English judiciary and the sophisticated infrastructure that those courts provide. Brexit will not affect the benefits of English law being the governing law of contracts, and a clause of this type will also ensure that any disputes arising out of English law governed contracts will be resolved in the best possible forum for them – the English courts – without the jurisdiction and governing law clauses having to be "split". Clauses of this type will therefore remain a very attractive option in most cases. However, there is now some risk that, post-Brexit, r.EU courts will cease to respect them in the way that they do now, potentially leading to parallel proceedings. There is also a risk that judgments handed down in English proceedings may become less readily enforceable in the r.EU than previously. If enforcement in the r.EU is a material consideration for a party, for example because key counterparties or assets are located there, then thought should be given to whether that is a sufficiently compelling reason to consider alternative options. In this context, if a party knows from the outset which particular r.EU jurisdiction or jurisdictions are likely to be engaged, checks can be made with local counsel as to how the courts of those jurisdictions are likely to treat exclusive English jurisdiction clauses and English judgments post-Brexit, following which a considered decision can be made. It is worth noting that any clauses of this type which are concluded after the Hague Convention comes into force for the UK as a standalone state, currently scheduled to take place on 1 April 2019, will fall within the scope of that convention and, as a result, are likely to be treated in a broadly similar way to the way that they are now.

● NON-EXCLUSIVE JURISDICTION TO THE ENGLISH COURTS:

A clause of this type is intended to enable the parties to bring proceedings in any court save that, if proceedings are first commenced in the English courts, no valid objection can be made to that choice. It will therefore allow a choice as to jurisdiction to be made further down the line (when the post-Brexit position on jurisdiction and enforcement may be clearer). This flexibility will, however, come at the expense of the certainty provided by an exclusive jurisdiction clause. If a party has sufficient bargaining power, it could also try to insert a "sole option" jurisdiction clause that allows it to sue in multiple jurisdictions, while the other party is only permitted to start proceedings in one jurisdiction. It is, however, worth bearing in mind that an asymmetric clause of this type may suffer from enforceability issues in other jurisdictions quite apart from Brexit – for example, the French *Cour de Cassation* chose not to uphold such a clause in 2015[4] - and parties should therefore consider taking appropriate local law advice to assess the likely enforceability of such structures. It is also worth bearing in mind that, even once the Hague Convention comes into force for the UK as a standalone state, non-exclusive and sole option clauses will not be caught by that convention.

● ARBITRATION:

A clause of this type is intended to ensure that the parties will resolve their dispute by way of arbitration. Both the UK and the r.EU will continue post-Brexit to be signatories to an international convention governing the recognition and enforcement of arbitral awards known as the 1958 New York Convention. As a result, arbitration clauses will continue to be respected both here and in the r.EU (as well as in many other jurisdictions) in the same way that they are now. Arbitral awards will also continue to be readily enforceable in the r.EU (as well as in many other jurisdictions). As a result, if enforcement in the r.EU is a material consideration for a party, for example because counterparties or assets are based there, then a London seated arbitration clause *may*, at least in this respect, be the most attractive option for them. It should, however, be remembered that there are a number of significant differences between litigation and arbitration, including in

[4] French Supreme Court, First Civil Chamber, 25 March 2015, *ICH v Crédit Suisse*, No. 13-27264.

relation to ability to appeal, general procedure, approach to disclosure, ability to obtain summary judgment or strike out, ability to obtain interim relief, ability to join in third parties, confidentiality and costs. These different features should be carefully considered before a final choice is made between litigation and arbitration (including, if arbitration is chosen, as regards the precise arbitral structure, given the different available options).

● EXCLUSIVE JURISDICTION TO A R.EU STATE:

If conduct of a case, and subsequent enforcement, in the r.EU is an absolute priority, and arbitration is not desirable, then a clause conferring jurisdiction on the courts of a suitable r.EU state may be necessary. It is, however, crucial to seek advice from local counsel in the chosen jurisdiction if seriously contemplating this option, including, if the law that the parties have chosen is English law, as to the likely ability of the local courts to apply that law correctly. In most cases, it will not be desirable to "split" governing law and jurisdiction clauses such that a foreign court is required to decide matters of English law.

FOR FURTHER INFORMATION, PLEASE CONTACT YOUR USUAL TRAVERS SMITH CONTACT OR A MEMBER OF OUR DISPUTE RESOLUTION TEAM.

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