Introduction

Updated 8 January 2021

1. This article looks at the impact of reaching the end of the Brexit transition period (at 11pm on 31 December 2020) on governing law, jurisdiction, enforcement, and service in contracts between UK entities and EU member state entities.

2. In a dispute resolution context, the end of the transition period is particularly relevant where a contract provides for disputes to be heard in the English courts but assets against which a judgment made in those proceedings would need to be enforced are located in an EU member state (or vice versa). We focus in particular on the key points to be aware of in relation to contracts containing a choice of English law/courts and set out some practical steps to consider.

Summary (of the position now that the Brexit transition period has ended)

3. Choice of law: EU member state courts will continue to respect an express choice of English law (and equally English courts will continue to respect an express choice of the law of an EU member state).

4. Choice of courts/jurisdiction and enforcement judgments: the key regime for recognition of English choice of court clauses and enforcement of English judgments in EU member states has switched from being Brussels (Recast) (defined below) to the Hague Convention (defined below). Note that the Hague Convention regime is not equivalent to Brussels (Recast): it is more limited in its application and its scope. The UK has applied to join the Lugano Convention, which would provide a broadly equivalent regime to the first Brussels Regulation (before it was “recast” and strengthened), but consent from all other signatories has not yet been obtained and it is therefore not in force in the UK.

5. The key limitations with respect to the Hague Convention are that it only applies to exclusive jurisdiction clauses entered into after the Convention came/comes into force in the state chosen in the choice of court clause. As a result:

5.1. There is uncertainty as to whether the courts of EU member states or the English courts will hold that asymmetric clauses/one sided exclusive jurisdiction clauses fall under the Hague Convention regime (recent comments by the English Court of Appeal suggest that the English courts probably will not); and

5.2. English choice of court/jurisdiction agreements/clauses entered into prior to 1 January 2021 may need...
to be restated to provide certainty that EU member state courts will apply the Hague Convention to such clauses and any resulting judgments (although the English courts will apply the Hague Convention to agreements entered into from 1 October 2015).

6. If the Hague Convention does not apply it does not mean that the courts of EU member states will necessarily disregard English choice of court clauses or refuse to enforce English judgments. In most cases, the courts considering the issue will apply local law. The patchwork of potentially applicable legal regimes that could therefore apply will give rise to some uncertainty.

7. **Service:** where contracts do not contain a process agent clause, allowing service within the jurisdiction, the process for service of documents will (in most cases) be governed by the Hague Service Convention instead of the EU Service Regulation (defined below). Service under the Hague Service Convention can be more time consuming and costly than under the EU Service Regulation but the need to use this process can often be avoided by including a process agent clause (where such a clause is acceptable in the jurisdictions of the contractual counterparties).

8. **Arbitration:** in contrast, Brexit will not affect the recognition and enforcement throughout EU member states of awards made by arbitral tribunals seated in the UK (or vice versa). Active consideration should be given to whether arbitration might provide a more attractive dispute resolution mechanism than court litigation in light of the uncertainties caused by Brexit.

### Choice of law

#### The pre-Brexit position

9. Regulation (EC) No.593/2008 (Rome I) governed the choice of law for contractual obligations in EU member states and in the UK and provided that parties' choice of law should be respected.

#### What has changed?

10. In short, nothing has changed:

   10.1. Rome I must be applied by EU member state courts (except Danish courts) even if the chosen law is not the law of a member state. This means that the choice of English law will still be given effect by EU member states' courts.

   10.2. Equally, the UK has brought the provisions of Rome I into its domestic law and the English courts will continue to uphold the parties' choice of law, whether English law, that of an EU member state, or that of another country.

### Choice of court/jurisdiction

#### The pre-Brexit position

11. Regulation (EU) No.1215/2012 (Recast) (Brussels (Recast)) applied to the UK and EU member states with respect to choice of courts/jurisdiction (and enforcement of judgments), and provided that parties' choice of courts/jurisdiction would be respected.

12. Brussels (Recast) provides that, where a party tries to bring a case in a court (the Other Court) in an EU member state other than the EU member state court given express exclusive jurisdiction in the relevant documents (the Named Court), the Other Court must stay its own proceedings until the Named Court decides whether or not it has jurisdiction. If the Named Court takes jurisdiction the action in the Other Court will not proceed. It therefore prevents the so-called "Italian torpedo" – a party commencing parallel proceedings in a jurisdiction that was not chosen by the parties. In contrast, if the choice of court in the relevant documents is non-exclusive, this protection will not apply and the court first seised (i.e. in which proceedings were brought first) will consider if it has jurisdiction to hear the case, even if it is not the Named Court (pending which the court which was not first seised has to stay its own proceedings).
13. In addition, the 2007 Lugano Convention applied with respect to jurisdiction provisions between EU member states (and the UK) and Iceland, Norway, and Switzerland. The Lugano Convention is very similar to Brussels (Recast). However, a key difference is that, even where there is an exclusive jurisdiction clause, it is the court first seised (not necessarily the Named Court) that decides if it has jurisdiction, so the Other Court might determine that the Named Court has to decline jurisdiction.

What has changed?

14. After the end of the transition period, Brussels (Recast) ceased to apply to the UK.

15. The UK’s preferred option is to join the Lugano Convention, which it has applied to do. However, consent is required from all the existing parties (including each EU member state) and the UK has only so far received support to join from Iceland, Norway, and Switzerland (i.e. the non-EU signatories). Once consent is received from all current parties, there is a three-month objection period before the Lugano Convention enters into force. Therefore, the Lugano Convention has not come into force in the UK and it is currently unclear when (or even if) it will.

16. The UK’s fallback position (which currently applies) is the Hague Convention on Choice of Court Agreements (the Hague Convention). The Hague Convention provides that exclusive choice of court agreements must be respected. The Hague Convention applies between the courts of participating states (i.e. the EU, Mexico, Montenegro, Singapore, and now the UK in its own right) with respect to contracts entered into after the Hague Convention came into force in the state of the chosen court.

17. The Hague Convention has been in force in the EU since 1 October 2015:

17.1. The UK argues that the Hague Convention has therefore also been in force in the UK since that date (as a member of the EU) and has adopted this position in domestic legislation. The European Commission does not agree.

17.2. As a fallback, the UK redeposited its instrument of accession to the Hague Convention on 28 September 2020 to ensure, as a worst case, that the Hague Convention would be in force on 1 January 2021; the European Commission’s stance is that this is the correct position.

18. There are two issues to note with the Hague Convention:

18.1. First, it only applies to choice of court agreements concluded after its entry into force. Therefore, from the European Commission’s perspective (which is not determinative, but which might be reflected in the approach taken by some EU member state courts) it should only apply to choice of law provisions giving the English courts exclusive jurisdiction in contracts entered into from 1 January 2021. However, the English courts will respect an exclusive choice of court agreement pursuant to the Hague Convention in contracts entered into from 1 October 2015 onwards.

18.2. Second, it only applies to exclusive jurisdiction clauses:

18.2.1. Where the choice of court clause provides for non-exclusive jurisdiction, the Hague Convention will not apply, and local law in the place where proceedings are brought (whether in England or in an EU member state) will determine which court has jurisdiction.

18.2.2. Where the choice of court clause is asymmetric (i.e. it provides for the exclusive jurisdiction of the courts of England or an EU member state, but also gives one party the option to commence proceedings in any other jurisdiction of its choosing), there is a degree of uncertainty and it is possible that such a clause would not be regarded as exclusive by the courts of EU member states. Recent comments by the English Court of Appeal suggest that the English courts are also unlikely to view such a clause as exclusive (in contrast to previous indications from the English courts).

19. By way of illustration of the points made in relation to asymmetric clauses above, concern would arise with respect to a clause which provided for the exclusive jurisdiction of the English courts, but gave one party (usually the lender in a finance context) the right to bring proceedings in any other court. This is a ubiquitous structure. However if the party to the contract who does not benefit from the asymmetry commences proceedings in the...
courts of an EU member state, the courts in that state may be persuaded (relying on, inter alia, case law from France which has cast doubt on such clauses) that an asymmetric clause is not exclusive. In such circumstances, the member state court may decide that the Hague Convention does not apply (and that it need not stay the proceedings before it in favour of the English courts, thereby defeating the intention of the clause). However, this risk should not be overstated: asymmetric jurisdiction clauses are a common feature of commercial contracts, particularly in financing transactions, and scenarios such as the example above rarely arise (albeit the position courts take under the Hague Convention might be different to the position previously taken under Brussels (Recast)).

20. In contrast, as explained in more detail below, Brexit does not affect the jurisdiction of arbitral tribunals or the enforcement of arbitral awards between the UK and EU member states. Moreover, Brexit poses no issue when choosing either London as a seat of arbitration or to arbitration under the rules of the London Court of International Arbitration. Arbitration therefore eliminates much of the uncertainty identified above.

What do you need to do?

21. Proceedings that were issued before the end of the Brexit transition period will still benefit from the provisions of Brussels (Recast); proceedings issued from 1 January 2021 will not.

22. When drafting new agreements with English courts as the choice of court, thought should be given to whether it might be advantageous to include unambiguously exclusive (i.e. not asymmetric) jurisdiction clauses when counterparties or their assets are located in EU member states, to maximise the prospect of benefitting from the protections in the Hague Convention.

23. Similarly, it might also be worth considering restating existing jurisdiction clauses in agreements which have English courts as the choice of court but in relation to which enforcement steps might be needed in EU member states so that they commence after 1 January 2021, to ensure EU member state courts will apply the Hague Convention, given that the position on this issue is currently unclear.

24. Arbitration could also be considered as an alternative dispute resolution mechanism to court litigation when entering into or restating agreements, to avoid the issues and uncertainty identified above.

Enforcement

The pre-Brexit position

25. Brussels (Recast) also deals with enforcement of judgments, and provided a relatively straightforward process for enforcement of an English court judgment in an EU member state or a judgment of an EU member state court in the UK. The Lugano Convention set out an equivalent process for the enforcement of judgments between the EU member states (and the UK) and Iceland, Norway, and Switzerland.

What has changed?

26. As set out above, Brussels (Recast) and the Lugano Convention ceased to apply to the UK after the end of the Brexit transition period.

27. Enforcement of an English court judgment in EU member states (and vice versa) has become less straightforward for new proceedings. If the English courts take jurisdiction and the Hague Convention applies, the judgment will be enforceable in the UK under the Hague Convention. If the Hague Convention does not apply, an English court judgment will be enforceable in accordance with the local law of the EU member state in which enforcement is sought and local law advice will be required in relation to whether enforcement is possible. (It is a good idea to take local law advice at the outset whenever commencing cross-border proceedings in any event). Bilateral treaties between the UK and certain EU member states might apply and assist on a state-by-state basis.

What do you need to do?

28. As explained above, consider restating existing agreements and whether jurisdiction clauses should be made exclusive (rather than asymmetric or non-exclusive). Arbitration might also be considered as an alternative dispute resolution mechanism to court litigation.
Service

The pre-Brexit position

29. It was possible to serve an English court claim form in the EU without the English courts’ permission under the provisions in CPR 6.33. The mechanics of service of English courts proceedings in the EU was governed by Regulation (EC) 1393/2007 (the Service Regulation).

What has changed?

30. For proceedings commenced after 31 December 2020, permission to serve out will not be required if the Hague Convention applies (i.e. if the jurisdiction clause is Hague-compliant).

31. It is also worth noting that the English Civil Procedure Rule Committee has approved certain changes to the rules under the English CPR which will remove the need for the English courts’ permission to serve out where the claim falls within an English jurisdiction clause and where the Hague Convention does not apply, but the relevant wording has not been finalised and is not yet in effect.

32. Provided the documents to be served were received by certain intermediaries by 31 December 2020, the Service Regulation will continue to apply, even though service is not completed until after 1 January 2021. If not, service will need to comply with the Hague Service Convention.

Arbitration – a mechanism to circumvent Brexit uncertainty?

33. We have focused above on the impact of Brexit on court litigation. One solution, to which active consideration should be given when entering into new contracts or restating existing contracts, is to choose arbitration, instead of court litigation, as a mechanism for dispute resolution. Although the financial services sector has traditionally leaned toward court litigation, there are a number of inherent advantages to international arbitration, not least that enforcement of awards does not face the uncertainties which we have highlighted above.

34. The UK and each of the EU member states (and the parties to the Lugano Convention) are all parties to the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The New York Convention provides that each of its signatories will recognise and enforce arbitral awards made by arbitral tribunals seated in the jurisdiction of other signatories. When an arbitration is “seated” in a particular jurisdiction, it means that it is subject to the supervisory power of the courts of that jurisdiction (for example, if a court injunction is required in support of the arbitral proceedings, parties would apply to the courts of the seat).

35. Brexit has not affected the UK’s membership of the New York Convention, which the UK acceded to in its own right in 1975. Therefore, arbitral awards made by tribunals seated in the UK (whether under the procedural rules of the London Court of International Arbitration, or otherwise) continue to be enforceable in each and every EU member state. Whether Brexit will result in increased interest in arbitration, to the detriment of court litigation, remains to be seen.

AUTHORS

James Carter
Partner
London | T: +44 (0)20 7349 0296
james.carter@dlapiper.com

Adam Ibrahim
Partner
Leeds | T: +44 (0)20 7349 0296
Jamie Curle
Partner
London | T: +44 (0)20 7349 0296
jamie.curle@dlapiper.com

Dan Jewell
Legal Director
London | T: +44 (0)20 7349 0296
danjewell@dlapiper.com

Paul Hardy
London | T: +44 (0)20 7349 0296
Paul.Hardy@dlapiper.com

Clare Semple
London | T: +44 (0)20 7349 0296
clare.semple@dlapiper.com

DLA Piper is a global law firm operating through various separate and distinct legal entities. Further details of these entities can be found at www.dlapiper.com. This may qualify as