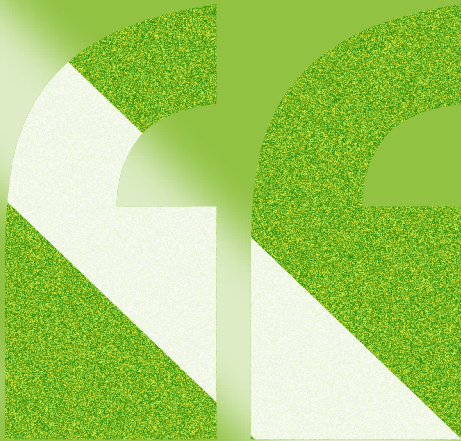


C L I F F O R D
C H A N C E



BREXIT, LAW AND JURISDICTION: WHERE WILL WE BE AFTER TRANSITION?



— THOUGHT LEADERSHIP

OCTOBER 2020



BREXIT, LAW AND JURISDICTION: WHERE WILL WE BE AFTER TRANSITION?

True Brexit is nearly upon us, with the end of the transition period on 31 December 2020. What will this mean for the law and jurisdiction clauses in international contracts entered into after that date? In most cases, no fundamental change will be required, but the UK's accession to the Hague Convention on Choice of Court Agreements may make exclusive jurisdiction provisions more attractive for some parties.

Key issues

- The rules on choice of law will not change materially after 2020
- The Brussels I Regulation will cease to apply between the UK and the EU in 2021
- The Hague Convention will apply between the UK and the EU for transactions concluded after its entry into force for the chosen court
- The Hague Convention requires participating courts to honour jurisdiction clauses and enforce the resulting judgment
- The Hague Convention only applies to exclusive choice of court agreements
- General law means to enforce foreign judgments exist in the UK and most EU member states

Much of the UK's private international law framework for issues arising from agreements is in EU legislation.

As a result, English courts currently apply the EU's Rome I Regulation on the law applicable to contractual obligations to decide what law governs a contract. These Regulations respect, with limited exceptions, the parties' choice of law whether that law is the law of an EU member state or of a third country.

So far as jurisdiction is concerned, English courts apply the EU's Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments (recast). This provides that where the parties have elected for the exclusive jurisdiction of the courts of an EU member state, the chosen courts are required to accept jurisdiction and can proceed to decide the case whether or not another court in the EU has before it an identical case; the other EU court should halt its proceedings. Where the jurisdiction clause is non-exclusive, the court chosen can go ahead provided that it is the first court seised of the issue in the EU. If another court in the EU is seised first, the chosen court must stay its proceedings until that other court has decided whether or not it has jurisdiction over the case. The other court's jurisdiction may arise from the Regulation itself, which applies in the main only to parties domiciled in the EU, or from the other court's local law for a party domiciled outside the EU.

Under Brussels I, a judgment given by a court in an EU member state is enforceable in all other EU member states (with, inevitably, some exceptions), whatever the basis of the court's jurisdiction.

From midnight CET on 1 January 2021, the Rome I and Brussels I Regulations will no longer apply in or to the UK. Will the position be significantly different, particularly so far as concerns the English courts?

Choice of law from 1 January 2021

For choice of law, the end of transition will have no material effect. The UK has brought the Rome I Regulation into its domestic law. The English courts will continue to apply the same rules as courts in EU member states to determine what law applies to a contract. English courts will still uphold the parties' choice of law whether that law is English law, the law of an EU member state or the law of a third country. Similarly, courts in EU member states will continue to uphold the parties' choice of law in accordance with the Rome I Regulation.

English courts will not be bound by decisions on Rome I made by the Court of Justice of the European Union after the end of 2020, and some higher English courts will be able to depart from prior CJEU decisions, but the practical effect of Brexit on the rules applicable to the parties' choice of law will be minimal.

Choice of court from 1 January 2021

The position on choice of courts is different. Unlike the Rome I Regulation, the Brussels I Regulation depends upon reciprocity. The aim of the Regulation is that one court in the EU should have jurisdiction, with that court's judgment then being enforceable throughout the EU. After the end of the transition period, the reciprocity that this requires will no longer exist between the UK and

the EU. As a result, the Brussels I Regulation will cease to apply in any form in the UK, and, so far as EU member states are concerned, the English courts will be in the same position as, for example, the New York courts.

However, for contracts entered into on or after 1 January 2021, the Hague Convention on Choice of Court Agreements will apply as between the UK and the EU. The EU is already a party to the Hague Convention, and the UK acceded in its own right on 28 September 2020, bringing the Convention into force for the UK one hour after at the end of the transition period. The Hague Convention is more limited than Brussels I, but it could play a significant role for international agreements.

The Hague Convention applies only to “vanilla” exclusive choice of court agreements (not, for example, to unilateral or asymmetric clauses), and only to choice of court agreements concluded after the Convention’s entry into force for the state of the chosen court. Where Hague applies, it will require courts in the UK and the EU to respect the parties’ choice of court.

(It is worth noting that the UK argues that the Convention is and will continue to have been in force for the UK without interruption since 1 October 2015, when the Convention came into force for EU member states, and thus applies to contracts made since that earlier date. The European Commission disagrees. The UK has adopted this position in its domestic legislation, but courts in EU member states, and ultimately the CJEU, will have to resolve this issue for the EU – there is no common judicial body for the Hague Convention.)

As a result, the position for jurisdiction agreements entered into after the beginning of 2021 will, in summary, be as follows:

- If the jurisdiction clause in an agreement is exclusive within the meaning of the Hague Convention, the court chosen must take jurisdiction, and other courts in

participating states (including in all EU member states) should decline jurisdiction. So, for example, if a jurisdiction clause gives exclusive jurisdiction to the English courts, the English courts must hear the case, and the courts in EU member states should refuse to do so, and vice versa.

- If the jurisdiction agreement is not within the Hague Convention, the English courts will still in most instances continue to take jurisdiction under English domestic law if the clause is in their favour. This will be the case whether the clause is, for example, asymmetrically exclusive or non-exclusive and whether or not the English courts were first seised of the issue.
- The position of courts in EU member states faced with a non-Hague clause in favour of the English courts is more complicated. Without going into detail, the complexity arises from the doubts expressed in some EU member state courts as to the validity of asymmetric clauses and from ambiguity in the Brussels I Regulation as to whether or in what circumstances courts in an EU member state that have jurisdiction under Brussels I are able to stay proceedings in favour of courts in a third country (such as the UK) on the basis of a jurisdiction clause in favour of that third country’s courts. For example, it may be that EU member state courts can only stay their proceedings in favour of the English courts if an English court was seised of the case before the EU court was seised. The CJEU may need to resolve these issues.
- The English courts will be able to grant anti-suit injunctions to restrain a party from pursuing proceedings in an EU member state’s courts (or other courts) brought in breach of a jurisdiction agreement. If the English courts are satisfied that there is an exclusive jurisdiction clause (vanilla or asymmetric) requiring the parties to bring proceedings in England, the English courts will normally grant an injunction unless there are strong

Asymmetric jurisdiction clauses: a history

Asymmetric jurisdiction clauses are commonly used in financial documents. So far as English law agreements are concerned, their use arose from a legal ambiguity in the Brussels Convention, which came into force for the UK in 1987.

Until 1987, non-exclusive jurisdiction provisions were, perhaps, the most common. However, the Brussels Convention stated that “If the parties...have agreed that... the courts of a Contracting State are to have jurisdiction... those courts shall have exclusive jurisdiction”. Did this mean that a non-exclusive jurisdiction clause was converted into an exclusive clause? Perhaps non-exclusivity didn’t work at all.

The Brussels Convention created this ambiguity, but it also offered a potential solution. It provided that “If the agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction...”. A jurisdiction clause could therefore be exclusive for one party, but non-exclusive for another, giving that other greater flexibility.

Thus was born the widespread use of asymmetric clauses in English law agreements. The ambiguity over the effect of non-exclusive clauses was removed when the Convention was replaced by the Brussels I Regulation from 2002. The reference to a clause being for the benefit of one party only was also removed. The Regulation made clear that non-exclusive agreements worked in accordance with their terms, but asymmetric clauses were established and maintained their hold, even after the French *cour de cassation* questioned their validity in 2012. They have obvious advantages to the parties in whose favour they operate.

But it may be that, in some circumstances, those advantages will diminish after the end of 2020.

reasons not to do so. If the clause is non-exclusive, the English courts may grant an anti-suit injunction

The enforcement of judgments from 1 January 2021

The enforcement of foreign judgments under the Brussels I Regulation again hinges on reciprocity. As a result, Brussels I will cease to apply to the enforcement in England of a judgment from an EU member state, and vice versa, for proceedings started after the end of the transition period. Instead, the position will be:

- If an English court has taken jurisdiction under an agreement to which the Hague Convention applies, any resulting judgment will be enforceable in EU member states under the Hague Convention. Likewise, an English court must enforce a comparable judgment given by a court in an EU member state.
- If a judgment falls outside the Hague Convention, it will be enforceable in accordance with the local law of the state in which enforcement is sought. So, for example, an English judgment will be enforceable in an EU member state in accordance with the law of that state applicable to non-treaty judgments (the same law that applies to New York judgments). Local legal advice will be required in each state as to whether this is possible and, if so, how practicable it is. Most states (including England) offer means of enforcing a foreign judgment that is not subject to a treaty or equivalent arrangement. These methods are seldom as efficient as Brussels I is intended to be, but that does not mean that they do not work or, at least, that their threat will not induce payment of a judgment debt. (It may also be that pre-EU bilateral treaties on the enforcement of judgments between, for example, the UK and France and the UK and Germany will become applicable again, allowing enforcement under their provisions.)

What does this mean in practice?

For choice of law, Brexit has no real impact on international contracts. Courts in EU member states remain bound by the Rome I Regulation, which applies regardless of the governing law that results from the application of its rules. English courts will similarly remain bound by the text of the Rome I Regulation, as translated into UK law. If the parties have chosen a particular law to govern their contract, courts in the EU and the UK will continue to give effect to that choice.

For jurisdiction and the enforcement of judgments, the position is more nuanced. The starting point is what, all other things being equal (which they seldom are), is your favoured court. This will turn upon familiarity, cost, procedures, commerciality, governing law, overriding laws and a host of other factors both tangible and intangible.

The next step is to consider whether you are likely to need to enforce a judgment given by your favoured court in another state. Enforcement for these purposes is not the same as insolvency risk but involves seizing and realising the assets of a party in order to meet the judgment debt, ie a party has the means to pay the judgment debt but refuses to do so.

Enforcement is unlikely to be necessary if, for example, you have security that will be your main recourse in the event of a default or you have the more onerous obligations such that you are more likely to be sued than to sue. Or perhaps your counterparty has assets in the territory of the chosen courts, or will be unable to ignore a judgment given by the chosen court for regulatory, reputational or other reasons.

In these circumstances, the main aim of the jurisdiction provision in an agreement may be to ensure that litigation takes place only in courts you consider acceptable. For this purpose, an exclusive jurisdiction clause in favour of your favoured jurisdiction may be the best choice.



Most states (including England) offer means of enforcing a foreign judgment that is not subject to a treaty or equivalent arrangement. These methods are seldom as efficient as Brussels but that does not mean that they do not work or, at least, that their threat will not induce payment of a judgment debt.



Brexit has the potential, in some circumstances, to strengthen the case for an exclusive jurisdiction clause in favour of the English courts so far as EU member states are concerned. Under Brussels I, English courts were unable to grant anti-suit injunctions to restrain parties from pursuing proceedings in other EU member states in breach of a jurisdiction agreement. The disappearance of Brussels I from English law will revive the English courts' ability to do this. Failure to observe an English anti-suit injunction will place a party in contempt of the English court. Whether a party outside the UK could afford to be in contempt of the English court will depend upon its circumstances. For example, any assets in the UK of a party in contempt of court would be at risk, and that party would also potentially be shut out of the London financial markets.

An exclusive jurisdiction clause that falls within the Hague Convention will also bring additional benefits. Courts in participating states (the UK and the EU, but also Mexico, Singapore and Montenegro) are obliged by the Convention to halt proceedings brought in breach of the clause.

If you think that there is a real risk that you will need to enforce a judgment in a state other than the one whose courts have given the judgment, the question is where. A party usually has assets in its home state, but it may also have assets in one or more other places. If, you are looking at enforcing an English court judgment in one or more EU member states, or vice versa, there are broadly

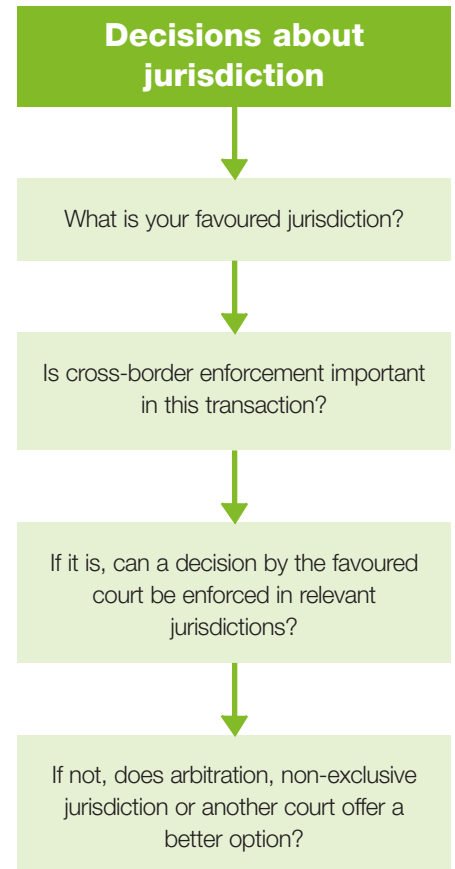
two choices on how to do so. First, rely on the Hague Convention, which means that the jurisdiction provisions must give exclusive jurisdiction to the English courts. Second, if an exclusive jurisdiction provision is unsuitable, you can rely on local law enforcement means, which allows greater flexibility in the jurisdiction provision, but also requires local law advice in order to be satisfied that this meets your needs.

If an exclusive jurisdiction agreement is not appropriate and local law means will not meet your needs, then you will need to look for alternatives to your favoured jurisdiction. These might include providing for jurisdiction of a court where your counterparty has assets or arbitration.

(It is also worth mentioning that, as things stand, the Lugano Convention will cease to apply to the UK at the end of 2020. This Convention is between Switzerland, Iceland, Norway and the EU, and is similar to the Brussels I Regulation. The UK has applied to become a party to Lugano in its own right, but this depends upon the consent of all existing parties, which is not currently forthcoming.)

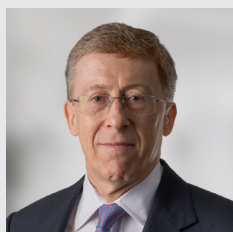
Conclusion

Plus ça change, plus c'est la même chose? Not quite, but, at least in this relatively confined area, Brexit is unlikely to require any radical change in practice. But ensuring that a jurisdiction provision meets the requirements of the Hague Convention may bring significant advantages.



CLIFFORD CHANCE

CONTACT



Simon James
Partner
London
T: +44 207006 8405
E: simon.james@cliffordchance.com



Christopher Bates
Partner
London
T: +44 207006 1041
E: chris.bates@cliffordchance.com



Kate Gibbons
Partner
London
T: +44 207006 2544
E: kate.gibbons@cliffordchance.com



Phillip Souta
Head of UK Public Policy
London
T: +44 207006 1097
E: phillip.souta@cliffordchance.com



Julia Machin
Knowledge Director
London
T: +44 207006 2370
E: julia.machin@cliffordchance.com



Benjamin Barrat
Senior Associate
Knowledge Lawyer
London
T: +44 207006 1696
E: benjamin.barrat@cliffordchance.com



Karen Lester
Knowledge Director
London
T: +44 207006 2633
E: karen.lester@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

© Clifford Chance 2020

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Moscow • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.