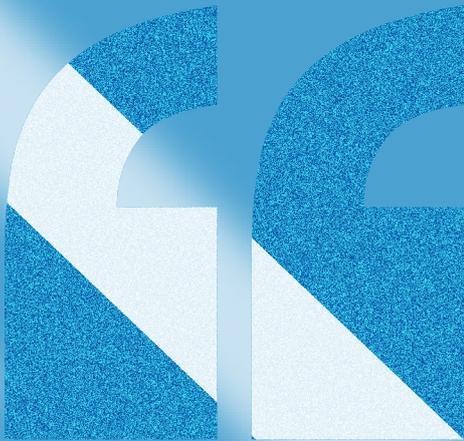


C L I F F O R D

C H A N C E



**BREXIT, ENGLISH LAW
AND THE ENGLISH
COURTS: WHERE ARE
WE NOW?**



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BREXIT, ENGLISH LAW AND THE ENGLISH COURTS: WHERE ARE WE NOW?

Brexit brings many uncertainties that have yet to be resolved. However, the English law used in transactions is not one of them; it will remain the same after Brexit as it was before because the EU, for all its law-making, has had minimal impact on transactional law. Similarly, the procedure, judges and practitioners in the English courts will not change as a result of Brexit. The main way in which Brexit might affect the English courts is the ease of enforceability of an English judgment in the EU, or vice versa, but that will only matter if enforcement in the EU is important and no satisfactory mitigants are available.

Key issues

- English transactional law will be unaffected by Brexit
- Recognition by EU27 and English courts of the parties' choice of law will be unaffected by Brexit
- Life cycle events under existing contracts may raise regulatory problems whatever the applicable law
- Moving the location of a contracting party may have practical implications
- English courts will uphold parties' choice of forum after Brexit; whether EU27 courts can uphold the choice of a non-EU court is less clear
- Four questions determine how to approach jurisdiction for contracts to be entered into now
- Changing law and jurisdiction has practical and institutional consequences

"If ifs and buts were candy and nuts, we'd all have a merry Christmas" goes one version of this doggerel. Brexit is potentially seven months away yet still has innumerable ifs and buts, not to mention maybes and perhapses, surrounding it. Will there be a deal between the EU and the UK or won't there? If the negotiators reach a deal, will it secure Parliamentary approval, both in the UK or the EU? Even if everyone signs up to the draft withdrawal deal, what will happen at the end of the transition period? The questions are numerous, and a continued absence of answers is unlikely to bring anyone a happy Yuletide.

Notwithstanding the political uncertainties, the effect of Brexit on substantive English transactional law is clear: next to none. Similarly, the effect of Brexit on the recognition by the English courts of the parties' choice of law is also clear: next to none again. The main area of uncertainty is the enforcement of judgments – both the enforcement of English judgments in the EU and of EU judgments in England. The provisions of the withdrawal agreement on judgments have been agreed, though they will only apply if the agreement as a whole comes into force, but the UK has indicated what it would like to happen and what independent steps it will take in the area. These point to the future, but they do not, as yet, bring complete certainty.

We discuss these issues below, as well as the factors that will direct a choice of jurisdiction in a transaction to be entered into before the uncertainties of Brexit have resolved themselves.

English Transactional Law

The English law that is used in transactions is largely contract law, domestic property and related security law, sometimes trusts law, with an occasional overlay of tort law. The EU has made a small number of incursions into these areas – for example, Directive 2000/35/EC on combating late payment in commercial transactions (introduced into UK law by the Late Payment of Commercial Debts (Interest) Act 1998), the much-maligned Council Directive 86/653/EEC on self-employed commercial agents (introduced into UK law by the Commercial Agents (Council Directive) Regulations 1993 (SI 1993/5053)), Directive 2002/47/EC on Financial Collateral (introduced into English law by the Financial Collateral Arrangements (No 2) Regulations 2003 (SI 3226/2003)), and various consumer protection measures (now largely in the Consumer Rights Act 2015). These (with the exception of financial collateral) are not of central relevance in commercial transactions but, in any event, will continue in force after Brexit as UK law with no material changes (see our briefing entitled *The European Union (Withdrawal) Act 2018: What it does, why and how*).

In short, English transactional law after Brexit will be substantively the same as it was before Brexit. Its underlying strengths remain the same – for transactions between commercial parties, it is an enabling structure, rather than a regulatory regime, with few overriding rules. If English law was the right choice of governing law before Brexit, there is no reason why it should not be the right choice after Brexit.

Regulatory issues

This is not to say that Brexit will not cause issues for some contracts. It may do so, but problems will arise in the main from the regulatory framework of EU law rather than from the transactional law itself, and will arise whether the contract is governed by English law, French law or any other law.

Others, such as ISDA and AFME, have published in greater depth than is appropriate here on where these problems might arise, but typically they will be caused by performance of a contract entered into before Brexit becoming unlawful in the place in which it must be performed after Brexit. Unlawfulness could arise, for example, because of the loss of passporting rights as a result of Brexit, but the consequence of this loss will depend upon the terms of the contract in question (eg is it covered by a force majeure or illegality clause?) and local law in the relevant jurisdiction. (If there is a transition period through to the end of 2020, these same problems will arise at that point – unless the contract has either run off or been amended or repapered by then – rather than on the exit day of 29 March 2019, subject to the terms of any long-term agreement reached by the UK and the EU.)

For example, ISDA has concluded that performance of derivatives transactions that were covered by passporting rights when entered into are unlikely to be affected by a subsequent loss of those rights. But commonplace activities that take place during the “life cycle” of derivatives contracts, like exercising an option or rolling-over an open position, could require local authorisation absent which they could become unlawful. Similarly, drawdowns under a revolving loan could become unlawful. In some EU member states, it could even be illegal for an insurer from what has become a non-member state to pay out on a pre-Brexit insurance contact.

ISDA and AFME have published a joint paper (*Contractual Continuity in OTC Derivatives – Challenges with Transfer*) examining the challenges faced by UK and EU firms and their clients seeking to transfer their legacy cross-border over-

the-counter derivative contracts to an appropriately licensed EU-27 affiliate in advance of Brexit. The best solution would be for the UK and the EU, whether by agreement or unilaterally, to pass legislation making clear that the performance of a contract entered into before Brexit should not be rendered unlawful solely as a result of Brexit and allowing the parties to perform “life cycle” activities to manage the run-off of existing contracts. In the UK, the Government proposes to make regulations under the European Union (Withdrawal) Act 2018 giving EU firms with UK businesses temporary permissions to replace their existing passports in order to allow those firms time to obtain UK authorisations for their business or to transfer, terminate or run-off existing contracts that cannot be continued on a cross-border basis.

Choice of Applicable Law

Recognition of the parties’ choice of law will also not change materially as a result of Brexit, either in the English courts or in the courts of EU member states.

The Rome I Regulation (EC/593/2008) lays down the rules that must be applied in the courts of EU member states to determine what law governs a contract. The Rome I Regulation will continue to apply in the EU27 after Brexit. Its basic rule is that a contract is governed by the law chosen by the parties, whether or not that is the law of an EU member state (articles 2 and 3(1)). Brexit will not, therefore, change the obligation on courts in EU member states to uphold the parties’ choice of English law, French law, New York law or any other law.

In the English courts, the Rome I Regulation will also continue to apply in an onshored, but largely unaltered, form. The European Union (Withdrawal) Act 2018 provides for EU regulations in force and applicable on exit day, such as Rome I, to become part of UK law. The UK Government has published the beginnings of a draft statutory instrument to be made under the Act to correct deficiencies in Rome I caused by Brexit (largely amending references to the EU) but these amendments have no material effect on the operation of Rome I in the English courts.



The draft withdrawal agreement between the UK and the EU published by the European Commission in March 2018 provides for the Rome I Regulation to apply to contracts concluded before the end of the transition period (article 62). Assuming that the withdrawal agreement is agreed and comes into force, this will merely confirm what must happen within the EU in any event and what the UK will in practice do, and what both will continue to do after any transition period.

The Rome I Regulation lays down the rules relating to the law applicable to a contract. The Rome II Regulation (EC/864/2007) lays down the rules courts

in EU member states must apply to determine the law applicable to non-contractual obligations (eg tort and restitution). The effect of Brexit on Rome II is the same as its effect on Rome I.

Exceptions to the general rule

An exception to the general rule of party autonomy under Rome I is article 3(3). This provides that where all the elements relevant to the situation at the time of the parties' choice are located in a country other than the one whose law has been chosen, the parties' choice will not prejudice the application of provisions of the law of that other country that cannot be derogated from by contract. Article 3(3)

Article 55 of the BRRD, MREL and Resolution stays

EU resolution rules have a number of provisions aimed at ensuring that resolution authorities' actions are effective for contracts entered into by the entity in resolution where those contracts are governed by a law outside the EU's system for the mutual recognition of resolution actions.

Article 55 of Directive 2014/59/EU on the recovery and resolution of credit institutions and investment firms requires relevant EU firms to include in a contract that creates a liability for the firm and that is governed by a non-EU law a term under which the counterparty agrees to the liability being written down or converted by the firm's (EU) resolution authority. This does not apply if the resolution authority determines that the decision to "bail-in" the liability can be recognised and given effect under the non-EU law governing the contract via a legal mechanism meeting the BRRD's requirements and technical standards.

English law is currently the law of an EU member state, and article 55 therefore does not apply to English law contracts. After 29 March 2019 (of, if there is a transition period, 31 December 2020), English law will become a non-EU law for these purposes; prima facie, therefore, a clause of this sort must be included in relevant English law contracts where one or more of the parties is subject to the Directive's requirements.

In practice, EU firms subject to these requirements must wait for a determination by their home state resolution authority and, in the meantime, may need to prepare for Brexit by including a recognition clause in English law contracts. This is not always straightforward where more than one party to the contract is subject to the Directive's requirements because the clause must then describe the resolution proceedings that could apply to each of the parties under their national law. In some cases, it may also be necessary to amend existing contracts governed by English law to include a bail-in recognition clause, such as where a master agreement covers future transactions that might be executed under the agreement after Brexit.

Soon after the Brexit referendum, many EU banks started to include bail-in recognition clauses in their new issues of debt securities governed by English law for a different resolution-related reason. Article 45(5) of the BRRD states that eligible liabilities governed by non-EU law will not count towards a bank's minimum requirement for own funds and eligible liabilities (MREL) unless the bank can demonstrate to its resolution authority that a decision to bail-in the liability would be effective under the non-EU law. However, many of these banks also have significant volumes of legacy English law governed debt that does not include relevant clauses, and it is not yet clear whether their resolution authorities will rely on the UK recognition regime when determining whether this debt can count towards a bank's MREL.

There are other resolution-related rules in the EU that may affect contracts governed by English law. For example, German banks are subject to requirements to ensure that derivatives and some other financial contracts governed by non-EU law include provisions giving effect to a decision to stay the exercise of termination rights during resolution. Proposed amendments to the BRRD would impose similar requirements on EU banks generally.

The same issues apply to UK institutions. For example, it is likely that the UK will amend its rules implementing article 55 of the BRRD to require relevant UK financial institutions using a non-UK law to include contractual provisions recognising bail-in by the UK authorities. Similarly, section 89H of the Banking Act 2009 (which applies to resolution actions by non-EU countries) will likely be applied to the EU27.

applies whether all the elements relevant to the situation are located in an EU member state or in a state outside the EU. It does not prevent the parties from choosing the law of another country, but subjects the chosen law to the non-derogable provisions of the law of the country where all the elements are located, ie if a contract is in reality an entirely domestic contract, parties can choose a foreign law but they cannot use that choice to escape from mandatory rules of their home law that they do not like.

The application of article 3(3) will not be directly affected by Brexit. If, for example, all the elements of the situation are located in Germany, the English courts must now give effect to the provisions of German law that cannot be derogated from by contract, and vice versa. However, the position could be affected if, instead of contracting out of a London entity or branch, a party chooses to contract out of an entity in, say, France because the French entity has the necessary authorisations. Article 3(3) could then apply to an English law contract between the French entity and a French counterparty if all other elements relevant to the situation, such as performance, are located in France (if the counterparty is German rather than French, article 3(3) will not be relevant). An approach in this circumstance may be to choose French law to govern the contract, but that would apply the whole of French law to the contract, not just French law that cannot be derogated from by contract. Further, if there are back to back contracts, such as hedging contracts, which remain governed by English law, it may result in a mismatch of rights and obligations.

The English courts have allowed article 3(3) very limited scope, concluding, for example, that the use of the ISDA Master Agreement or hedging on the international markets may, on its own, be sufficient to take a derivatives contract outside the scope of article 3(3) (*Banco Santander Totta SA v Companhia Carris de Ferro de Lisboa SA* [2016] EWCA Civ 1267).

Article 3(4) of Rome I provides that where all the elements relevant to a situation at the time of choice are located in one or more EU member states, the choice of

the law of a non-member state will not prejudice the application of provisions of EU law, as implemented in the member state of the forum, that cannot be derogated from by contract. This again does not prevent the choice of the law of a non-member state, nor does it import any provisions of a member state's contract law; it is only EU regulations or directives that cannot be derogated from by contract that will apply, but these are few in number (such as the Commercial Agents Directive, mentioned above).

Another exception concerns property rights, which fall outside Rome I. These are, as a general rule, governed by the law of the location of the property (the *lex situs*). The application of this rule is not directly affected by Brexit. If, for example, a UK firm takes security from an Italian client over collateral held in London or holds the client's assets in custody in London, the English courts would continue to apply English law when determining the property rights of the parties. However, the position could be affected if, instead of contracting out of a UK entity or branch, a party chooses to contract out of an entity in, say, Germany because the German entity has the necessary authorisations. In that case, if the German entity also holds the collateral or custody assets in Germany, it may be that German law will govern the proprietary rights of the parties. The parties may decide that the document conferring the security interest or governing the custody relationship should be governed by German law as that may make it easier to document the parties' proprietary rights.

A change of contracting party may have other implications for contracts. If a party chooses to contract with EU clients or counterparties out of an entity in, say, Spain, because the Spanish entity has the necessary authorisations, Spanish regulation may require that entity to include different or additional terms or disclosures in its contracts, irrespective of the governing law of the contract. In some cases, these can be documented within an English law governed contract or it may be more convenient to meet these requirements via a supplemental contract governed by local law.



“[Financial contracts] are prepared by professional international organisations applying the common law, are drafted in English and are used by operators worldwide, which dispose of highly qualified staff to conduct negotiations concerning these instruments. It is precisely the technical expertise of the London Commercial Court that has enabled it to acquire a near monopoly in handling these disputes, on the basis of contractual clauses that confer jurisdiction on that court.”



(Haute Comité Juridique de la Place Financière de Paris, 3 May 2017)

Articles 9(2) and 21 of Rome I provide that nothing restricts the application of the overriding mandatory laws of the forum (a more restricted category than laws that cannot be derogated from by contract) or of the public policy of the forum (a more restricted category still). The application of these provisions depends upon the court that determines any dispute between the parties.

Choice of Forum

Choice of court raises more complicated issues than choice of law, which, as explained above, is not directly affected by Brexit. Choice of court could also be affected by whether there is a deal or no deal between the EU and the UK.

A “deal” scenario

The Brussels I Regulation recast (2012/1215/EC) determines the jurisdiction of the courts of EU member states in civil and commercial matters. The draft withdrawal agreement between the UK and the EU provides for the jurisdictional provisions of Brussels I to apply to proceedings instituted before the end of the transition period (article 63(1)). As a result, as long as proceedings are started before 31 December 2020, Brexit will have no effect on jurisdiction (or the enforcement of judgments – see below).

If, however, proceedings are started after the end of the transition period, then Brussels I will not apply. The position will depend upon any long term arrangements between the UK and the EU or, if there are none, the position will become a “no deal” scenario, discussed below.

The UK Government’s White Paper on The Future Relationship between the United Kingdom and the European Union says that the UK will seek to participate in the Lugano Convention, which is substantially the same as the Brussels I Regulation (though without the amendments that came into effect with the recast Regulation in 2015) but extending to Switzerland, Norway and Iceland in addition to EU member states. Unless the UK joined the EEA, participation in Lugano would require the consent of all existing signatories, including the EU. Even if all the consents required were forthcoming, it is unlikely to

be practicable for the UK to participate in the Lugano Convention in time for 29 March 2019 or even 31 January 2020.

The UK Government’s White Paper also says that the UK would be keen to explore a new bilateral agreement with the EU, covering rules on applicable law, jurisdiction and the enforcement of judgments. Legally, this would not be controversial or difficult since, in practice, it would replicate the existing arrangements under Brussels I. Politically, however, it could be more problematic as the EU might insist on the Court of Justice of European Union being the ultimate arbiter, directly or indirectly, of the meaning of whatever treaty was agreed (though the CJEU has no direct role with regard to the Lugano Convention or the Hague Convention, as to which see below). Some EU member states also see Brexit as an opportunity to obtain for themselves legal work, including the resolution of disputes, that currently comes to London; they might not be keen to replicate the current position, initially at least.

A “no deal” scenario

A no deal scenario could arise either if the UK leaves the EU on 29 March 2019 with no transition or other arrangement in place or, even if a transition period is agreed, if no longer term arrangement is agreed in time for the end of that period, on 31 December 2020. The transition arrangements will only apply to proceedings started within the transition period.

The UK has said that, whether or not there is a deal with the EU, the UK will adhere to the Hague Convention on Choice of Court Agreements. The EU is already a party to this Convention, which requires courts in participating states to give effect to exclusive choice of court agreements in favour of other participating states (and to enforce the resulting judgment). The Hague Convention applies to agreements concluded after its entry into force in the state of the chosen court (article 16). The Convention would come into force on the first day of the month following the expiration of three months after deposit of the instrument of ratification (article 31). If there is no transition period, there would, therefore, be a gap of at least three months before

the Hague Convention came into force in the UK since the UK cannot sign the Convention in its own right while still a member of the EU. If there is a transition period, it is likely that the UK could sign up to Hague in time for it to come into force on 1 January 2021. Once the Hague Convention is in force in the UK, courts in EU member states will be obliged to give effect to provisions conferring exclusive jurisdiction on the English courts in contracts entered into after that date (and to enforce the resulting judgment).

Outside the scope of the Hague Convention, in a no deal scenario the UK is likely to apply to parties domiciled in EU member states the jurisdictional rules that currently apply to parties domiciled outside the EU. The UK is unlikely to onshore the Brussels I Regulation because the Regulation is rooted in reciprocity – it makes little sense without the common rules on jurisdiction and the resulting enforcement of judgments across the participating states.

As a result, proceedings already on foot could continue, even if jurisdiction had been taken in accordance with the Brussels I Regulation, but new proceedings would be subject to the new rules. This might mean, for example, that the English courts could determine proceedings (subject to *forum non conveniens* principles) even if there were already proceedings involving the same cause of action between the same parties in the courts of an EU member state (and vice versa). Similarly, the English courts could grant an anti-injunction to restrain proceedings brought in the courts of an EU member state in breach of a jurisdiction agreement or otherwise abusively, something not permissible under Brussels I (*Erich Gasser GmbH v MISAT Srl*, Case C-116/02).

In a no deal scenario, there is no doubt that an English court would give effect to a jurisdiction agreement in favour of courts in the EU, unless there was a strong reason not to do so. It is less clear whether courts in EU member states could give effect to a jurisdiction clause in favour of the English courts, unless the Hague Convention applies. Article 25 of Brussels I upholds the parties' choice of the courts of an EU member state to

resolve disputes arising from a particular relationship, but says nothing about a choice of the courts of a non-member state. The only reference to the courts of non-member states is in article 33, which allows courts in EU member states to stay their proceedings in favour of courts in a non-member state if, amongst other conditions, the non-member state's courts were seised of the action before the EU courts and a judgment given by the non-EU court is enforceable in the relevant EU member state.

Outside the strict confines of article 33, it is unclear whether courts in EU member states could stay proceedings before them in favour of the English courts merely because the parties had agreed that the English courts would have jurisdiction. For example, could a court in an EU member state stay its proceedings in favour of the English courts if the EU court was seised before the English courts? This is an existing problem where, for example, parties have agreed that the New York courts should have jurisdiction. It might be expected – indeed, hoped – that the EU would respect the parties' wishes ("The autonomy of the parties to a contract... should be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation": recital (19) of Brussels I), but the terms of the Regulation do not expressly provide for it. Perhaps a "reflexive" approach could be taken, applying the provisions to non-EU courts in the same way that they apply to EU courts.

Even if the Brussels I Regulation does not allow courts in an EU member state to give effect to a jurisdiction agreement in favour of the English courts, the English courts would not be without remedy. The English courts could, in these circumstances, grant an anti-suit injunction to restrain parties from bringing proceedings in an EU member state in breach of a jurisdiction provision. A party with a presence, personnel or assets in the UK could not generally afford to ignore an injunction granted by the English courts; severe penalties can flow from contempt of court. The English courts can also award damages for breach of a jurisdiction agreement.

Article 46(6) of MIFIR

Article 46(6) of the Regulation on Markets in Financial Instruments (2012/648/EU) applies to firms from states outside the EU if the European Commission has made an equivalence decision in respect of that state and if the firm has registered with ESMA to provide investment services or to perform investment activities in the EU for eligible counterparties or professional clients.

In these circumstances, article 46(6) provides the firm "shall, before providing any service or performing any activity in relation to a client established in the Union, offer to submit any disputes relating to those services or activities to the jurisdiction of a court or arbitral tribunal in a Member State."

The meaning of article 46(6) is far from clear. Is it enough that this offer of dispute resolution in the EU is made at the outset of a relationship, even if it is rejected? What inducements can be offered to the client to reject the offer? Or does the offer have to be made when a dispute arises, perhaps in the form of a one-sided contractual right allowing the client to take proceedings in the courts of a particular member state? Can that offer be made but the firm retain the right to take simultaneous proceedings in a court or tribunal outside the EU?

The Enforcement of Judgments

The effect of Brexit on the enforcement of judgments raises the most difficult issues, and will also be affected by whether there is a deal or there is no deal.

A “deal” scenario

The Brussels I Regulation not only determines the jurisdiction of the courts of EU member states in civil and commercial matters, but it also provides for the ready enforcement of a judgment given by a court in one EU member state in all other EU member states. The philosophy of the Regulation is for one court in the EU to have jurisdiction over a dispute, and for the judgment given by that court to be readily enforceable throughout the rest of the EU.

The draft withdrawal agreement between the UK and the EU provides for a judgment given in proceedings started before the end of the transition period to continue to be enforceable in accordance with Brussels I, whether enforcement takes place during or after the end of the transition period (article 63(2)(a)). The transition period will, therefore, be a continuation of the status quo, with the added benefit of the application of Brussels I to judgments given in proceedings started before the end of the transition period. This could lead to a rush of litigation shortly before the end of the transition period.

The discussion above with regard to the UK Government’s plans regarding jurisdiction applies equally to enforcement, ie the UK Government would like to adhere to the Lugano Convention which, like Brussels I, provides for the ready enforcement of judgments given in one participating state in all other participating states (though the Lugano Convention does not include the most recent amendments made to Brussels I, which were intended to speed up the enforcement process somewhat). Similarly, the Hague Convention requires

participating states to enforce judgments given in other participating states that have taken jurisdiction in accordance with the Convention.

A “no deal” scenario

This scenario could arise if there is no deal by 29 March 2019 or if no long-term deal is agreed by the end of the transition period, on 31 December 2020. If so, the enforceability of a judgment will depend upon the rules in force in the relevant state at the time enforcement is sought (unless there is a transition period, in which case Brussels I will continue to apply to judgments given in proceedings started before the end of the transition period).

The absence of a treaty providing for the enforcement of an English judgment in EU member states or vice versa does not mean that a judgment will not be enforceable. It is highly unlikely that pre-EU treaties between the UK and certain EU member states would revive, still less that the Brussels Convention (which was replaced by the Brussels I Regulation) would do so. Instead, enforceability will depend upon the local rules in each member state and in the UK for the enforcement of judgments given in states with which there is no treaty on reciprocal enforcement. These are the rules that currently apply to, for example, the enforcement of New York judgments – the US has no treaties providing for the mutual enforcement of judgments (though it has signed, but not ratified, the Hague Convention). In general, these rules allow a foreign judgment to be enforced, though enforcement will not be as straightforward as it is intended to be under Brussels I or Lugano. Local law advice is required in each case as to whether enforcement is theoretically available and practically possible.

In addition, for contracts entered into after the Hague Convention comes into force in the UK, a judgment given by the English courts will be enforceable in EU member states, and vice versa, in accordance with the Convention.

Decisions on Jurisdiction in the Light of Brexit

In the longer term, the Hague Convention may offer a happy home but, until then, there is no universal solution to the uncertainties of Brexit so far as jurisdiction and the enforcement of judgments for contracts under consideration now. Any decision depends upon factors specific to each contract. Nevertheless, when deciding what jurisdiction provisions to include in a contract to be entered into now, there are **four questions to ask**.

The **first question**, is what, aside from Brexit, is your favoured jurisdiction, taking into account court procedures, speed, cost, expertise, language and other factors.

The **second question** is whether cross-border enforcement is likely to be important, ie whether it is likely to be necessary to enforce the judgment given by the favoured court outside the jurisdiction of that court. Enforcement for these purposes is not the same a credit risk – insolvency raises other issues – but involves the use of a judgment to seize assets of the judgment debtor in

order to meet the judgment debt. Enforcement is therefore concerned with a counterparty which has the means to satisfy a judgment debt but declines to do so voluntarily.

Cross-border enforcement will not be significant where, for example, a party is more likely to be sued than to sue (in which case avoiding courts considered unacceptable will be more important), if the party has security, if the counter-party has assets in the favoured jurisdiction, if the counterparty's position is such that it could not afford to allow a judgment to go unsatisfied (eg if it in a regulated industry, such as financial services), or if the counterparty could not afford to be shut out of the favoured jurisdiction.

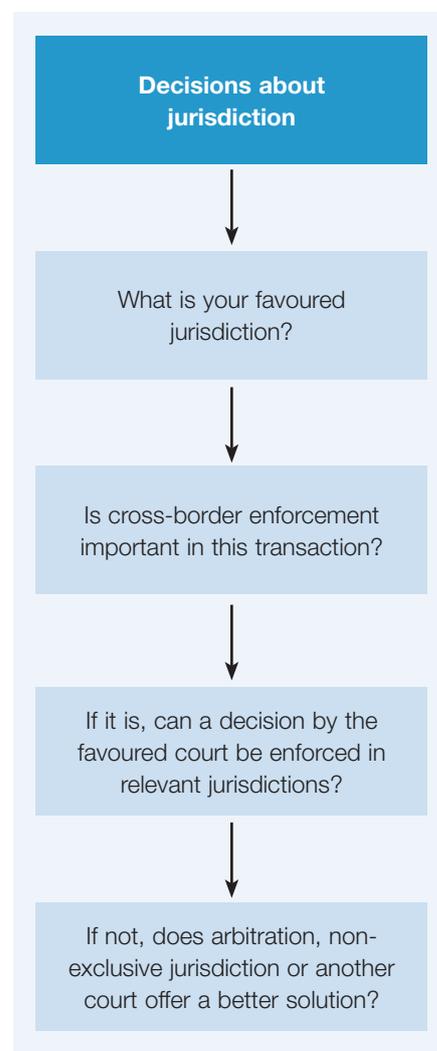
If enforcement in a location that is not the favoured jurisdiction is important, that

leads to the **third question**, namely whether a judgment given by the courts of the favoured jurisdiction will be enforceable in that location. The location in question will be one where the counterparty has assets available for enforcement (typically, but not necessarily or exclusively, its home state). Whether any particular judgment will be enforceable in the relevant location is a matter of the law of that location. Just because there is no treaty does not mean that enforcement is impossible; and the existence of a treaty will not necessarily mean that enforcement is practicable. It could be that the general law means of enforcing a foreign judgment is sufficient, or at least provides a sufficient threat to persuade the counterparty to pay its judgment debts.

If, however, a judgment from the favoured jurisdiction is not, or may not with sufficient certainty be, enforceable in a jurisdiction where the counterparty has assets, that leads to the **fourth question**, which involves choosing between three main options in order provide a judgment that can be enforced in a jurisdiction where the counterparty has assets. These options are: arbitration; non-exclusive jurisdiction; or another jurisdiction.

The UK and all other EU member states are parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This provides, as its name suggests, for the enforcement of an arbitral award given in one participating state in all others. Arbitration is common where, for example, the counterparty's assets are in a state where a judgment given by the courts of the favoured jurisdiction is not enforceable and the local courts are regarded as unacceptable (eg Russia and the Middle East). In any event, some prefer other features of arbitration, such as confidentiality.

The second option is to confer non-exclusive jurisdiction (perhaps one-sided jurisdiction) on the favoured courts. This will allow a party to decide what to do



when a dispute arises. If enforcement is important at that stage, litigation in the counterparty's home state might be needed; but if the dispute is not likely to give rise to an enforcement risk, litigation in the favoured court will still be a possibility.

The final option is to confer jurisdiction on a court, though not the favoured court, that can give a judgment that is enforceable where the counterparty has assets. This might be the courts of the counterparty's home state, but does not necessarily need to be those courts. It may be that other courts are preferable.

Practical Problems

Whether or not it is justified, Brexit will bring – indeed, has brought – pressure for greater diversity in choice of law and courts. So, for example, ISDA has published French and Irish law versions of the ISDA Master Agreement, and various countries are making a play for work that would traditionally have come to the English courts.

But as with many changes to the status quo, this brings practical problems that must be addressed. For example, for French and German counterparties, English law is a neutral law. Will either agree to use the home law of the other, or, if not, what other neutral law is suitable? If the French and German parties agree on French law, will an Italian counterparty of the German party also agree on French law just because the German party intends the contract with the Italian to hedge that with the French? If not, what is the basis risk between the two governing laws? Will the same event allow termination of both contracts on the same day? Will the amount payable be the same or, for example, does one law reject compound interest?

The issues can also be institutional. If, say, a financial firm is to enter into contracts governed by a different law from that it has habitually used, it must have the infrastructure to do so. If it wishes to opt for a single law, it must first decide what that law will be. This requires a complex

exercise in comparative law. What are the risks of pre-contractual liabilities under various laws? How does any obligation of good faith affect performance and termination of a contract? Must notices be given in a particular way? What rights might third parties obtain under a contract? What dispute resolution provisions are appropriate? Will market counterparties accept the law that the financial institution would like to use? If not, it might be necessary to use a number of laws, as well as managing the basis risk between them.

A firm that has been through this comparative law exercise must then ensure that its legal function and resources are appropriate for its choice. It may need to update its legal manuals on, for example, the negotiation and termination of contracts to cater for the requirements of the new law or laws, as well as ensuring that it has appropriately qualified staff. Laws also have the irritating habit of changing, so it cannot just carry out a single exercise but must have the means to keep up to date with the law or laws it chooses to operate under.

Change of the law habitually used is possible, but it requires infrastructure change to go with it.

Conclusion

Substantive English transactional law and the recognition by courts (whether English or in the EU27) of the parties' choice of law will not be materially affected by Brexit. After Brexit, English courts will continue to respect the parties' choice of jurisdiction, but there is some uncertainty as to whether EU courts will do so outside the scope of the Hague Convention (though that could give rise to anti-suit injunctions from the English courts). But the principal issue is likely to be the cross-border enforceability of judgments, to the extent that it is important. No single solution is available at this stage for this issue, which depends upon the risks attached to each counterparty and an analysis of the laws relating to the location of its assets.

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C H A N C E

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