

Post-Brexit Jurisdiction and Conflict of Laws Landscape

11 November 2020

As the Brexit transition period ends on 1 January 2021, so will the application in the UK of the EU legal framework for determining jurisdiction in civil and commercial matters. In this client update, we outline the upcoming changes and their implications. The implications are wide-ranging, impacting upon the conduct of future proceedings and the enforceability of jurisdiction clauses in favour of the English Courts.

Jurisdiction and Recognition and Enforcement of Judgments

The main framework governing jurisdiction over civil and commercial matters within the EU is *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* (the “Recast Brussels Regulation”). Last year, the UK government passed *The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 2019/479)* (“EU Exit Regulations”), with the effect that the Recast Brussels Regulation will be repealed from 1 January 2021.

The Recast Brussels Regulation will continue to apply to all legal proceedings that are commenced either: (i) before 1 January 2021, or (ii) after that date if they are deemed to be “related”—for the purposes of section 9 of the Recast Brussels Regulation—to proceedings that commenced before the end of the transition period. For proceedings commenced after 1 January 2021, the UK government currently intends to fill the Recast-shaped gap by acceding to: (i) *The Convention of 30 June 2005 on Choice of Court Agreements* (“2005 Hague Convention”), and (ii) *The 2007 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* (the “Lugano Convention”).

The 2005 Hague Convention mandates that the courts of signatory states give effect to exclusive jurisdiction clauses in favour of the courts of other contracting states, and that those courts recognise and enforce judgments given pursuant to such clauses. The contracting states presently include the EU (on behalf of all Member States), Mexico, Montenegro, and Singapore. By virtue of its EU membership, the UK is party to the

2005 Hague Convention and will remain so throughout the transition period. The consent of other contracting states is not required for the UK to accede to the 2005 Hague Convention in its own right. The UK government has ensured that the 2005 Hague Convention will apply after 1 January 2021 by depositing the formal instrument for accession on 28 September 2020.

The scope of the 2005 Hague Convention is limited.

First, it applies only to exclusive jurisdiction clauses and does not address jurisdiction issues arising out of non-exclusive clauses.

Second, the 2005 Hague Convention applies only to clauses entered into after the 2005 Hague Convention came into force in the country whose courts are chosen. The 2005 Hague Convention came into force in the UK on 1 October 2015 when the EU acceded to the 2005 Hague Convention on Members States' behalf. It is arguable that after the transition period, the 2005 Hague Convention will continue to apply to jurisdiction clauses in favour of the English Courts concluded prior to 1 January 2021. However, the EU Commission has stated that it considers that the 2005 Hague Convention will only apply between the UK and EU Member States with respect to exclusive jurisdiction clauses concluded on or after 1 January 2021¹ on the basis that the UK had not acceded to the 2005 Hague Convention in its own right before that date. The UK's Ministry of Justice disagrees and has stated that the 2005 Hague Convention will "*continue to apply to the UK (without interruption) from its original entry into force date of 1st October 2015*".²

It is unclear whether the EU Commission's statement is posturing by the EU or whether that view will be carried through after the transition period ends. The EU Commission's view is not binding on signatory states' courts. However, there is clearly a risk that EU Member States' courts will disregard exclusive jurisdiction clauses concluded between 1 October 2015 and 1 January 2021 in favour of the English courts based on the EU Commission's statement.

The Lugano Convention replicates the jurisdiction regime under the 2001 Brussels Regulation, which preceded the Recast Brussels Regulation. The Lugano Convention applies as between the EU (on behalf of its Member States) and Iceland, Norway and

¹ See the EU Commission's Notice to Stakeholders dated 27 August 2020 in which the Commission stated that the 2005 Hague Convention "*will apply between the EU and the United Kingdom to exclusive choice of court agreements concluded after the Convention enters into force in the United Kingdom as party in its own right to the Convention*" (emphasis added).

² Ministry of Justice, "Cross-border civil and commercial legal cases: guidance for legal professionals from 1 January 2021" 30 September 2020, available at < <https://www.gov.uk/government/publications/cross-border-civil-and-commercial-legal-cases-guidance-for-legal-professionals-from-1-january-2021/cross-border-civil-and-commercial-legal-cases-guidance-for-legal-professionals-from-1-january-2021> >

Switzerland. The UK formally requested to accede to the Lugano Convention on 8 April 2020. The unanimous consent of the other contracting states is necessary in order for the UK to accede.

While Switzerland, Iceland and Norway have consented to the UK's accession, consent is not (yet) forthcoming from the EU Member States. The EU Commission reportedly advised EU Member States that a quick decision on the issue was not in the EU's interests, and that there are reasons to reject the UK's request.³

Article 72(3) of the Lugano Convention requires contracting states to “endeavour” to give their consent (or otherwise) within a year of the accession request being lodged with the Convention's Depository. If all contracting states give their unanimous consent, the Depository would invite the UK to accede, which in turn starts a further 3-month objection period. (The Lugano Convention would not apply as between the UK and any contracting state that objects to the UK's accession during this 3-month period.) For the UK to accede on 1 January 2021, the EU Member States had to have approved the request by 1 October 2020. At the time of writing, no approval has been given, which means that the UK will not accede to the Lugano Convention before 31 January 2021. It is possible that EU Member States will not consent to the UK's accession in the future.

Reviving the old common law rules

From 1 January 2021, and until such time as the UK accedes to the Lugano Convention, the common law rules will apply again to govern jurisdictional issues. The revival of those rules will entail two major changes from the regime under the Recast Brussels Regulation.

First, the ECJ's decision in *Owusu v. Jackson* (Case C-281/02) will no longer apply, allowing UK-domiciled defendants to again challenge the English Courts' jurisdiction on the basis that England is not an appropriate forum.

Second, the English courts will again be able to grant anti-suit injunctions restraining parties from pursuing proceedings in an EU Member State in breach of a jurisdiction or arbitration agreement. This is because the ECJ's decisions in *Turner v. Grovit* (C-159/02) and *West Tankers* (Case C-185/07) will no longer be binding.

³ Financial Times, “Britain Risks Losing Access to valuable European Legal Pact”, 27 April 2020, available at <<https://www.ft.com/content/d3cf6d9f-2e2d-4af9-a550-91e476723ea2>>.

If and when the UK accedes to the Lugano Convention, the position will change (yet) again. Three main differences between the Recast Brussels Regulation and the Lugano Convention should be borne in mind:

First, CJEU decisions interpreting the Lugano Convention are not binding on the courts of contracting states, and there are no penalties for deviating from those decisions. Instead, the Lugano Convention only obliges the courts applying and/or interpreting it to “pay due account to... any relevant decision rendered” by the CJEU. However, as David Richards J noted in *Enasarco v. Lehman Brothers Finance S.A* [2014] EWHC 34 (Ch), the English courts have so far viewed the CJEU’s decisions as “authoritative guidance” in Lugano Convention cases.

Second, unlike under the Recast Brussels Regulation, a jurisdiction agreement will only be given effect in accordance with the Lugano Convention if at least one of the parties to the agreement is domiciled in a contracting state.⁴

Third, the Lugano Convention does not give precedence to exclusive jurisdiction clauses, which means that jurisdiction falls to be determined by the court first seised of a dispute, which in turn may choose not to decline jurisdiction even where there is a clear choice in favour of the courts of another contracting state. This might revive the problem of a party pre-empting litigation so as to gain a tactical advantage by issuing proceedings in a jurisdiction where the court process moves slowly (the so-called “Italian Torpedo”). This problem is partially addressed by the overlap with the 2005 Hague Choice of Court Convention, which accords primacy to exclusive jurisdiction agreements concluded after October 2015.⁵

Choice of law

The provisions of *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations* (the “Rome I” and “Rome II” Regulations, respectively) will continue to apply after 1 January 2021. The UK has incorporated the

⁴ See Article 23(7) of the Lugano Convention, which provides that “*If the parties, one or more of whom is domiciled in a State bound by this Convention, have agreed that a court or the courts of a State bound by this Convention are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise*” (emphasis added).

⁵ See Article 5(1) of the 2005 Hague Choice of Court Convention, stating that “*The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State*”.

provisions of both Regulations into English law by virtue of The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019, which comes into force on 1 January 2021. EU Member State courts will continue to apply the Rome I and Rome II Regulations and thus continue to give effect to parties' choice of English law as they do currently. Over time, the English courts may interpret the provisions of the Rome I and Rome II Regulations (as enacted domestically) differently to the CJEU, but the end of the transition period will bring no significant change to those rules.

Comment

The EU Commission's stance in respect of the UK's accession to the 2005 Hague Convention creates some uncertainty surrounding the effectiveness of selecting an exclusive jurisdiction clause in favour of the English Courts. For parties considering whether to amend existing jurisdiction agreements to account for the incoming changes, there are two routes forward:

- Parties can re-state their exclusive jurisdiction clause on or after 1 January 2021. However, this may not be commercially viable for many parties, particularly in view of the vast number of agreements that are likely to be affected.
- Alternatively, parties can leave the jurisdiction agreement as is and wait and see how things develop. If a broader deal is reached with the EU, the concerns identified may not materialise. In any event, if a party chooses to commence proceedings in a EU Member State in breach of the exclusive jurisdiction agreement—irrespective of when that agreement was concluded—it will be open to the other party to apply for an anti-suit injunction in England to protect their position.

For parties looking to conclude jurisdiction agreements before 1 January 2021, there are two main ways to structure the agreement so as to safeguard against the potential gaps in the legal framework after the repeal of the Recast Brussels Regulation:

- One option is to include wording in the relevant clause to the effect that the 2005 Hague Convention is applicable to the choice of jurisdiction. For the avoidance of any doubt, parties can agree to restate the jurisdiction clause on or shortly after 1 January 2021—and then proceed to restate the clause—in order to ensure the 2005 Hague Convention applies.
- Alternatively, parties can opt for a deeming provision to the effect that the jurisdiction clause is deemed to be re-stated on 1 January 2021. While this avoids the

need for parties actually to restate the agreement at a later date, there is a possibility that EU Member States' courts would find that such an agreement was not concluded on or after 1 January 2021 for the purposes of the 2005 Hague Convention.

Whether and when the UK will accede to the Lugano Convention remains uncertain. Meantime, the Courts will apply the old common law rules, which are sufficiently well-developed to address the jurisdictional issues that the Recast Brussels Regulation governed for the past 20 years. The old rules might be seen as a welcome revival for UK-domiciled defendants looking to challenge the English Courts' jurisdiction in favour of a non-EU Member State's courts or litigants wanting to protect their dispute resolution agreement from parallel proceedings in the EU through an anti-suit injunction.

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Please do not hesitate to contact us with any questions.

LONDON



Lord Goldsmith QC, PC
phgoldsmith@debevoise.com



Christopher Boyne
cboyne@debevoise.com



Georgina Petrova
gpetrova@debevoise.com



Sara Ewad
sewad@debevoise.com