



BREXIT AND CHOICE OF COURTS: UK ACCEDES TO THE HAGUE CONVENTION

The Hague Convention on choice of court agreements will come into force in the UK on 1 April 2019 if there is a "no deal" Brexit. As a result, all EU member states will be obliged to give effect to exclusive choice of court agreements in favour of the English courts entered into after that date and to enforce the resulting judgment.

Our briefing entitled *Brexit, English Law and the English Courts: Where are we now?* (August 2018) discussed in detail the effect of Brexit on the choice of English law and of the English courts. In summary:

- The substance of English transactional law will be unaffected by Brexit. If English law was the right choice before Brexit, it will remain so after Brexit.
- The main effect of Brexit on the English courts will be the ease of enforceability of an English judgment in EU member states, and vice versa, following the disappearance for the UK of the Brussels I Regulation (which governs the mutual enforcement of judgments between member states). If enforceability in another EU member state is key (not the case where, for example, the counterparty has assets in the UK, there is adequate security or the counterparty is more likely to sue than to be sued), then it is necessary to consider whether satisfactory alternative means are available to enforce an English judgment in the relevant member state or, if not, what other dispute resolution means are acceptable (including, for example, litigation in that state or arbitration).

We pointed out that the Hague Convention on choice of court agreements potentially offered for contracts a longer-term solution to any difficulty in enforcing an English judgment in EU member states. As a member of the EU, the UK is currently bound by the Convention, but is entitled to accede to the Convention in its own right after Brexit. The Convention applies to exclusive choice of court agreements in favour of the English courts entered into after the Convention comes into force in the UK; it obliges participating states (all EU member states, Mexico, Montenegro and Singapore) to uphold these agreements and, most significantly, to enforce the resulting judgment. If, therefore, the principal factor against choosing the English courts after Brexit is concern about the enforceability in an EU member state of an English judgment, the Hague Convention will potentially solve this problem.

On 28 December 2018, the UK deposited its Instrument of Accession to the Hague Convention. As the depositary (the Netherlands' Ministry of Foreign Affairs) confirmed, this means that the Hague Convention will enter into force for the UK on 1 April 2019, two days after Brexit. Accordingly, any judgment

Key issues

- The Hague Convention will come into force in the UK on 1 April 2019, absent a UK/EU Withdrawal Agreement
- The Convention applies to exclusive choice of court agreements entered into after that date
- The Convention will require EU member states to enforce judgments given by the English courts, and vice versa
- Parties may wish to consider entering into supplemental agreements on or after 1 April 2019 providing for exclusive jurisdiction.

given by the English courts on a contract with an exclusive jurisdiction clause will be enforceable throughout the EU in accordance with the Convention. The Convention will take effect in English law by virtue of a statutory instrument under the European Union (Withdrawal) Act 2018.

The Convention will, however, only apply to agreements entered into on or after 1 April 2019. Parties may therefore wish after that date to enter into a new exclusive choice of court agreement applicable to prior agreements. For example, banks that have lent to borrowers in the EU out of their London lending office subject to the exclusive jurisdiction of the English courts may wish to consider entering into a short supplemental agreement on or after 1 April 2019 granting exclusive jurisdiction to the English courts.

The one caveat to the above is that the UK will withdraw its Instrument of Accession if the Withdrawal Agreement enters into force between the UK and the EU. The Withdrawal Agreement has been agreed politically but requires approval from the European Parliament and, far more problematically, from the UK Parliament (see our briefing entitled *UK and EU agree Brexit deal – what does it mean and what happens next?* (November 2018)).

The Withdrawal Agreement provides that a judgment given in proceedings started before the end of the transition period (31 December 2020) will continue to be enforceable in accordance with the Brussels I Regulation, whether enforcement takes place during or after the end of the transition period. The Withdrawal Agreement will therefore maintain the status quo for 21 months. This will only defer the enforcement issues, but (depending on the terms of any long-term agreement between the UK and the EU), the UK would then accede to the Hague Convention again, in September 2020, so that the Convention would come into force in the UK on 1 January 2021.

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