BREXIT AND JURISDICTION CLAUSES: CHOICE OF ENGLISH LAW FOLLOWING THE EU REFERENDUM

The choice of law to govern a contract will be unaffected by Brexit, if and when it occurs, but jurisdiction provisions may require consideration. But that is only the case if enforceability of a judgment throughout the EU is a significant factor in the choice of jurisdiction. If it's not, nothing changes. If enforceability of a judgment throughout the EU is important, there are various responses available, including the bold one of giving the English courts exclusive jurisdiction.

Key issues

- Nothing changes so far as choice of law is concerned
- Is enforcement of a judgment throughout the EU important?
- If not, no change to jurisdiction provisions is needed
- If it is, then consideration of the various options is required

The initial shock at the UK's referendum vote of 23 June 2016 is dying down. It must be replaced by sober consideration of how to respond in a situation where the only certainty is uncertainty. Will it really happen? When will it happen? Will the continuing EU play hardball in negotiations pour décourager les autres or will it look to ensure that the UK becomes a good neighbour? What will the post-Brexit UK and EU look like? What unknown unknowns will emerge from beneath an unobserved stone? Identifying the questions is hard enough, let alone finding the answers.

But life must go on despite the earthquake. Decisions must be taken. One, perhaps minor, decision for those entering into contracts in the post-referendum world is what to do about the governing law and jurisdiction provisions in the contract, especially where these point to England. The referendum result hasn't itself changed anything legally, but it may be necessary to invoke these provisions of a contract in two, three or more years' time, when the legal framework might – or might not – be different.

GOVERNING LAW

One area where there is, fortunately, little uncertainty is governing law. Recognition of the governing law of a contract will not change materially as a result of the referendum or a subsequent Brexit. The courts of EU member states will continue to apply the Rome I Regulation (EC/593/2008), which gives effect to a non-EU law in the same way as to an EU member state's law. The UK might continue to apply the rules set out in Rome I but, even if changes were to be made, the English courts will continue to uphold to the parties' choice of law.

As to what that choice of law should be, the post-referendum position is again the same as the pre-referendum position: if English law was appropriate before the referendum, it remains appropriate afterwards. The substance of English contract law will not be affected by the UK's departure from the EU. English law will retain its emphasis on freedom of contract and business

certainty. Even those aspects of English contract law that derive from the EU - largely concerning consumers - can continue in effect whether or not the UK remains in the EU (though, outside the EU, the UK will have greater freedom to revise those laws if appropriate).

The governing law of an agreement need not be the same as the courts with jurisdiction over disputes arising from the contract. Courts in one country can, and often do, apply the law of another country. Whilst a given law should be the same whatever court is applying it (subject, in rare cases, to overriding mandatory laws or public policy), there may be a greater degree of certainty and comfort when a court is applying its own law. But law and jurisdiction are not the same thing even though they often feature in the same or adjacent clauses in a contract.

JURISDICTIONAL PRINCIPLES

The jurisdiction of the English courts, and that of the courts in other EU member states, is currently largely dictated by the Brussels I Regulation (recast) (EU/1215/2012). This provides that a choice of jurisdiction by the parties should be upheld and that judgments given by the courts of one member state should be enforced in all other member states. After Brexit, the Brussels I Regulation will in all probability cease to apply to the UK, which has led some lawyers in continuing EU member states to promote the idea that litigation that might have traditionally come to the English courts should instead be diverted to their courts. English lawyers are naturally rather defensive about this prospect.

What the post-Brexit jurisdictional and enforcement landscape will look like is one of the innumerable uncertainties. Lawyers can debate enthusiastically whether judgments given in proceedings commenced before Brexit will continue to be enforceable after Brexit, whether the 1968 Brussels Convention will revive, whether the pre-Brussels Convention treaties between the UK and individual member states will be resuscitated, whether the UK has a right to adhere to the Lugano Convention or, if not, whether one or more of the existing parties will block the UK's doing so, and so on. Interesting though those debates will be, they compound, rather than reduce, uncertainty and offer scant help to those who must make a decision now. So what is the percentage play?

THE STARTING POINT ON JURISDICTION

The first question is what the jurisdiction provision in any particular contract is trying to achieve. If a fundamental objective of the jurisdiction clause is to provide a judgment that will be enforceable throughout the EU, then the uncertainties of the post-referendum world come into play. There is a real risk that, with the probable disappearance from English shores of the Brussels I Regulation and the uncertainties over Lugano and other issues, an English judgment will not be so readily enforceable in the continuing EU as is the case now (the reverse will also obviously be true). We discuss below possible responses where enforceability of a judgment in the continuing EU is an important factor.

There are, however, many reasons for a choice of jurisdiction other than the enforceability of the resulting judgment within the continuing EU. For example, the party against whom enforcement is likely to be required may not have any accessible assets in the EU. Most obviously, the party might have assets in the UK or otherwise outside the EU, in which case the issues will be the same pre-Brexit as post-Brexit.

In some instances, enforceability might not be a major issue. For example, a party may have sufficient security against which to discharge its counterparty's obligations. Or a party may conclude that it is more likely to be the sued rather than the suer. Or enforcement risk may simply not be a big factor for the particular counterparty. In these situations, a jurisdiction clause may fulfil a more defensive role of ensuring that the party can only be sued in a court in which it has confidence. If so, again the considerations may not have change significantly as a result of the referendum vote.

Post-Brexit, a jurisdiction clause in favour of the English courts may not require courts in EU member states to defer to the English courts in quite the same way or for the same reasons as now, but the counter may be that, if so, the English courts will, contrary to the current position, be able to grant anti-suit injunctions to restrain a party from pursuing proceedings in an EU court. A party with any business, presence or assets in the UK cannot afford to ignore an injunction.

EU ENFORCEABILITY: SOLUTIONS

If enforceability of a judgment throughout the continuing EU is important, there are four obvious solutions in circumstances where, pre-referendum, jurisdiction would have been given to the English courts.

First, give jurisdiction to the courts of an EU member state or a party to the Lugano Convention (Norway, Iceland and Switzerland, along with the EU). This depends upon being comfortable with proceedings in that court, including as to its procedures, costs, speed and outcomes. This is already sometimes done in, for example, security agreements where the security in question is located in another EU member state.

Secondly, give non-exclusive jurisdiction to the English courts. This is a wait and see approach. It allows the position to be reconsidered at the time that legal proceedings are required. If at that time enforcement remains important and an English judgment is enforceable in the EU, then the English courts can be used; if, however, an English judgment is not enforceable in the EU, it will allow the use of other courts.

A variant on this theme is one-sided exclusivity, which is commonly used in financial contracts. This allows one party to sue in the named courts only, but allows the other party to take proceedings in that court or in any other court with jurisdiction. The French Cour de Cassation has cast some doubt on the validity of these clauses under the Brussels I Regulation (though that doubt may have been somewhat diminished by the most recent decision, eBizcuss.com), but that doubt as to a matter of EU law may be less important if the UK is outside the EU because the English courts will uphold these clauses. It could, however, affect EU member states' courts' approach to the jurisdiction clause, but that is in any event a matter of some uncertainty.

Thirdly, arbitration is a possibility. Arbitration is already commonly used if enforcement is important and the counterparty has assets in a location where an English judgment is not enforceable (such as Russia and much of the Middle East) because of the extensive reach of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. All EU member states are parties to the New York Convention, which provides for the enforcement in participating states of an arbitral award given in another participating state. An arbitration seated in a participating state, whether the UK, a continuing EU member state or elsewhere, should therefore be able to give an award enforceable throughout the EU.

Fourthly, parties could continue with whatever their current policy is. The massive uncertainties surrounding what Brexit will bring could be treated as meaning that the risks of change are as great as the risks of no change. The status quo has a comforting familiarity until there is some positive reason to change.

The Schedule to this briefing contains more detailed analysis on some of these points.

EU ENFORCEABILITY: AN ALTERNATIVE SOLUTION

There is another possible solution to the problem of enforceability of a judgment throughout the EU that is, perhaps, less intuitive. This is to give the English courts exclusive jurisdiction.

The potential benefits of this route arise because the EU is a party to the Hague Convention on Choice of Court Agreements. In addition to the EU, only Mexico and Singapore have also signed and ratified the Convention, which is therefore currently of limited significance in global terms. The Convention does, however, provide that all parties to it must give effect to exclusive choice of court agreements and enforce the resulting judgment given by the chosen court. The UK is not currently an individual party to the Convention because the Convention's subject matter falls within the exclusive competence of the EU. However, the UK is entitled to sign and ratify the Convention in order to bring it into force immediately on the UK's leaving the EU or soon afterwards; the consent of the existing parties is not required. If the UK were to do so – as surely it will – a judgment given by an English court that has taken jurisdiction under an exclusive jurisdiction clause will again be enforceable throughout the EU.

This position is not, however, without potential transitional wrinkles. Article 16 of the Convention states the Convention applies to exclusive choice of court agreements concluded after its entry into force for the state of the chosen court and that the Convention does not apply to proceedings instituted before its entry into force in the state of the court seised. The Convention has, however, already entered into force in the UK because of the EU's ratification of the Convention even though the UK is not individually a party to the Convention. The fact that the Convention might continue in force because the UK signs up as a party in its own right may arguably not affect that position. Nevertheless, there may be some uncertainty over this point until Brexit actually happens, after which giving exclusive jurisdiction to the English courts will offer a solution assuming that, as seems inevitable, the UK signs and ratifies the Hague Convention.

SCHEDULE

EU member state courts and non-EU exclusive jurisdiction clauses

Suppose that a contract contains an exclusive jurisdiction clause in favour of the English courts but that, post-Brexit, a court in an EU member state is seised of proceedings falling within the scope of that clause. What will the EU member state's court do, assuming that the Hague Convention on Choice of Court Agreements is not applicable?

Post-Brexit, so far as the continuing EU is concerned the English courts will (subject to any contrary arrangements with the EU) be in the same position as the New York courts and any other courts outside the EU. The commercial expectation might be that the courts of EU member states would give effect to the parties' wishes, but it is not entirely clear that this will necessarily be the case.

The Brussels I Regulation (recast) provides in article 33 that courts in EU member states may stay proceedings in favour of courts outside the EU if three conditions are met: first, the non-EU court was first seised; secondly, the non-EU court can give a judgment capable of enforcement in the EU member state in question; and, thirdly, a stay is necessary for the proper administration of justice. If these three conditions are met, then the court in the EU member state can stay, and might generally be expected to stay, proceedings in favour of the non-EU court.

But what if any of these conditions is not met (for example, because the court in the EU member state was seised first)? It is arguable that, despite the fact that the agreement between the parties has been broken by one party starting proceedings in an EU member state's courts, the courts of EU member states cannot stay their proceedings in favour of the non-EU court.

Before article 33 was added to the Brussels I Regulation in 2012, there was no provision addressing the position of non-EU courts. The practice, though not necessarily universal across the EU, was to give effect to jurisdiction agreements in favour of non-EU courts under the guise of giving "reflexive effect" to the Regulation's provisions regarding jurisdiction clauses, ie treating the Regulation's provisions regarding jurisdiction agreements in favour of EU courts as if they also applied to non-EU courts. However, because the Brussels I Regulation (recast) now specifically addresses the position of non-EU courts, this artificial, if convenient, approach is harder to justify. The Court of Justice of the European Union will have to determine what can be done in these circumstances.

Even if the courts of an EU member state consider that they have no power to stay proceedings in favour of the English courts despite an exclusive jurisdiction clause in favour of the English courts, the English courts may not be without remedy. Under the Brussels I Regulation (recast), the English courts cannot grant an anti-suit injunction to restrain a party from pursuing proceedings in the courts of another EU member state bought in breach of the jurisdiction agreement *(Erich Gasser GmbH v MISAT Srl, Case C-116/02).* If the UK is no longer a member of the EU, the English courts would again be free to grant, and would generally grant, anti-suit injunctions ordering parties to stop legal proceedings brought in breach of contract. Failure to obey an injunction would constitute contempt of court, which could lead to a fine, imprisonment and, ultimately, sequestration of assets. A party with any presence or assets in the UK would have to comply with the injunction or reconcile itself to the loss of those assets.

If, contrary to the assumption made above, the Hague Convention on Choice of Court Agreements were applicable, the courts of an EU member state that are seised of proceedings in breach of an exclusive jurisdiction agreement should defer to the English courts.

Unilateral jurisdiction agreements

A unilateral jurisdiction agreement allows one party to sue in the named courts only, but allows the other party to take proceedings in that court or in any other court with jurisdiction. The French Cour de Cassation cast doubt upon these clauses in *Mme X v Rothschild* (26 September 2012), holding that they do not comply with the requirements of the Brussels I Regulation. This concern may have been somewhat eased by *eBizcuss.com* (7 October 2015), but it remains a point that the Court of Justice of the European Union may have to resolve.

Post-Brexit, however, the CJEU's conclusions, even if they follow the Rothschild case, are unlikely to affect the position of the English courts. The English courts will, without the constraints of the Brussels I Regulation, uphold a unilateral jurisdiction clause in their favour as valid and will accept jurisdiction.

Whether or not EU member state courts uphold these clauses, those courts will be able to stay proceedings in favour of the English courts if the conditions of article 33 of the Brussels I Regulation are met and, similarly, the English courts will be able to grant an anti-suit injunction if those conditions are not met.

Non-exclusive jurisdiction

The purpose of a non-exclusive jurisdiction clause is to give jurisdiction to one court but to not to require the parties necessarily to take proceedings in the nominated court. When a dispute arises, a party can commence proceedings in another court that, under its local rules, has jurisdiction without that party being in breach of contract by doing so.

Under the Brussels I Regulation (recast), once a court in an EU member state is seised of proceedings, whether or not it is the nominated court, all courts in other EU member states must stay subsequent proceedings (article 29). As a result, a non-exclusive jurisdiction clause runs the risk of a counterparty – even if it is the natural defendant – starting proceedings pre-emptively in its favoured courts in order to forestall proceedings in the EU court nominated by the parties. This risk was one of the factors that led to the development of unilateral jurisdiction clauses after the Brussels Convention came into force in the UK in 1987 – before that time, non-exclusive jurisdiction clauses were probably the norm in financial contracts.

Post-Brexit (and subject to any contrary arrangements with the EU), the English courts will no longer be bound by the Brussels I Regulation (recast). The English courts will not, therefore, be obliged to stay proceedings in favour of courts in EU member states. Indeed, English courts will commonly go ahead with proceedings in these circumstances even if the overseas court was seised first. Since the English courts are, in comparison with many European courts, relatively quick, the English courts might give judgment first, leading to questions in the other court of res judicata or recognition.

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