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THE USE OF ENGLISH LAW IN ITALIAN FINANCIAL TRANSACTIONS AFTER BREXIT

Since the Brexit referendum of June 2016, clients have on several occasions queried whether after the United Kingdom's withdrawal from the European Union ("**Brexit**") judgments of the English courts will continue to be recognised and enforced in Italy, and whether the choice of English law and English jurisdiction will remain viable options for Italian financial transactions.

While the short answer to all three of these questions is "**yes**", Brexit will bring about certain changes, some of which we will discuss in this briefing.

A MOVING TARGET: DEAL OR NO DEAL?

At the time of writing, it has yet to be confirmed whether the UK will withdraw from the EU with ("**Orderly Brexit**") or without ("**No Deal Brexit**") a withdrawal agreement in place with the EU.

Without going into the detail of the "**withdrawal agreement**" provisionally agreed between the EU and the UK Government, in the case of an Orderly Brexit the status quo will broadly continue for the duration of a 21-month "**transition period**", during which time the UK and the EU may agree (amongst other things) a new arrangement for the recognition and enforcement of English judgments across the EU (and vice versa), to apply once the transition period ends. If, on the other hand, no such arrangement were to be agreed or a No Deal Brexit were to occur, the position outlined herein would apply with effect from the day on which the No Deal Brexit occurs or the transition period ends.

Finally, it is theoretically also possible that the UK leaves the EU on a legal basis which is currently not being expressly contemplated by either the EU or the UK, e.g. by leaving the EU but remaining a member of the European Economic Area (i.e. the so-called "Norway option"). These potential scenarios have been disregarded for the purposes of this briefing.

RECOGNITION OF ENGLISH JUDGMENTS IN THE EU

As at the date hereof, English judgments (and the judgments of any other EU/EEA member state) are recognised and enforced throughout the EU/EEA in accordance with the provisions of Regulation (EU) No 1215/2012 (hereafter, "**Brussels I**").

Once the UK leaves the EU and the EEA, the Brussels I regime will no longer be available for the recognition and enforcement of English judgments, but other effective means to achieve the recognition and enforcement of English judgments in the EU/EEA, and Italy in particular, are nonetheless available.

Key issues

- English transactional law after Brexit will be substantively the same as it was before Brexit. 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.
- The recognition of the parties' choice of English law will not change as a result of Brexit.
- Brexit does not make the choice of English jurisdiction inappropriate or impracticable.
- The manner in which English judgments will be enforced in the EU and Italy will change. The Brussels I regime will cease to apply, but the equivalent regimes of the Italian Conflict of Laws Act and the Hague Convention provide efficient and practicable alternative means for the enforcement of an English judgment in the EU and Italy.
- The EU courts will be compelled to give effect to the exclusive jurisdiction of the English courts and to recognise their judgments in respect of any agreement falling within the scope of the Hague Convention.
- The Hague Convention applies only to "exclusive choice of court agreements". Asymmetric exclusive jurisdiction clauses fall outside the scope of such definition and the Hague Convention. Hence, adjustments to jurisdiction clauses in finance documents may be worth considering in some instances.

The position under Italian domestic law

Recognition of a foreign judgment

In Italy, *Legge 31 maggio 1995, n.218* (the "**Italian Conflict of Laws Act**") provides for a remarkably open regime for the recognition of foreign judgments. Article 64 of the Italian Conflict of Laws Act provides that foreign judgments are recognised in Italy, without a re-examination of the merits of the foreign judgment by the Italian courts or even the need for any order of an Italian court formally declaring the recognition of the judgment. The sole condition is that the foreign judgment does not fall foul of any one of the seven tests set out in Article 64 (the "**Seven Tests**"). The Seven Tests, which cover broadly similar ground as paragraphs 1(a) to 1(d) of Article 45 (*Refusal of recognition*) of Brussels I, are:

- **first**, that the court rendering the judgment had, pursuant to Italian domestic civil procedure rules, jurisdiction to hear the case;
- **second**, that the documents commencing the litigation have been served on the defendant in compliance with the rules on service of process of the jurisdiction of the court rendering the judgment and that the defendant's basic rights of defence have not been violated;
- **third**, that the defendant has entered an appearance in accordance with the laws of the jurisdiction of the court rendering the judgment or that its default of appearance has been declared in accordance with such law;
- **fourth**, that the foreign judgment has become final pursuant to the law of the jurisdiction of the court rendering the judgment;
- **fifth**, that the foreign judgment is not contrary to a judgment rendered by an Italian court which has become final;
- **sixth**, that there is no litigation pending before an Italian court between the same parties and with respect to the same subject matter which was commenced prior to the commencement of the proceedings from which the foreign judgment results; and
- **seventh**, that the provisions of the foreign judgment do not contrast with Italian public policy.

The **first** test will always be satisfied if the court rendering the judgment was expressly chosen by the litigants (e.g. in a jurisdiction clause) and none of the exceptions (for enforcement proceedings, interim orders, etc.) set out in Article 28 of the Italian civil procedure rules apply.

The **second** and **third** tests cover broadly the same ground as paragraph 1(b) of Article 45 of Brussels I and simply seek to ensure that, in reaching the foreign judgment, a due and fair process was followed.

The **fourth**, **fifth** and **sixth** tests cover similar ground as paragraphs 1(c) and 1(d) of Article 45 of Brussels I and simply seek to ensure that no contrast between judgments arises in Italy.

The **seventh** test is equivalent to paragraph 1(a) of Article 45 of Brussels I.

Enforcement of a foreign judgment

While the automatic "recognition" of a foreign judgment in Italy does not equate to its immediate "enforceability" in Italy, a foreign judgment only really needs to be "enforceable" in Italy if the judgment debtor does not voluntarily comply with

the foreign judgment. In order to render the foreign judgment "enforceable" in Italy, an application for a declaration of conformity of the foreign judgment with the Seven Tests will have to be made to the competent Italian Court of Appeal. The decision of the Italian Court of Appeal on such application may be appealed to the Italian Supreme Court, but is enforceable in the interim.

One key difference between Brussels I and the Italian Conflict of Laws Act lies in the fact that, under Brussels I, the foreign judgment will not only be automatically recognised but also be immediately enforceable across the EU. However, pursuant to Brussels I, a judgment debtor remains entitled to challenge the enforcement of the foreign judgment during the enforcement proceedings on the basis of any one of the grounds for refusal of recognition specified in Article 45 of Brussels I. The first instance decision on such challenge can be appealed first to the competent Italian Court of Appeal and, finally, to the Italian Supreme Court.

Impact on timing

Clifford Chance recently applied (on behalf of a client) to the Court of Appeal of Bologna for a declaration of conformity in respect of a judgment issued by a US court. Said judgment was related to one of Italy's most notorious insolvency cases and was therefore not only extraordinarily complicated but also politically sensitive. We would therefore assume that the Court of Appeal of Bologna was particularly diligent in its verifications. Nevertheless, the Court of Appeal issued the declaration of conformity in less than a year. We deduce from this that the process could be completed in even less time if the foreign judgment to be recognised were straightforward.

Furthermore, it is worth noting that once the declaration of conformity becomes final, the question of the foreign judgment's conformity to the Seven Tests cannot be raised again by the judgment debtor in a challenge during the enforcement proceedings. This means that the judgment creditor runs a lesser risk of being dragged into a lengthy challenge during the enforcement proceedings (which may potentially last longer than the process to obtain the declaration of conformity).

1964 Convention between the UK and Italy

According to some Italian legal scholars and practitioners, the 1964 Convention between the United Kingdom and the Republic of Italy for the reciprocal recognition and enforcement of judgments in civil and commercial matters could potentially revive. However, given the considerable uncertainty around this matter, the provisions of said convention are outside the scope of this briefing.

The Hague Convention

On 28 December 2018, the UK deposited its Instrument of Accession to the Hague Convention on Choice of Court Agreements of 30 June 2005, which is therefore currently scheduled to enter into force for the UK on 1 April 2019 (two days after the originally scheduled "Brexit date" of 29 March 2019). Pursuant to the Hague Convention, any "exclusive choice of court agreement" conferring exclusive jurisdiction to the English courts (or any other contracting state) and any resulting judgment given by such courts, will be enforceable in all other contracting states. The European Union, as well as Mexico, Singapore and Montenegro, are party to the Hague Convention.

The Hague Convention will, however, only apply to "exclusive choice of court agreements" **entered into after the Hague Convention comes into force in**

the UK. Parties must, therefore, enter into a new "exclusive choice of court agreement" after the Hague Convention comes into force in the UK if they want agreements executed **prior** to such date to be covered by the Hague Convention. It is not possible to future-proof now any existing agreements and/or agreements to be signed before the coming into force of the Hague Convention in the UK.

In the event of an Orderly Brexit, the UK will withdraw its Instrument of Accession to the Hague Convention, as the withdrawal agreement provides that a judgment given in **proceedings started before the end of the transition period** will continue to be enforceable in accordance with Brussels I, whether enforcement takes place during or after the end of the transition period. In other words, the withdrawal agreement will maintain the pre-Brexit status quo for 21 months. The UK would then likely accede to the Hague Convention again, so that the Hague Convention would come into force in the UK as soon as possible after the end of the transition period, unless a new long-term agreement on jurisdiction and the recognition and enforcement of judgments comes into force after the transition period, as is a stated objective of the UK.

It is yet to be confirmed what action, if any, the UK government intends to take with respect to the UK's accession to the Hague Convention in light of the fact that Brexit will now certainly not occur on 29 March 2019 but be delayed. If the UK government chose to withdraw its current Instrument of Accession to the Hague Convention and deposited a revised version, there may be a slightly longer gap between the date on which a No Deal Brexit occurs and the date on which the Hague Convention comes into force in the UK.

What is an "exclusive choice of court agreement" for the purposes of the Hague Convention?

The Hague Convention defines "exclusive choice of court agreement" as an agreement which "*designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship,* ***the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts***".

Do "asymmetric" exclusive jurisdiction clauses, i.e. a jurisdiction clause pursuant to which one party must sue in the exclusive jurisdiction whereas the other party may also sue elsewhere, fall within this definition? While the Hague Convention itself contains no operative provisions which might assist with answering this question, the Explanatory Report issued by the Hague Conference on Private International Law in connection with the adoption of the Hague Convention states expressly that asymmetric jurisdiction clauses fall **outside** the scope of the Hague Convention.

Agreements entered into prior to a No Deal Brexit or the end of the transition period

A key point to note is that it is not (necessarily) the date of the execution of the agreement which is relevant in order to determine the correct route for the cross-border recognition and enforcement of an English judgment post-Brexit. The key factor is the date on which the proceedings from which the judgment results were issued. Consequently:

- whatever form Brexit will take, any judgment resulting from **proceedings issued before Brexit** will be recognised and enforced in accordance with Brussels I;

- in the event of an Orderly Brexit, any judgment resulting from **proceedings issued before the end of the transition period** will be recognised and enforced in accordance with Brussels I; and
- in the event of a No Deal Brexit, any judgment in respect of any agreement containing an "**exclusive choice of court agreement" entered into after the coming into force of the Hague Convention in the UK** will be recognised and enforced in accordance with the Hague Convention. The same position will apply in the event of an Orderly Brexit following the expiry of the transition period, if no new arrangement for the recognition and enforcement of judgments is entered into during the transition period between the EU and the UK.

Hence, judgments resulting from proceedings issued **after a No Deal Brexit** (or after the end of the transition period) with respect to agreements which have been **entered into prior to Brexit** will fall **outside the scope** of Brussels I and (unless they have been "retrofitted" with an "exclusive choice of court agreement", or an existing "exclusive choice of court agreement" in such agreements is "confirmed", **after** it comes into force in the UK) the Hague Convention. Recognition and enforcement of such judgments in an EU member state will therefore have to be achieved on the basis of such member state's domestic legislation.

However, as described above, at least as far as Italy is concerned, the regime for the recognition and enforcement of foreign judgments provided for under the Italian Conflict of Laws Act is, *prima facie*, not considerably more burdensome or time-consuming than a recognition and enforcement under Brussels I.

Actions for which the recognition of a foreign judgment is not (necessarily) required

It is important to note that it is not (necessarily) required to have a recognised and enforceable English judgment in Italy in order to claim in the bankruptcy estate of an Italian debtor or enforce an Italian security interest (for which, unless the security interest qualifies as a financial collateral arrangement (*contratto di garanzia finanziaria*), an enforcement title (*titolo esecutivo*) is required, which can take several forms).

CHOICE OF ENGLISH JURISDICTION AFTER BREXIT

Generally speaking, when deciding on the jurisdiction provisions to include in a contract, 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. Enforcement for these purposes is not the same as credit risk. Enforcement is 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, the party is more likely to be sued than to sue, the party most likely to sue has satisfactory security, if the counterparty has assets in the jurisdiction of the favoured courts, if the counterparty's position is such that it could not afford to allow a judgment to go unsatisfied, 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.

If a judgment from the favoured jurisdiction is not enforceable in a relevant jurisdiction, that leads to the **fourth question**, which involves choosing between three main options in order to provide a judgment that can be enforced in the relevant jurisdiction, which are arbitration, non-exclusive jurisdiction or another jurisdiction.

Enforcement in the EU

When choosing the jurisdiction of the English courts following a No Deal Brexit (or after the transition period, if no new arrangement for the recognition and enforcement of judgments is entered into between the EU and the UK), if your answer to the **third question** above is that the ability to enforce the judgment in the EU is a requirement for the transaction at hand, the following should be borne in mind.

The Hague Convention

The Hague Convention will become a valuable means to ensure that a choice of court agreement awarding exclusive jurisdiction to the English courts (and any resulting judgment) will be recognised and enforced across the EU.

It may therefore be worth considering adjustments to the jurisdiction clauses of finance documents in order to ensure that these will certainly fall within the scope of the Hague Convention.

Outside the scope of the Hague Convention

For agreements/judgments falling outside the scope of the Hague Convention (see sections "The Hague Convention" and "Agreements entered into prior to a No Deal Brexit or the end of the transition period" above), there is a theoretical risk that in the case of a No Deal Brexit the EU courts would not necessarily give effect to an exclusive jurisdiction clause in favour of the English courts.

Article 25 of Brussels I upholds the parties' choice of the courts of an EU member state, 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 in certain circumstances **allows (but does not oblige)** courts in EU member states to stay their proceedings in favour of the courts of a non-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 exclusive jurisdiction. This is an existing problem where, for example, parties have agreed that the New York courts should have jurisdiction.

To counter the above risk, the English courts could grant an anti-suit injunction to restrain parties from bringing proceedings in an EU member state in breach of a jurisdiction agreement and award damages for breach of a jurisdiction agreement.

CHOICE OF ENGLISH LAW

No changes to English transactional law

The English law that is used in financial 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 which (with the exception of the EU regime on financial collateral arrangements) are not of central relevance in commercial transactions but, in any event, will remain in force after Brexit as UK domestic law with no material changes. 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.

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. Regulation (EC) No 593/2008 ("**Rome I**") lays down the rules that must be applied in the courts of EU member states to determine what law governs a contract, and Regulation (EC) 864/2007 ("**Rome II**") lays down the rules to determine the law applicable to non-contractual obligations. These will of course continue to apply in the EU after Brexit. In the UK, Rome I and Rome II will also continue to apply in an "onshored" form as the European Union (Withdrawal) Act 2018 provides for EU regulations in force and applicable on exit day to become part of the UK's domestic law.

Impact of Brexit on EU financial regulation

Brexit will have an impact on how English law will be treated by certain provisions of EU financial regulation. Prominent examples are Articles 45(5) and 55 of the Bank Recovery and Resolution Directive and the Eurosystem Collateral Eligibility Criteria. These aspects are outside the scope of this briefing.

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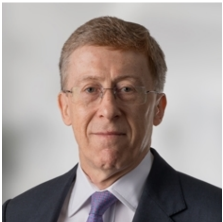

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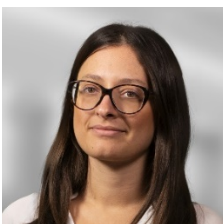

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