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Selection Of English Governing Law, Jurisdiction Post-Brexit

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Among the multitude of issues arising from the United Kingdom's likely departure from the European Union, for those drafting and negotiating international commercial contracts, a key concern will be the potential implications of Brexit on the selection of governing law and jurisdiction.


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Further issues (outside the scope of this article) requiring careful consideration include how Brexit and the U.K.'s future trade arrangements might affect ongoing commercial arrangements and what provisions can be built into contracts being drafted now to address potential areas of risk (for example, the potential imposition of tariffs or duties, the application of particular standards etc.). There are also more technical drafting points, such as how references to EU law or the territory of the EU will be interpreted post-Brexit, and the possible impact of force majeure, termination or similar provisions. There may be scope to renegotiate existing contracts to deal expressly with what are now "known unknowns" and parties should be keeping under review how the U.K.'s exit terms might affect performance of their existing rights and obligations.

Choice of Governing Law

A survey undertaken last year by the Ministry of Justice highlighted the popularity of English law in international transactions, with respondents pointing to its quality, certainty, clarity and predictability. Parties welcome its respect for freedom of contract and its recognition that, as the U.K. Supreme Court recently stressed in Arnold v. Britton[1], the function of the court is not to rewrite the commercial bargain between the parties.

Brexit will not cause these advantages to disappear — English contract law is predominantly based on domestic common law, which will continue its incremental development irrespective of the U.K.'s membership of the EU.

The U.K.'s membership of the EU has shaped English law in a number of other respects and the government will need to consider to what extent EU legislation should effectively remain in place. It is unlikely to sweep away all such provisions wholesale, not least because of the practical difficulty of so doing given the sheer volume of new domestic law that would be required. The changes are unlikely to be so marked or made so rapidly as to warrant selection of a different law. Indeed, English law provides a sound platform for drafting contracts that expressly regulate how the parties will deal with changes

caused by Brexit.

Parties which continue to have their commercial contracts governed by English law will want to ensure that their choice will be upheld post-Brexit.

Within the EU, choice of law is governed by the Rome I Regulation on the Law Applicable to Contractual Obligations (Rome I) and the Rome II Regulation on the Law Applicable to Non-Contractual Obligations (Rome II). Both provide for parties' choice of law generally to be respected, regardless of whether they selected the law of an EU or a non-EU country. Accordingly, the courts of EU member states should continue to respect a choice of English law post-Brexit.

But what approach will the U.K. take? It seems very unlikely the U.K. would risk undermining the popularity of English law by adopting a materially different approach. Many consider that the U.K. is likely to apply regimes which mirror Rome I and II. But if not, one option would be to revert to the previous rules.

For contractual claims, that would mean the Contracts (Applicable Law) Act 1990 (and therefore the Rome Convention, the precursor to Rome I) or historic domestic rules. Either way, an express choice of law would be upheld.

The position for noncontractual claims is more complex. Before Rome II, English law did not provide for making an express choice of law to govern noncontractual disputes. It remains to be seen whether this would change, although reverting to a regime which did not provide for parties' freedom of choice would be an unwelcome (and somewhat surprising) backward step.

Choice of Jurisdiction

The popularity of English law is closely linked with London's advantages as a leading venue for international dispute resolution. Respondents to the Ministry of Justice survey cited a range of reasons for litigating in the English courts, of which the top two were the reputation/experience of the judiciary and the combination of English jurisdiction and governing law.

The question of which (if any) EU member state has jurisdiction over a dispute is currently governed primarily by Regulation 1215/2012, the so-called Recast Brussels Regulation (for proceedings issued on or after Jan. 10, 2015; Regulation 44/2001 applies to earlier proceedings).

One possible Brexit outcome is that the Recast Brussels Regulation and/or the similar Lugano Convention (to which the EU, Switzerland, Iceland and Norway are party) will continue to apply in, and in respect of, the U.K., or a new equivalent might be agreed along the same lines.

Under the Recast Brussels Regulation, jurisdiction clauses in favor of the court of an EU member state are generally upheld. Where the clause is exclusive, it is now for the court of the chosen member state to determine its jurisdiction, even where proceedings have already been brought in another member state. This neutralized the effect of the so-called "Italian Torpedo" — commencing proceedings first elsewhere in breach of an exclusive jurisdiction clause to delay proceedings before the named court. If the clause only confers nonexclusive jurisdiction, it is still the court "first seised" which determines whether it has jurisdiction, and proceedings in other member states are stayed in the meantime.

The Lugano Convention is similar to the Recast Brussels Regulation, but there are some significant

differences. For example, unlike under the Recast Brussels Regulation, a jurisdiction agreement will only be effective if one of the parties is domiciled in a Lugano contracting state. Also, the Lugano Convention has not yet been amended to address the problem of "Italian torpedo" claims disrupting the effect of an exclusive jurisdiction clause. That said, Lugano tends to adopt Brussels revisions after a short period, so these differences may not be a major concern if the U.K. were to be subject to a Lugano/quasi-Lugano regime in years to come.

A further consideration is the 2005 Hague Convention on Choice of Court Agreements, which provides for the enforcement of exclusive (rather than nonexclusive) jurisdiction clauses. It is currently in force between the EU (other than Denmark) and Mexico, with Singapore to follow on Oct. 1, 2016 (the U.S. and Ukraine are also already signatories but are yet to ratify it). Following Brexit, the U.K. would (if necessary) almost certainly accede individually so that, regardless of whether a quasi-Brussels/Lugano regime is agreed, the convention would apply as between the U.K. and most EU states.

Finally, absent applicable international agreements, the English courts could instead apply common law principles, just as they do now when issues fall outside the Brussels/Lugano regime. These tried and tested principles almost always result in the enforcement of exclusive jurisdiction agreements, and ordinarily the application of nonexclusive ones too. The effect of English jurisdiction clauses in EU/Lugano states, however, would be a matter for their domestic laws. While most would generally uphold exclusive clauses (especially in view of the Hague Convention), nonexclusive clauses would increase the risk of parallel proceedings.

Parallel Proceedings in EU/Lugano States

If a quasi-Brussels/Lugano regime for the U.K. cannot be agreed upon, the rules that prevent or limit parallel proceedings (and potentially conflicting judgments) in the courts of multiple EU/Lugano states would cease to apply in respect of the U.K. That might increase the risk of parallel proceedings (which might also have implications for enforcement).

On the other hand, the cessation of those rules would sometimes permit an English court to take jurisdiction over claims which, despite being the most appropriate forum, it would currently be prevented from hearing, and the English courts would also regain their power to grant anti-suit injunctions restraining proceedings wrongly commenced in EU/Lugano states.

In any event, a well-drafted exclusive jurisdiction clause would continue to be a useful mechanism to avoid, or at least mitigate the risk of, parallel proceedings.

Enforcement

The Brussels/Lugano regime provides a clear framework for the recognition and enforcement of judgments as between EU/Lugano states (although procedural simplifications introduced via the Recast Brussels Regulation are yet to be mirrored in the Lugano Convention).

If a quasi-Brussels/Lugano regime can be agreed on for the U.K., there will be no dramatic change — English judgments will continue to be recognized/enforced in Brussels/Lugano states in much the same way.

But without such a regime, the enforceability of an English judgment in EU/Lugano states would depend on Hague Convention on Choice of Court Agreements and whatever other arrangements are in put

place, or alternatively on the domestic rules of each state.

The Hague Convention would enable the enforcement in other convention states of both monetary and nonmonetary U.K. judgments awarded pursuant to an exclusive jurisdiction clause (although the procedure would not be as simple as under Brussels/Lugano).[2]

Any alternative arrangement or domestic rules are unlikely to provide for enforcement without scrutiny of the basis on which the English court took jurisdiction, and their application may also sometimes be limited to monetary judgments.

Other Implications of Brexit

Certain other EU procedural benefits might no longer be available post-Brexit. These include, in respect of uncontested claims, European Enforcement Orders and European Orders for Payment, which are enforceable throughout the EU.

The EU regulations on service of documents and the taking of evidence in the EU might also cease to be applicable in respect of U.K. proceedings. That should not be a major concern since the Hague Convention equivalents bind both the U.K. and the vast majority of EU member states, but it nonetheless remains sensible to ensure that contracts require overseas parties to appoint an agent to accept service of process within the jurisdiction, so the additional effort of service out of the jurisdiction is avoided.

Conclusions

So where does that leave anyone drafting a law and jurisdiction clause? Does the uncertainty of precisely how U.K. law might deal with choice of law and jurisdiction post-Brexit justify adopting a different governing law or forum choice? Although it makes sense to keep this under review as the post-Brexit landscape emerges, a change of approach might be to throw out the baby with the bathwater.

Regardless of the outcome of trade negotiations, a choice of English law would continue to be generally upheld by the courts of both the U.K. and EU member states. Most will see no reason to change any general policy to select English law simply because the U.K. is leaving the EU. Changing the governing law involves much more than simply swapping one law for another in the choice of law clause. It could have a material impact on how the contract would be interpreted and its legal effect — which would call for a careful and time-consuming review so the knock-on effects of the change could be properly considered.

Similarly, an exclusive jurisdiction clause (and judgments awarded pursuant to it) would almost certainly be enforced by the courts of EU member states (just as they would by an English court). But there are uncertainties as to how parallel proceedings and the enforcement of judgments will be addressed where only nonexclusive jurisdiction is conferred, so clauses that confer exclusive jurisdiction will be more attractive.

The question of what happens when there are parallel proceedings in the U.K. and an EU/Lugano state, and the substantive law and practicalities of enforcing a U.K. judgment in EU/Lugano states, will depend much more upon the outcome of trade negotiations. While some have expressed concern that these issues may not be "top of the list" in future negotiations, that means that there is an opportunity to forge sensible solutions to what are essentially technical rather than political issues.

With the legal and business community having already impressed on the U.K. government that it should not lose sight of the importance of cross-border dispute resolution rules and procedural mechanisms, and that it should remain mindful of increasing competition from other international dispute centers, there is good reason to think that Brexit should not reduce the popularity of choosing English governing law in commercial contracts and coming to the English courts to resolve disputes.

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[1] [2015] UKSC 36

[2] A draft has recently been drawn up of a new Hague Convention on The Recognition and Enforcement of Foreign Judgments (applicable regardless of whether they were awarded pursuant to an exclusive jurisdiction clause), although it will no doubt take a substantial period of time for this to be finalised, signed and ratified by a significant number of countries.
