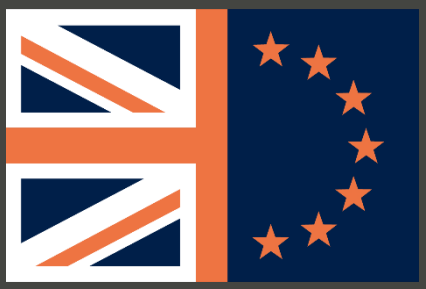
BRIEFING

TRAVERS SMITH

Brexit Briefing: Dispute Resolution



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1 Introduction

This briefing note addresses the impact of Brexit on matters relevant to civil judicial co-operation between the English courts and the courts of EU member states.

In particular, it provides:

- an overview of the current status of the Brexit process;
- an explanation of why Brexit ought not to affect either the continued attraction of English law as a law to govern international contracts, or London as an international dispute resolution centre; and
- practical guidance on the key areas, namely: choice of law, jurisdiction, enforcement and service of process.

Should you require further information on the matters addressed in this note, please speak to a member of our Dispute Resolution department.

FOR FURTHER INFORMATION, PLEASE CONTACT

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2 The Brexit process: where matters stand

The current position

On 31 January 2020, after 47 years of membership, the UK left the European Union ("**EU**").

The terms of the UK's exit were agreed in a Withdrawal Agreement between the UK and the EU[1] (the "**Withdrawal Agreement**"), which was implemented into English law by two Acts of Parliament: the EU (Withdrawal) Act 2018 (the "**2018 Act**") and the EU (Withdrawal Agreement) Act 2020 (the "**2020 Act**").

The key feature of the Withdrawal Agreement is an agreement by the UK and the EU to a transition period lasting from 31 January 2020 until 11pm on 31 December 2020 (the "**Transition Period**"), absent any agreement to extend it. The purpose of the Transition Period is to allow both parties some breathing space to reach agreement as to how their future relationship will look. During it, EU law will largely continue to apply in and to the UK as if it had remained a member state, and that law must also be interpreted in the same way as it was before, including by reference to the case law of the European Court of Justice ("**CJEU**"). In short, from a legal perspective, things will remain largely the same during the Transition Period as they were before.

At around the same time that the Withdrawal Agreement was concluded, the UK and the EU also entered into a non-binding political declaration (the "**Political Declaration**") which sets out the framework for their future, post-Transition Period relationship[2]. Although the Political Declaration states that the parties will aim for an "*ambitious, broad, deep and flexible partnership*", a huge amount of uncertainty remains as to how that future relationship will look. In particular, the European Commission published negotiating directives on 25 February 2020 which expressly state that any deal with the UK must respect the integrity of the Single Market and the Customs Union, while the UK government continues to take a diametrically opposed position and talks up the possibility of a deal which does not require the UK to adhere to EU rules.

The long term position

As a result of this uncertainty, the available options for the parties' relationship post-Transition Period still include, but are not limited to:

- (probably least plausibly) the adoption by the UK of the so-called "Norwegian model" through membership of the European Free Trade Association[3] and accession to the Agreement on the European Economic Area ("**EEA**")[4]. Accession to the EEA would entail the adoption of EU legislation which covers the four freedoms (of movement of goods, services, persons and capital)[5]. This model would provide considerable access to the single market (although not in respect of agriculture or fisheries), but would also entail compliance with many EU rules and regulations, making significant monetary contributions to the EU and, importantly, accepting free movement of people[6];
- the negotiation by the UK of a bilateral free trade agreement with the EU. While this would likely entail less compliance with EU rules, the greater the access granted by the EU to the single market, the greater the pressure on the UK to allow free movement would be (as per, for example, the current Swiss position). Access to the single market in sectors which are economically important for the UK, such as services, would likely be limited; or
- the adoption of the so-called "WTO model", meaning that the UK would rely solely on rights and obligations under World Trade Organisation rules to govern its relationship with the EU. This would be the default position if no agreement can be reached prior to 31 December 2020 (or any later date agreed). It would not permit the UK any

[1] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 19 October 2019.
[2] Political Declaration setting out the Framework for the Future Relationship between the European Union and the United Kingdom, 19 October 2019.
[3] Comprised of Switzerland, Iceland, Liechtenstein and Norway.
[4] Comprised of all EU member states along with Iceland, Liechtenstein and Norway (i.e. Switzerland has not acceded to the EEA Agreement).
[5] Acceding to the EFTA Convention would require unanimous agreement of the EFTA states, including Switzerland (which would likely result in a referendum on the question being put to the Swiss population); acceding to the EEA Agreement would likewise require approval from all the contracting parties, including all 27 member states of the EU.
[6] It is worth noting that there is an EFTA Court. It has jurisdiction over the EEA members in the same way that the CJEU has jurisdiction over EU member states. However, unlike the CJEU, the advisory opinions which it issues are not binding on national courts, and references to the EFTA Court may only be made by Supreme Courts of EFTA members. These are, potentially, important differences between the EU and EEA models from the perspective of those who voted for Brexit on the basis of the incursions on British sovereignty and law making that they perceived the EU to represent.

access to the single market or the benefit of any of the free trade agreements that the EU has negotiated with third countries (of which there are currently over 50).

However, although each of these options theoretically remains available, it is looking increasingly likely, given that the end of the Transition Period is drawing ever closer, and both sides have acknowledged that the UK has no intention at this stage of seeking to extend it, that the last option is the one that will come to pass.

Implications for civil judicial co-operation

Given all these uncertainties, the extent to which EU and English law will remain intertwined post-Transition Period remains uncertain. That is the case both generally and in the field relevant to the Dispute Resolution topics discussed in this note: civil judicial co-operation.

In that specific field, there are currently EU-wide rules in place, which must be applied consistently across all EU member states[7], which, in particular:

- determine which law should apply to a contract and give primacy to the law that the parties have chosen;
- determine which court should deal with any dispute which may arise under the contract and give primacy to the courts that the parties have chosen;
- ensure that proceedings can quickly and easily be served throughout the EU; and
- ensure that any judgment that the chosen courts hand down can be quickly and easily recognised and enforced throughout the EU[8].

These rules also continue to apply to and in the UK pending the end of the Transition Period.

The position after that remains uncertain, but both the UK government and the EU have now given some indications as to what they would ideally like to happen in the longer term, including via: (i) statements of policy made during the course of the negotiations to date between the UK and the EU; and (ii) a series of UK Statutory Instruments setting out the changes to domestic legislation that will be required on day one in this jurisdiction in the event that the Transition Period concludes with no agreement between the parties as to how their longer term relationship should look. These sources have been used to set out below a best guess at this stage as to how civil judicial co-operation between the UK and the EU is likely to be affected in future, and the areas of potential risk which may arise as a result.

BREXIT: KEY POINTS FOR DISPUTE RESOLUTION

English law – the benefits of using English law to govern international commercial transactions should generally remain unchanged by Brexit.

English courts – the attraction of using the English courts to resolve international disputes should also generally remain unchanged by Brexit.

Choice of law – English choice of law clauses will continue to be respected post-transition period both here and in the EU in the same way that they are now. As a result, there is not currently any need to replace or change the drafting of such clauses (unless a change is required to ensure that the parties' choice of law clause matches their chosen dispute resolution mechanism, as to which see further below).

Jurisdiction – at least some types of English jurisdiction clause may, post-transition period, cease automatically to be respected throughout the EU in the way that they are now. There will as a result be an increased risk that courts in EU states will allow proceedings to go forward before them in breach of such clauses in a way that could not happen now (although in that situation the English courts will potentially be free to issue anti-suit injunctions, which may help to rectify matters).

[7] Denmark has opted out of some of these rules.

[8] There are also currently reciprocal rules in place as between the EU (and also the UK for the duration of the Transition Period) and Norway, Iceland and Switzerland, pursuant to the 2007 Lugano Convention. The UK will cease to benefit from the 2007 Lugano Convention once the Transition Period ends, unless it re-joins it in its own right at that point.

Enforcement – at least some types of English court judgment may, post-transition period, become less readily enforceable in the EU than is currently the case. As a result, if obtaining a judgment that is quickly and easily enforceable in the EU is an important factor, then consideration must continue to be given to whether a dispute resolution mechanism other than an exclusive English jurisdiction clause would be appropriate for the contract. This could include a non-exclusive English jurisdiction clause (by which there is effectively a choice as to where to litigate but no valid objection can be brought if proceedings are first commenced in the English courts), a "sole option" jurisdiction clause (by which one party effectively has a choice as to where to litigate but the other is confined to the courts of one jurisdiction, e.g. England), agreeing to arbitration, or choosing another acceptable EU court. Each of these options will have their own pros and cons.

Service – post-transition period, it may become more difficult to serve English legal proceedings on EU based counterparties. It therefore remains strongly recommended that an agent for service of process clause is included in any contracts with such counterparties (and indeed with international counterparties more generally).

3 English law and London as a dispute resolution centre

Regardless of what follows the Transition Period, it should not significantly affect either the inherent attractions of English law as a law to govern international contracts or London's prestige as a centre of dispute resolution.

English law has historically been viewed as providing sophistication and certainty, while maintaining flexibility in various key areas. This looks set to continue. From a commercial perspective, English law gives parties greater freedom in determining the terms of a contract than some of the major codified civil law systems in Europe.

Equally, neither recent political events, nor Brexit itself, should affect the reasons why many parties, both domestic and international, view the English courts as a highly desirable forum for resolving legal issues. High regard is given to the independence and quality of the judiciary, the quality of English law firms and counsel and the sophisticated infrastructure of the English courts – with the Commercial Court, the Technology and Construction Court and the Financial List being some of the major attractions.

International arbitration in London should also be unaffected. The quality of the arbitral institutions based in London, such as the LCIA, accompanied by the responsive legal infrastructure provided by the Arbitration Act 1996 and the English courts' relative reluctance to interfere with the arbitral process, will not be impacted by Brexit. Furthermore, the fact that the UK is a signatory to the 1958 New York Convention means that international enforcement of arbitral awards handed down in London-seated arbitrations will not be affected by Brexit.

The innate quality of the English courts and English law together with the pervasiveness of the English language in international commerce and London's location between the Americas and Eurasia suggest that London is well-positioned to remain a leading global centre for resolving international disputes, including those that are likely to arise out of the uncertainty and change in the legal, economic and political landscape as a result of Brexit.

SOME POTENTIAL DISPUTE RESOLUTION-RELATED EFFECTS OF BREXIT:

- disputes arising from assertions that Brexit is a force majeure/material adverse change event;
- disputes arising from the exercise of so-called "Brexit clauses";
- a desire to expedite or, to the extent possible, delay litigation (or, less likely, arbitration) that is either on foot or contemplated until greater political and legal clarity around the post-Transition Period arrangements is achieved; and
- a possible preference for arbitration clauses over litigation clauses in some contracts as a result of potential issues concerning the enforcement of English court judgments in EU member states post-Transition Period.

4 Key areas for Dispute Resolution

CHOICE OF LAW

Current position

The current European regime concerning choice of law is as follows:

- **Law applicable to contractual obligations**: The current rules for determining choice of law in relation to contractual claims are contained in the Rome I Regulation ("**Rome I**")[9], which has direct effect throughout the EU[10]. Rome I applies to contracts entered into on or after 17 December 2009[11]. It gives primacy to the law the parties have chosen to govern their claims and is the basis on which English choice of law clauses in contracts are currently respected throughout the EU.
- **Law applicable to non-contractual obligations**: The current rules for determining choice of law in relation to non-contractual (i.e. particularly tortious) obligations are contained in the Rome II Regulation ("**Rome II**")[12], which also has direct effect throughout the EU[13]. Rome II applies to disputes concerning events giving rise to damage where such events occurred on or after 11 January 2009[14]. It gives parties the ability to make an express and binding choice as to the law that will govern any such disputes, and is therefore another key part of the framework which underpins English choice of law clauses in contracts, to the extent that such clauses extend (as they usually do) to non-contractual obligations.

The Withdrawal Agreement provides that both Rome I and Rome II will continue to apply on a reciprocal basis in both the UK and the EU[15] with respect to any contracts concluded and any torts committed prior to the end of the Transition Period[16].

As a result, English choice of law clauses in contracts will during the Transition Period continue to be respected both in this jurisdiction and the EU[17] in the same way that they are now (and indeed beyond it, provided that the relevant contract is concluded or the relevant tort is committed while the Transition Period is ongoing).

Post-Transition Period

The UK government has legislated to the effect that, immediately upon the conclusion of the Transition Period, the rules in both Rome I and Rome II (which do not generally speaking require reciprocity to operate) will be incorporated into domestic law[18]. Rome I and Rome II will also continue to have direct effect in the EU[19]. As a result, even post-Transition Period, English choice of law clauses in contracts will continue to be respected both in this jurisdiction and the EU in the same way that they are now[20].

Risks

In practical terms, Brexit is unlikely to have much impact in this area and English choice of law clauses as typically formulated in commercial contracts will not need to be replaced or changed.

That said, there will now be a greater focus on the dispute resolution mechanism to be included in contracts (as to which see further below), and if a forum other than the English courts or a London seated arbitration is chosen, careful

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[9] Regulation 593/2008 on the law applicable to contractual obligations.
[10] Except in relation to Denmark, which has opted out of Rome I.
[11] Contracts entered into before that date are governed by the Rome Convention, which is incorporated into English law by the Contracts (Applicable Law) Act 1990 (the "1990 Act").
[12] Regulation 864/2007 on the law applicable to non-contractual obligations.
[13] Except in relation to Denmark, which has opted out of Rome II.
[14] Rome II replaces the previous regime in the Private International Law (Miscellaneous Provisions) Act 1995, which has continued to apply otherwise.
[15] With the exception of Denmark.
[16] See Article 66 of the Withdrawal Agreement.
[17] With the exception of Denmark.
[18] See The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019. These were originally intended to come into force on exit day, in the event of a hard Brexit, but are now intended to come into force at the end of the Transition Period instead (absent any agreement between the EU and the UK in the interim in relation to this area which may render them obsolete).
[19] With the exception of Denmark.
[20] Although the UK will automatically leave the Rome Convention upon the conclusion of the Transition Period, the UK government has indicated that the 1990 Act will remain in place with appropriate amendments, so the position with respect to contracts concluded prior to 17 December 2009 will also remain the same after that point as it is now.

consideration should be given to whether English law remains an appropriate choice of law. While less likely to be an issue in the context of arbitration, it is not generally a good idea to confer decision making power on a foreign court in respect of a contract governed by English law.

Checklist: points to consider when negotiating contracts

- ☐ What is your preferred choice of law and why?
- ☐ Are there any potential commercial or other obstacles to an express choice of law clause and what leverage is there to overcome these and make an express election?
- ☐ Does your preferred choice of law match your preferred dispute resolution mechanism?

JURISDICTION

Current position

The current rules for determining which EU member state court has jurisdiction to deal with any given civil or commercial dispute are contained in the Recast Brussels Regulation (the "**Recast Regulation**")[21], which has direct effect throughout the EU[22].

The starting point for those rules is that persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that member state, subject to the following exceptions:

- where the parties (including non-EU parties) have agreed that the courts of another member state should have jurisdiction, that choice will be respected;
- where the parties have agreed that their dispute should be subject to arbitration, that choice will be respected and the rules in the 1958 New York Convention will apply instead; and
- where the dispute involves certain "reserved" subject matters (e.g. rights in rem in immovable property, certain matters relating to companies and cases involving employment, consumer or insurance contracts), the courts of certain member states are given exclusive jurisdiction to deal with it.

The Recast Regulation therefore in most circumstances gives primacy to the parties' choice of forum.

In support of this, the general rule in the Recast Regulation is that when multiple member state courts are seised in respect of a dispute, all courts other than the court first seised must stay their proceedings while the court first seised determines whether or not it has jurisdiction to hear the dispute. There is, however, an exception to this where one of the member state courts has been seised pursuant to an exclusive jurisdiction clause. In those circumstances, it is for that court, not the court first seised, to take the initial step of determining whether or not it has jurisdiction, and all other courts must stay their proceedings in the meantime. The reasoning behind this is to prevent parties from initiating so-called 'Italian torpedo' actions (i.e. initiating proceedings in a reputedly "slow" jurisdiction in breach of an exclusive jurisdiction clause as a delaying tactic, on the basis that it will take that court some time to determine whether or not it has jurisdiction, during which time the hands of the court which should be dealing with the dispute are tied).

The Withdrawal Agreement provides that the rules in the Recast Regulation for determining which member state court has jurisdiction to deal with a civil or commercial dispute will continue to apply on a reciprocal basis in both the UK and the EU with respect to any proceedings instituted before the end of the Transition Period[23].

As a result, the status quo will be maintained in respect of any proceedings commenced on or prior to 31 December 2020.

Post-Transition Period

Absent any agreement to the contrary, the Recast Regulation will, immediately upon expiry of the Transition Period, cease to have effect in the UK[24]. From that point onwards, there will be no comprehensive reciprocal regime in place between the UK and the EU for determining which member state court should take jurisdiction over any given civil or commercial dispute.

The UK government has indicated that it will not, post-Transition Period, unilaterally incorporate the provisions of the Recast Regulation into domestic law (save for the limited grandfathering provisions described above in respect of proceedings instituted before the end of the Transition Period, and certain other limited provisions in respect of consumer and employment disputes), on the basis that they require reciprocity to operate[25].

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[21] Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).
[22] 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.
[23] See Article 67(1) of the Withdrawal Agreement.
[24] As will the 2005 EU/Denmark Agreement.
[25] See The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019. These regulations were originally intended to apply upon exit day, in the event of a hard Brexit, but it is now intended that they will come into force at the end of the Transition Period instead (unless they need to be changed as a result of any agreement reached between the EU and the UK in this area in the interim).

The 2005 Hague Convention

In order partially to fill the gap left by the Recast Regulation, the UK government has therefore indicated that the UK will, as soon as practicable following the conclusion of the Transition Period, re-join in its own right the 2005 Hague Convention[26]. The UK is currently a party to the 2005 Hague Convention by virtue of the Transition Period, but will upon its expiry cease to be so.

The 2005 Hague Convention, like the Recast Regulation, covers disputes with a civil or commercial subject matter, but is much more limited in scope. 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. The current parties to it are the UK (by virtue of the Transition Period), the EU, Mexico, Singapore and Montenegro, but it does not apply intra-EU, or as between the EU and the UK, on the basis that the Recast Regulation takes precedence. Once the Transition Period has ended, and the UK has re-joined the 2005 Hague Convention in own right, it will however apply between the UK and the EU, as well as between the UK and Mexico, Singapore and Montenegro (and any other future parties).

The 2005 Hague Convention will therefore, to an extent, fill the gap left by the Recast Regulation. It should, however, be noted that it is likely only to apply where both:

(i) an exclusive jurisdiction clause has been concluded in favour of a contracting state (i.e. although the point has never been tested, sole option clauses, which seek to give one party a choice as to where to litigate but to confine the other to the courts of one jurisdiction, and non-exclusive jurisdiction clauses, which seek to ensure that the parties have a choice as to where to litigate but cannot validly object if proceedings are first commenced in the courts on which non-exclusive jurisdiction has been conferred, are likely to fall outside its scope[27]); and

(ii) that exclusive jurisdiction clause was *concluded after the convention entered into force for the contracting state upon which jurisdiction has been conferred*.

The regime in the 2005 Hague Convention on parallel proceedings (i.e. for determining which court shall proceed to determine jurisdiction in the first instance in the event that multiple courts are seised) is both less detailed, and less tried and tested, than that contained in the Recast Regulation. While it would ultimately result in the court upon which jurisdiction has been conferred proceeding to hear the claim, it is therefore potentially more open to abuse by a party willing to commence parallel proceedings as a delaying tactic.

Finally, there remains a question mark as to the status of exclusive English jurisdiction clauses concluded while the UK was a member of the 2005 Hague Convention by virtue of its membership of the EU (or by virtue of the Transition Period), given that there will be a (theoretical at least) "break" between that period of membership and the UK re-joining the convention as a standalone state in its own right. The UK government has implemented domestic legislation to the effect that any exclusive jurisdiction clauses which would have been caught by the 2005 Hague Convention while the UK was a party to it by virtue of its membership of the EU, or by virtue of the subsequent transitional arrangements, will be continue to be treated as such, despite the break in the UK's membership[28]. However, that legislation is of limited comfort as it will not catch exclusive jurisdiction clauses concluded during that period which would at the time have been caught by the Recast Regulation instead. It is also not something that EU states will necessarily be prepared to replicate. In short, therefore, there can be no guarantee as to how exclusive jurisdiction clauses concluded before the UK re-joins the 2005 Hague Convention in its own right will be treated.

The Lugano Convention

On 8 April 2020, the UK government made a formal application to accede to the 2007 Lugano Convention from the end of the Transition Period. The UK is currently a party to the Lugano Convention by virtue of the Transition Period, but will upon its expiry cease to be so. The current parties to the Lugano Convention are the EU (and, during the Transition Period, the UK), Iceland, Norway and Switzerland, but it does not apply intra-EU, or as between the UK and the EU, on the basis that the Recast Regulation takes precedence. If the UK were to re-join the Lugano Convention in its own right, it would then apply as between the UK and the EU, as well as between the UK and Iceland, Norway and Switzerland. Unlike

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[26] See the 2005 Hague Convention on Choice of Court Agreements.

[27] The Explanatory Report to the Hague Convention by Professors Trevor Hartley and Masato Dogauchi notes at paragraphs 105-106 that sole option jurisdiction clause are often used in international loan agreements but that the relevant Diplomatic Session agreed that they "*are not exclusive choice of court agreements for the purposes of the Convention*".

[28] See The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018. These regulations were originally intended to apply in the event of a hard Brexit, but it is now intended that they will come into force at the end of the Transition Period instead.

the 2005 Hague Convention, however, the UK would need the agreement of all the existing signatories before it could re-join it. Iceland, Norway and Switzerland have all indicated that they would be content for it to do so, but there have been some recent indications that the EU may withhold its consent in order to use it as a bargaining chip in the wider negotiations over the parties' future relationship.

If and when the UK does re-join the Lugano Convention, its provisions are very similar to those of the Recast Regulation. In particular, it gives precedence to the parties' choice of forum to resolve their dispute in the same way that the Recast Regulation does. There is, however, one key difference, in that the Lugano Convention provides, in the event of parallel proceedings, that it is the court first seised which must take the initial step of determining whether it has jurisdiction while all other proceedings are stayed: it does not allow courts seised of claims on the basis of exclusive jurisdiction clauses to take this initial step in the way that the Recast Regulation does. It is, as a result, less effective in preventing the use of 'Italian torpedo' style claims as a delaying tactic.

A new agreement

The UK government has also indicated that it would in the long term like to explore the possibility of a new, comprehensive agreement with the EU on civil judicial co-operation, obviating the need to rely on either the 2005 Hague Convention or the Lugano Convention. There is, however, no indication as yet as to what such an agreement would contain, the likely timeframe for it or, most importantly, whether the EU would even be amenable to it. The Political Declaration makes no mention of civil judicial co-operation, and it does not appear to be a priority in the negotiations which are currently underway[29].

To the extent that the 2005 Hague Convention, the Lugano Convention or any bespoke new agreement do not apply to any given civil or commercial dispute, the English courts will need to revert to their own common law rules for determining jurisdiction, which currently apply in cross border cases concerning the rest of the world. Those rules will usually result in the English courts taking jurisdiction over a dispute where the parties to it have agreed that they should do so. The courts of EU member states will also need to apply their own domestic rules in this area.

Risks

The major risks in this area post-Transition Period are that:

- in the event that the UK does not re-join the Lugano Convention in its own right, at least some types of English jurisdiction clause will cease to be respected throughout the EU in the way that they are now, and there will no longer be a comprehensive EU-wide bar on parallel proceedings being commenced in EU states in breach of such clauses; and
- even if the UK does re-join the Lugano Convention its own right, while English jurisdiction clauses will then be respected throughout the EU (and in Norway, Iceland and Switzerland), there will still be scope for parties prepared to deploy aggressive tactics to cause delays by pre-emptively initiating 'Italian torpedo'-style claims. This may, in some circumstances, lead to a "race to court" (e.g. a lender enforcing a debt claim may wish to strike quickly in London before the borrower issues proceedings in Italy).

That said, if and when the Recast Regulation and Lugano Convention fall away in this jurisdiction, so will the restrictions they contain on the issuing by national courts of anti-suit injunctions. This would mean that the English courts could once again issue injunctions prohibiting proceedings being brought in other jurisdictions, while proceedings are live in this jurisdiction. The success of these injunctions relies upon the counterparty having some form of presence in the UK, such that it is in its interests not to act in defiance of an English court order.

Either way, in light of the above, parties must continue to pay very close attention to the dispute resolution mechanism that they include in any new contracts. For a summary of the potential options, see the section below entitled "Dispute Resolution Mechanisms in Contracts: the Options".

Checklist: points to consider when negotiating contracts

☐ Do you want to be able to initiate proceedings in the courts of a particular country?

[29] The text of a new international convention governing jurisdiction and enforcement of judgments, the 2019 Hague Convention, was finalised last year. The 2019 Hague Convention is much broader in scope than the 2005 Hague Convention, and could, in the long term, harmonise the rules in this area not just between the UK and the EU, but internationally. However, it is currently not in force in any jurisdiction. It has to date been signed by only Ukraine and Uruguay, and is therefore of no assistance in the short or medium term as between the EU and the UK.

- ☐ Have you considered the respective risks of entering into an exclusive vs a non-exclusive jurisdiction clause?
- ☐ Have you considered the risk that, post-Transition Period, exclusive English jurisdiction clauses may not be respected in EU states in the same way that they are now (albeit that the position once the 2005 Hague Convention takes effect for the UK as a standalone state will be much improved)?
- ☐ Have you considered an arbitration clause as a potential alternative and, if so, the key differences between litigation and arbitration?
- ☐ Is enforcement in the EU of any judgment obtained a key consideration? If so, see further the Enforcement section below.

ENFORCEMENT

Current position

The topic of recognition and enforcement of court judgments is distinct from, but closely related to, the topic of jurisdiction.

Recognition and enforcement of judgments across the EU (and by, virtue of the Transition Period, between the EU and the UK) is currently governed by the Recast Regulation[30]. That regulation provides that English judgments must be recognised and enforced in EU member states, and that judgments given in EU member states must be recognised and enforced in the UK, via a relatively simple and informal procedure[31]. Importantly from the perspective of London as an international dispute resolution centre, judgments given by the English courts are recognised and enforceable across the EU regardless of the nationality of the parties to the dispute. This is doubtless an attractive feature of England as a jurisdiction.

The Withdrawal Agreement provides that the rules in the Recast Regulation which ensure that judgments handed down by the courts of member states are recognised and enforceable throughout the EU will continue to apply on a reciprocal basis in both the UK and the EU to any judgments handed down in proceedings commenced before the end of the Transition Period[32].

As a result, any judgments arising out of proceedings commenced before the English courts on or prior to 31 December 2020 will remain readily recognisable and enforceable throughout the EU in the same way that they are now, even once the Transition Period has expired. All other things being equal, this may result in an impetus to issue proceedings before the end of the Transition Period.

Post-Transition Period

As set out in the section on Jurisdiction above, the Recast Regulation will, upon expiry of the Transition Period, immediately cease to have effect in the UK[33]. From that point on, there will be no comprehensive reciprocal regime in place between the UK and the EU for the recognition and enforcement of judgments of each other's courts.

The rules in the Recast Regulation require reciprocity to operate effectively and so the UK cannot, and indeed has indicated that it will not, attempt to replicate them simply by incorporating them into domestic law[34]. As a result, something more will be needed to fill the gap created once the Recast Regulation falls away.

The Hague Convention

As discussed in the "Jurisdiction" section above, the Hague Convention will hopefully provide a partial solution to this, once the UK re-joins it as a standalone state post-Transition Period. That convention, which will once the UK has re-joined it apply as between the UK and the EU, provides that contracting states must recognise and enforce judgments of each other's courts, provided that those judgments arise from proceedings commenced pursuant to an exclusive jurisdiction clause in favour of a contracting state, and that exclusive jurisdiction clause was concluded after the convention came into force for that state. It will as a result be of assistance on a forward-looking basis for parties which conclude exclusive English jurisdiction clauses after the Transition Period ends, but may not assist parties which have concluded such clauses prior to that date[35]. Judgments arising from proceedings commenced pursuant to non-exclusive or sole option jurisdiction clauses will also likely fall outside its scope.

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[30] The Recast Regulation applies to judgments handed down in proceedings commenced on or after 10 January 2015. Regulation 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (the "**Brussels Regulation**") applies to judgments handed down in proceedings commenced prior to that date. The rules in the Brussels Regulation and the Recast Regulation are very similar, save that the process for recognition and enforcement in the Recast Regulation is even quicker and simpler than that in the Brussels Regulation.

[31] Denmark has opted out of the Recast Regulation but its provisions nonetheless apply as between it and other EU member states (and during the Transition Period, between it and the UK) by virtue of the 2005 EU/Denmark Agreement.

[32] See Article 67(2) of the Withdrawal Agreement.

[33] As will the 2005 EU/Denmark Agreement.

[34] See The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019. These regulations were originally intended to apply in the event of a hard Brexit, but it is now intended that they will come into force at the end of the Transition Period.

[35] The UK government has legislated to the effect that, immediately upon expiry of the Transition Period, exclusive jurisdiction clauses which would have been caught by the Hague Convention when the UK was a party to it in its capacity as a member of the EU (or by virtue of the Transition Period) will be treated in exactly the same way as exclusive jurisdiction clauses concluded once the UK has become a member of the Hague Convention it its own right. However, this legislation will not catch clauses which would at the relevant time have been caught by the Recast Regulation rather than the Hague Convention. There can also be no guarantee that EU states will take the same approach.

The Lugano Convention

As set out in the "Jurisdiction" section above, the UK has formally applied to accede to the 2007 Lugano Convention from the end of the Transition Period. As mentioned, the Lugano Convention currently applies as between the EU (and, during the Transition Period, the UK), and Norway, Switzerland and Iceland, but does not apply intra-EU on the basis that the Recast Regulation takes precedence. If the UK were to re-join in its own right, it would apply as between the UK and the EU, and would in most respects replicate the rules in the Recast Regulation regarding recognition and enforcement of judgments, save that the procedures it contains for doing so are slightly less streamlined.

A new agreement

Finally, the UK government has indicated that it would ultimately like to conclude a new, more comprehensive agreement with the EU on civil judicial co-operation in general, including in relation to recognition and enforcement of judgments, obviating the need to rely on either the Hague or Lugano Conventions in this area. However, as set out above, there is as yet no indication as to what such an agreement would contain, the timeframe within which it would be concluded or even, most importantly, whether the EU would be amenable to it.

Risks

The likely changes post-Transition Period to the current EU-wide regime for recognising and enforcing judgments are arguably its most important consequence from a dispute resolution perspective. As noted above, while the English courts will remain an attractive forum for the resolution of international disputes, one of their advantages to date has been the ease and relative speed of recognition and enforcement of their judgments across the EU. Post-Transition Period, and particularly in the event that the UK does not accede to the Lugano Convention, there will be no EU-wide "one stop shop" enforcement process for English court judgments. As a result, parties will need to be prepared to deal with local law and procedure when enforcing such judgments in the EU (in the same way that they currently need to when enforcing English judgments in, say, the United States, China or Japan). In some EU jurisdictions, this could potentially include having to re-argue the merits of a claim in order to obtain an order for enforcement. Parties are likely to encounter a diverse spectrum of experiences in different EU states, including as to timescales for enforcement, depending on the efficiency and complexity of local law and procedure.

It is clearly desirable that alternative and workable arrangements are put in place promptly upon the expiry of the Transition Period. One would also hope that EU states would be incentivised in such negotiations by a need to enforce judgments from their courts here. However, no mention is made of reciprocal recognition and enforcement of judgments (or indeed of civil judicial co-operation more generally) in the Political Declaration which accompanies the Withdrawal Agreement. This suggests that it is not an immediate priority in the ongoing negotiations between the UK and the EU as to the shape of their long term future relationship.

Either way, quick and easy recognition and enforcement of English court judgments in the EU is likely to be something which has hitherto been taken for granted, and now needs to be given due consideration in light of the potential changes in this area post-Transition Period. Parties negotiating new contracts will need to consider carefully whether, in light of those potential changes, an exclusive English jurisdiction clause remains the most appropriate dispute resolution mechanism for them. If quick and easy recognition and enforcement of any judgment they may obtain in the EU is a critical factor for them (for example because of the location of counterparties or assets), then alternative options will need to be considered. For further information, see the section below entitled "Dispute Resolution Mechanisms in Contracts: the Options".

Checklist: questions to consider when negotiating contracts

- ☐ Is any court judgment obtained likely to need to be enforced in one or more EU states (e.g. by reference to the location of the counterparty or its assets)?
- ☐ If so, have the potential difficulties in doing so post-Transition Period been considered, along with possible risk mitigation?

DISPUTE RESOLUTION MECHANISMS IN CONTRACTS: THE OPTIONS

As set out above, there is at least some prospect of the Transition Period expiring on 31 December 2020 without a long-term comprehensive reciprocal regime being agreed in relation to either jurisdiction or the recognition and enforcement of judgments. It is therefore vital that parties continue to give close attention to the dispute resolution mechanism that they include in any new contracts. There will never be any one size fits all "perfect" solution, given the potential uncertainties, but the key options and some of their pros and cons are set out below.

Please speak to any member of our Dispute Resolution department for any additional guidance that may be needed. Note also that certain of the options below will require local law advice.

- ***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. It will remain a very attractive option in most cases, notwithstanding the potential complications to which the end of the Transition Period may give rise. However, there is now some risk that, once that period expires, EU courts will cease to respect such clauses in the way that they do now, potentially leading to parallel proceedings. There is also a risk that, post-Transition Period, judgments handed down in English proceedings may be less readily enforceable in the EU than previously. If enforcement in the EU is a material consideration, for example because key counterparties or assets are located there, then consideration should be given to whether that is a sufficiently compelling reason to consider alternative options. In this context, if you know from the outset which particular 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-Transition Period, following which a considered decision can be made. Finally, note that any clauses of this type which are concluded after the 2005 Hague Convention has come into force for the UK as a standalone state 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. We are as a result starting to see provision in some contracts for exclusive English jurisdiction clauses being concluded now to be re-executed post-31 December 2020, to ensure that they remain captured by the Hague Convention.
- ***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 it is clear which laws will apply as to establishing jurisdiction and to what extent English judgments will be enforceable in the EU. 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, such a clause was held to be incompatible with the Lugano Convention by the French Cour de Cassation in 2015[36] – and you 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 are unlikely to 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 EU will continue post-Transition Period to be signatories to the 1958 New York Convention. As a result, arbitration clauses will continue to be respected both here and in the 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 EU (as well as in many other jurisdictions) in the same way that they are now. As a result, if enforcement in the EU is a material consideration, 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. It should, however, be remembered that there are a number of significant differences between litigation and arbitration, and there will often be good reasons to litigate not arbitrate. In particular, there are important differences in 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 considered before a final decision is made (including, if arbitration is chosen, as regards the precise arbitral structure, given the different available options).

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

- ***Exclusive jurisdiction to an EU state***: if conduct of a case, and subsequent enforcement, in the EU is an absolute priority, and arbitration is not desirable, then a clause conferring jurisdiction on the courts of a suitable 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.

SERVICE OF PROCESS

Current position

Service of proceedings on defendants and their lawyers domiciled in EU member states is currently governed by the EU Service Regulation[37], which has direct effect throughout the EU[38], and also currently applies to and in the UK by virtue of the Transition Period. The Service Regulation sets out a relatively quick and simple process for effecting such service, typically via designating "transmitting agencies" and "receiving agencies" in each state.

It is also currently the case that permission of the English courts is not required prior to effecting service in EU member states.

Post-Transition Period

The Service Regulation will, post-Transition Period, cease to have direct effect in the UK. The UK government has also indicated that its provisions will not be incorporated into domestic law, on the basis that they require reciprocity to operate. The UK government has, however, implemented domestic legislation to the effect that any outstanding requests for service received by the UK transmitting agency prior to expiry of the Transition Period are complied with[39].

Once the Service Regulation has ceased to apply, the UK will instead need to fall back on the provisions of the 1965 Hague Service Convention[40]. The UK is currently a party to that convention in its own right, along with all EU states except Austria (which has signed but not yet ratified it), and will remain so post-Transition Period. The Hague Service Convention contains a procedure for service of proceedings in contracting states which is less quick and streamlined than that contained in the Service Regulation.

A further consequence of the expiry of the Transition Period will be that permission of the English courts to effect service out of the jurisdiction will likely be required in a much greater range of cases than previously. The English Civil Procedure Rules currently provide that no such permission is required where the English courts have jurisdiction pursuant to the Recast Regulation, the Lugano Convention or the Hague Convention. Given that the Recast Regulation will cease to have effect in the UK upon expiry of the Transition Period, and that the UK will also cease to be a member of both conventions in its capacity as an EU member state and be required to re-join them in its own right (something which could, in the case of the Lugano Convention, be blocked by the other signatories), permission applications are therefore likely to become much more commonplace in future.

Risks

Aside from the extra administrative hurdle of applying to court for permission to serve out of the jurisdiction, the key risk for parties to existing contracts, and those entering into new contracts, with EU-based counterparties is that they may post-Transition Period face procedural challenges and delays when effecting service in the EU, where previously no such issues would have existed.

The best way to counteract this risk is to include agent for service of process clauses in any new contracts with EU counterparties, under which the counterparty irrevocably appoints an entity in this jurisdiction to accept service of proceedings on their behalf. Such clauses are in fact strongly recommended in contracts with international counterparties more generally.

Checklist: questions to consider when negotiating contracts

☐ Are any of the parties to the contract based outside of the UK? If so, a clause appointing an agent for service of process based in this jurisdiction should, whenever possible, be included.

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[37] Regulation 1393/2007 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters.
[38] Except for in Denmark, which has however notified the European Commission of its intention to treat itself as bound by it.
[39] See The Service of Documents and Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provisions) (EU Exit) Regulations 2018.
[40] See the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters.