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Cross-border disputes

The Brexit effect assessed, and the bigger global picture

A. The UK's position as a dispute resolution global capital

1. There has been much speculation about the risk of Brexit affecting London's position as a dispute resolution capital of the world including, in particular, if the UK and EU/EFTA States were unable to agree terms, broadly equivalent to those currently in place, in respect of cross-border disputes and judicial co-operation.

2. It is certainly the case that the UK is facing increasing competition from other dispute resolution forums across the globe - and such competition is being further fuelled by speculation as to the potential implications of Brexit on cross-border litigation.

3. At the same time however:

    - it may be that the greatest risk for the UK courts comes not from the substantive or practical concerns that Brexit in fact creates, but rather from the effects of uncertainty and international perception (and in some instances, misperception); and
    - it is important to emphasise that the UK courts are not "resting on their laurels": a number of steps are being taken to modernise the UK courts, systems, procedures and available remedies, in order to keep pace with a rapidly evolving modern world.

B. The substantive and practical reality

4. Some cross-border issues (where the existing rules require no substantive or practical mutuality or recognition) will be almost entirely unaffected by Brexit - for example:

    - on the question of **choice of law/ governing law**, the UK has taken steps to replicate the governing law rules in the Rome I and II EU Regulations[1] into domestic law upon Brexit;

1 I.e. EU Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I) and Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II).

- as regards **international interim/protective relief**, the ability of the UK courts to grant such relief (including where the main proceedings are heard in the courts of an EU Member State or another Lugano State[2]) is already a matter for domestic law[3], as is the ability of the courts of an EU/Lugano State to grant such relief in support of UK proceedings[4]; and
- in relation to **state immunity**, most UK rules are enshrined in its domestic law.

5. In respect of other issues, such as **international service** and the obtaining of **international evidence**, rules that are broadly similar to the equivalent EU Regulations already exist in the form of Hague Conventions – by which both the UK and almost all EU Member States[5] are bound, and which will apply as between those states in the absence of the continued operation of the existing EU Regulations or the equivalent.

6. It is the rules in relation to **forum/jurisdiction and parallel proceedings** and **international asset recovery/ enforcement** which have sparked the greatest debate. However, even if no rules equivalent to those applicable as between EU/Lugano States[6] can be agreed between the UK and such States (albeit that one would hope such agreement should be possible), a number of points should be noted in this respect, as follows.

Jurisdiction and parallel proceedings

7. Where the parties agreed an exclusive UK (English) jurisdiction clause, one would hope that, at least in most cases, EU/Lugano States would continue to respect that clause, whether as a consequence of the 2005 Hague Convention on Choice of Court Agreements (the "**2005 Hague Convention**")[7] or otherwise[8].

2 Lugano States comprise EU Member States and the other Lugano States of Iceland, Norway and Switzerland. The only other EFTA State is Liechtenstein, but that is neither an EU Member State nor a Lugano State.

3 Pursuant to Section 25 of the Civil Jurisdiction and Judgments Act 1982, and Order in Council SI 1997/302 (which, in accordance with Section 25(3)(a), extended that ability to circumstances in which the substantive proceedings are in the Courts of a non- EU/Lugano country).

4 See Article 35 of the EU Recast Brussels I Regulation (EU) No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("**Recast Brussels I**") and Article 31 of the 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the "**2007 Lugano Convention**").

5 A total of 73 countries are party to and bound by the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (of the EU Member States, only Austria is not currently party to/ bound by that Convention), and a total of 61 are party to and bound by the 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (of the EU Member States, only Austria, Belgium and Ireland are not currently party to/ bound by that Convention).

6 I.e. those in Recast Brussels I Regulation, and in the 2007 Lugano Convention to which all EU Member States and the other Lugano States are party.

7 All EU Member States (although not the other Lugano States) are party to, and bound by, that Convention, and the UK will accede to it in its own right as may be necessary such that it will apply in the absence of an alternative agreement between the UK and EU Member States on the issues it covers. In that event, it is envisaged that the UK courts will in effect apply the terms of that Convention in respect of UK (English) choice of court agreements entered into on or after 1 October 2015 (the date on which it originally became enforceable in EU Member States). However, because of the transition as to the capacity in which the UK is a signatory, it may be that other contracting states would not be bound to apply it where the choice of UK (English) court agreement was entered into before the UK's accession in its own right takes effect – see Article 16. There are also some limits to the application of that Convention depending upon the residence of the parties – see Article 26. Note that the 2005 Hague Convention is also already in force in Mexico, Montenegro and Singapore, and had been signed by (although is not yet in force in) China, Ukraine and the USA.

8 That said, note the recent decision in *Gulf International Bank BSC v Sheik Badr Fahad Ibrahim Aldwood* [2019] EWHC 1666 (QB) in which the English High Court considered that under Recast Brussels I, the courts of an EU Member State could not, despite the existence of an exclusive choice of court agreement in favour of the courts of a non- EU/Lugano country, decline to hear or stay proceedings against an EU-domiciled Defendant in favour of the courts of that non- EU/Lugano country if that country was not bound by the 2005 Hague Convention (or it otherwise did not apply), unless proceedings in the non- EU/Lugano country chosen by the parties had been commenced prior to those in the EU Member State. If correct, the courts of EU Member States post-Brexit would be unable to respect exclusive English jurisdiction clauses if such courts were first seised in proceedings against an EU-domiciled Defendant in the event that the 2005 Hague Convention did not apply per footnote 7 above.

8. Whilst there may be more scope than before for parallel proceedings in the UK and an EU/Lugano State if no "EU/Lugano-equivalent" rules can be agreed, this is unlikely to be a reason to select a forum other than the UK courts.

9. Further, in that event an English court would regain its powers:

   - to grant anti-suit injunctions restraining the commencement/continuation of proceedings in the courts of another EU/Lugano State (for example in breach of an exclusive jurisdiction clause)[9];
   - to hear disputes (where there was no exclusive jurisdiction clause and it was the more appropriate forum) despite proceedings already having been commenced first in a less appropriate EU/Lugano forum[10];
   - to hear all disputes involving various related claims between all parties in one forum (where previously it might not have been permissible for it to do so because of the rigidity of some of the EU/Lugano jurisdictional rules); and
   - to exercise its discretion to decline jurisdiction or stay its proceedings in favour of the courts of a non- EU/Lugano country on the basis that such country was the more appropriate forum[11] (and to do so even if the English proceedings were commenced first[12]), thus reducing the likelihood of parallel proceedings in the courts of England and in that non- EU/Lugano country, and thus the risk of conflicting judgments and associated international enforcement difficulties[13].

International enforceability of court judgments

10. Any Brexit effect would be almost entirely irrelevant[14] to the question of enforcement against judgment debtors which are, and whose assets are, located outside of EU/Lugano States - and UK court judgments remain more respected and enforceable worldwide than any other.

If an equivalent principle were also applied under the (differently worded) 2007 Lugano Convention, the Courts of EU/Lugano States would also be unable to respect an exclusive English jurisdiction clause if they were first seised of proceedings against a Lugano-domiciled Defendant, unless the Hague Convention applied and obliged them to do so (and in the case of the Courts of the three non-EU Lugano States, the 2005 Hague Convention could not apply since those three Lugano States are not currently a party to it).

9 They are currently unable to do so – see *Turner v Grovit* Case C-159/02 [2004] E.C.R. I-3565, [2005] A.C 101. The re-instated power would offer a potential solution to the potential problem identified in footnotes 7 and 8 above.

10 Currently, if the court of another EU/Lugano State is "first seised" and it decides it has jurisdiction to hear the dispute (potentially on the basis of a very loose connection with that state), a UK court which is "second seised" cannot hear the claim – see Article 29 of Recast Brussels I and Article 27 of the 2007 Lugano Convention.

11 Where proceedings had been commenced on the basis of a Brussels/Lugano jurisdictional ground, the ability of the courts of an EU/Lugano State to decline jurisdiction or stay those proceedings in favour of the courts of a non-EU/Lugano country on that basis was removed by the ECJ in *Owusu v Jackson (t/a Villa Holidays Bal Inn Villas)* (C-281/02); [2005] Q.B. 801, ECJ, favouring certainty of jurisdictional rules over flexibility.

12 New wording in Recast Brussels I (Articles 33 and 34) provided expressly for an ability to stay proceedings in favour of the courts of a non- EU/Lugano country, but only in certain instances and only where equivalent or related proceedings had been commenced first in such non- EU/Lugano courts.

13 The UK courts would thus also be relieved of any inability on their part (on the basis of *Gulf International* per footnote 8 above) to respect exclusive jurisdiction clauses in favour of the courts of non- EU/Lugano countries.

14 Save perhaps in very limited circumstances because of the potential for existing non-EU contracting states to the 2005 Hague Convention to cease its application in respect of the UK where the choice of UK (English) court agreement was entered into before the UK's accession in its own right takes effect, per footnote 7 above. However, such UK court judgments given pursuant to an exclusive English jurisdiction clause might still be enforceable under their domestic rules (although perhaps only money judgments).

In addition, because of the increased scope for parallel proceedings in the courts of an EU/Lugano State in cases with an EU/Lugano connection (see paragraph 8 above), in theory there may also be a greater (but still relatively remote) risk of refusal of enforcement of English judgments in non- EU/Lugano countries on the basis of a prior conflicting judgment of the courts of an EU/Lugano State whose judgments are recognised by the enforcing court. That said, the English court might not have been able to award the relevant judgment at all under the EU/Lugano rules. Further, the issue would not arise if the English judgment is the one handed down first.

11. It is likely, in the majority of cases[15], that judgments awarded by UK courts specified in exclusive jurisdiction clauses would, even if no "EU/Lugano-equivalent" rules can be agreed, remain enforceable in EU/Lugano States (whether as a consequence of the 2005 Hague Convention[16], pursuant to other reciprocal agreements or under national law) in broadly the same circumstances as they are now[17].

12. Whilst the enforceability of other[18] UK judgments in EU/Lugano States, following a Brexit without an agreement on "EU/Lugano-equivalent" rules, would depend upon any bilateral agreements and/or domestic law, and whilst the types of remedy which would be enforceable may then be limited to money judgments[19], that would also be the case when enforcing judgments of the courts of EU/Lugano States in the UK. As a consequence, the circumstances in which it would be worth considering commencing proceedings in the courts of an EU/Lugano state rather than in the UK for Brexit-related enforceability reasons alone would be relatively limited.

13. Similarly, whilst a UK court judgment, following a Brexit without an agreement on "EU/Lugano-equivalent" rules, would once again have to be rendered enforceable in an EU State[20], again that would also be so of an EU judgment to be enforced in the UK. Further, depending on the circumstances, that may be largely a question of timing and procedure than real substance.

14. A new Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters was finalised on 2 July 2019 (the "**2019 Hague Convention**"). Like the 2005 Hague Convention, the 2019 Hague Convention applies in relation to both monetary and monetary judgments but, unlike the 2005 Hague Convention, it applies where any jurisdiction clause is non-exclusive and where there is no jurisdiction clause (or indeed no contract) at all. As such, it has been heralded as a "*gamechanger for cross-border litigation*". As with the 2005 Hague Convention, countries (including not only the EU and other Lugano States, but also non- EU/Lugano countries) may be motivated to sign up, in order to encourage worldwide trade[21], although that process will take time.

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15 Note that if *Gulf International* is correct (see footnote 8) and the 2005 Hague Convention did not apply per footnote 7, in theory it would be possible for there to be a prior judgment of the enforcing court or the courts of another EU/Lugano State (as a consequence of proceedings commenced against an EU/Lugano-domiciled Defendant) which conflicts with the English court judgment. In that instance, recognition of the prior judgment of the courts of an EU/Lugano State would prevent enforcement of the English judgment in EU/Lugano States.

16 Note that the 2005 Hague Convention envisages the enforcement of non-monetary judgments as well as monetary ones, just as Recast Brussels I and 2007 Lugano Convention do.

17 There would be some changes to the potential defences available however, and the procedure would become more cumbersome than it is under Recast Brussels I (since "exequatur" of the judgment of the court of origin would once again be necessary to render it enforceable in EU Member States). Further, non-monetary judgments might not be enforceable in those Lugano States which are not also EU Member States (since they are not party to the 2005 Hague Convention) nor, if/when the 2005 Hague Convention is not applied by EU Member States in certain instances (see footnote 7 above), in EU Member States. However, the same may be true in equivalent instances of the enforcement of judgments in the UK of the courts of EU/Lugano States that were selected in exclusive jurisdiction clauses. As a consequence, these factors are unlikely to justify an alteration to a preferred choice of court save in limited circumstances.

18 I.e those not awarded by a UK (English) court specified in an exclusive choice of court clause.

19 Unlike under Recast Brussels I and the 2007 Lugano Convention.

20 Recast Brussels I removed the need for such "exequatur" before the judgment of the courts of one EU Member State could be enforced in another. The 2007 Lugano Convention, by contrast, has not yet been updated so as to achieve the same as between an EU Member State and a Lugano State that is not also an EU Member State, or as between two such "non-EU" Lugano States.

21 A shift in momentum in this respect has been seen recently in relation to the recent flurry of activity in relation to the 2005 Hague Convention. However, the 2019 Hague Convention is much wider in scope and, unlike the 2005 Hague Convention and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**"), the prior agreement of the parties (via a choice of court or arbitration clause) is not required for it to have effect. Consequently, countries may be more cautious about signing up, although under the terms of the 2019 Hague Convention those that do will have the right to limit its scope by electing to exclude from time to time other existing or subsequent signatory countries from its application. Uruguay has already signed.

Arbitration

15. Arbitration (and the selection of the UK as the seat or venue) would be almost entirely unaffected by Brexit[22] in that:

    - the selection of arbitration as a forum (wherever its seat and location) and the enforceability of an agreement to arbitrate would be unaffected save in one respect, namely that the English courts would regain their power to grant anti-suit injunctions to restrain a party from commencing/ continuing proceedings in the courts of an EU/Lugano State in breach of an arbitration clause[23]; and
    - the enforceability of an arbitration award, whether in the UK or in an EU/Lugano State would be unaffected.

16. When considering arbitration as an option, however, one should also have in mind the following:

    - whilst arbitration has a number of potential advantages (one of them being enforceability in more remote countries which are party to the New York Convention but which do not have reciprocal enforcement understandings in respect of court judgments), there are potential disadvantages too;
    - in respect of dispute resolution clauses entered into on or after the date on which the UK's accession to the 2005 Hague Convention in its own right takes effect, it is unlikely that a judgment made by a UK (English) court specified in an exclusive choice of court clause would be any less enforceable, or any less easily enforced, in an EU Member State than would an arbitration award[24];
    - thus, the question of whether arbitration or court proceedings are preferable will depend on the particular case at hand, but any Brexit implications or uncertainty would only be one of a number of factors of which account should be taken[25].

C. Brexit as a factor in forum choice

17. Ordinarily, the key question when considering forum choice will remain "in which forum, and by what means, do I prefer to have my disputes determined?".

18. On this basis, there may be a clear instinctive forum preference, for example because of:

    - the reputation of the judiciary or the expertise of arbitrators;
    - a preference for a particular country's governing law, and that the courts of the same country apply it;
    - the relevant procedural and evidential rules;
    - the available remedies (and the powers and flexibility of those awarding them in an ever-changing world); and/or
    - geographical and linguistic practicalities.

22 Since Recast Brussels I and the 2007 Lugano Convention exclude arbitration from its scope, and since both the UK and all EU/Lugano States are party to and bound by the New York Convention and will remain so post-Brexit.

23 They are currently unable to do so – see *West Tankers Inc v Allianz SpA* Case C-185/07 [2009] E.C.R. I-663, [2009] AC 1138 and (after the introduction of Recast Brussels I) *Nori Holdings Ltd v Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm).

24 See above, and in particular footnotes 7, 16 and 17 regarding the 2005 Hague Convention.

25 In respect of exclusive choice of court agreements entered into after UK's accession to the Hague Convention in its own right takes effect, Brexit implications/uncertainty may not be a real factor at all.

19. It is usually only where the answer to that question is equivocal, or where other cross-border issues (such as international enforceability) are likely to be key and point clearly towards a different forum, that an alternative to the instinctive choice need be considered.

20. In view of the points made above, in most cases Brexit should not affect what would otherwise have been a clear instinctive preference for the UK courts/arbitration – it is a mere factor, if a true factor at all. Further, there may be instances in which the UK becomes more attractive to some, either generally or in particular instances, as a forum post-Brexit.

21. This does not mean that efforts to agree terms in respect of cross-border disputes and judicial co-operation as between the UK and the EU/EFTA States are not important – they are, including in the interests of certainty, perception and trade. Agreement of such terms would benefit all.

22. However, even if such an agreement cannot be reached, the UK remains a very attractive forum for litigation and arbitration, and any suggestion to the contrary based on Brexit alone may well be one fuelled more on (mis)perception and the fear of uncertainty, rather than substantive and practical reality.

23. In that regard, it is also worth noting that the UK courts and systems are being adapted, and the procedural rules and available remedies are evolving, in order to ensure they reflect the needs of a modern, globalised world. Three recent examples of this are:

    - the piloting of new disclosure rules in the Business & Property Courts;
    - the survey and review being conducted by the Business & Property Courts working group on the current rules and practice for factual witness evidence; and
    - the recent award of the first reported worldwide freezing injunction over assets of "persons unknown", made in an effort to combat on-line financial cyber-fraud[26].

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26 See *CMOC v Persons Unknown* [2017] EWHC 3599 (Comm), *CMOC Sales & Marketing Limited v Persons Unknown and Others* [2017] EWHC 3602 (Comm), and *CMOC Sales & Marketing Limited v Persons Unknown and 30 others* [2018] EWHC 2230 (Comm).

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