

The impact of Brexit for London Litigation

The outcome of the referendum of 23 June 2016 creates uncertainties that have the potential to damage London as a global centre for litigation if not proactively managed and addressed. Naturally, other litigation hubs will seek to capitalise and, in a bid to attract work, highlight any challenges litigants in London may now face. Articles have already appeared from notable voices on the continent and elsewhere suggesting that commercial parties should avoid choosing the English courts as the forum for resolving their disputes.¹

The reasons why so many international litigants choose to have their disputes resolved in London are numerous and remain almost entirely unaffected by Brexit. The English courts' record of impartiality, the world's best commercial judiciary, a large pool of legal talent and a legal system almost uniquely attuned to the realities of international commerce and finance will continue to attract court users.

English contract law is largely unaffected by Brexit and likely to continue to be widely used. But the more uncertainty there is about whether the remaining Member State Courts will continue to recognise and enforce English jurisdiction clauses and/or judgments of the Courts of England and Wales, the more likely it is that clients will become nervous about using an English jurisdiction clause in their commercial agreements. That, in turn, could lead to a gradual decline in workflows for the English courts and for those who practise in them over the coming years. There is too much at stake to be complacent².

This note sets out the London Solicitors Litigation Association's position in relation to the potential impact of Brexit on London as a litigation hub, and identifies some of the practical steps that our members can take in the short to medium term when considering issues of jurisdiction, choice of law, service and enforcement.

It also identifies the steps, which the LSLA urges the UK Government to take in its negotiations with the remaining EU Member States in relation to these issues. The LSLA considers it imperative that the Government acts quickly.

Jurisdiction

For proceedings commenced on or after 10 January 2015, the issue of jurisdiction within the EU is governed by the Brussels I Regulation Recast ("the Recast Regulation"³). Where proceedings concern EFTA Member States, the issue of jurisdiction is governed by its sister convention, the

¹ For example see the article by Professor Burkhard Hess in IPRax Volume 36 Issue 5, entitled "BREXIT and European International and Private and Procedural Law"

² IRN's UK Legal Services Market Report 2016 estimated the value of UK legal services at £32.1bn in 2015. A report by TheCityUK in July 2016 found that the sector's trade surplus has nearly doubled over the past decade to £3.4bn in 2015, while the sector's contribution to the UK economy represented 1.6% of GDP, more than agriculture. It also found that the UK accounts for 10% of the global market for legal services and 20% of legal services in Europe.

³ Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1

Lugano II Convention⁴. Those rules have priority; it is only when the EU or EFTA rules do not apply that national rules on jurisdiction become relevant. In England, those rules are the traditional common law rules.

The primary rule as to jurisdiction under the Recast Regulation is found in Article 4(1), which states that “*persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State*”. However, this is subject to various exceptions, the most important of which, in the commercial context, is the existence of an agreement between the parties conferring jurisdiction on the courts of an EU Member State.⁵

Unless the Recast Regulation is replaced with another governing instrument, then upon the UK’s departure from the EU, the English courts will no longer be courts of an EU Member State and the regulation will cease to apply to English jurisdiction clauses.

A court in an EU Member State would no longer be obliged to stay proceedings commenced before it until the English court had decided whether it had jurisdiction. Instead, it would apply its own domestic rules to that issue. This could well lead to a resurgence in instances of parallel proceedings, where multiple courts are seized of a dispute. This would run counter to the objectives of the Recast Regulation, which specifically introduced changes to the previous regime to curtail the ability of litigants to bring abusive parallel proceedings in several jurisdictions.

Enforcement of judgments

The Recast Regulation also governs the automatic enforcement of judgments of Member State courts throughout the EU. After the UK leaves the EU, an English judgment might still be enforceable in EU Member States, but again, this would depend upon the domestic law of each Member State. Enforcement would require those local rules to be investigated for each individual Member State in which enforcement was sought and inevitably the process would be slower, more costly and less certain than enforcement under the uniform rules of the Recast Regulation.

While enforcement of judgments out of the jurisdiction in which they are given is less common than domestic enforcement, the threat of being able to do so is often a powerful incentive for parties to resolve litigation and comply with judgments without the need to resort to coercive measures.

Service of legal documents

The Service Regulation⁶ will cease to be effective when the UK departs from the EU. While this instrument is far from perfect, it nonetheless provides a uniform methodology for serving proceedings within the EU. Service of proceedings out of the jurisdiction occurs far more frequently than cross-border enforcement, and any added complexity in doing so may, in the long term, have a negative impact on the standing of the English courts as a choice of jurisdiction.

⁴ The Lugano II Convention covers the EU countries (including Denmark), Iceland, Norway and Switzerland. In 2007 the Lugano II Convention was entered into so as to align with the original Brussels I Regulation, though it has not been updated again to align with the revised provisions of the Recast Regulation.

⁵ Articles 24 and 25 of the Recast Regulation

⁶ Council Regulation (EC) 1393/2007 of 13 November 2007 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters

Choice of law

The Rome I and II Regulations⁷, which govern parties' choice of law for their disputes, apply across the EU regardless of whether or not the chosen law is that of an EU Member State. Irrespective of the UK's departure from the EU, the remaining Member State Courts will still be obliged to recognise and enforce a contractual choice of English law.

However, that leaves the question of how the English courts will decide which law governs parties' obligations, both contractual and non-contractual. Steps will be needed to ensure continuity of the approach set down by the Rome Regulations, which will no longer apply directly in the UK. This point is addressed below.

Markets in Financial Investments Regulation ("MiFIR")⁸

A further threat is posed by the wording of Article 46 of MiFIR, which compels parties offering financial services from outside the EU to a party within the EU to offer to have disputes resolved by the courts of, or in a tribunal seated in, a Member State. UK-based financial institutions will have to comply with this. If both parties want the English courts to hear any disputes, this will not be a barrier. However, it may lead to a decrease in the use of English jurisdiction clauses where counterparties based in an EU Member State would prefer a jurisdiction within the EU.

Of greater concern, this may prove to be the start of a more protectionist trend by the EU, where EU Regulations specify that all disputes concerning matters of EU law or regulation *have* to be resolved in the courts of a Member State. It is conceivable that the EU will deliberately legislate to reduce the role of the UK in commercial dispute resolution. This in turn would be likely to lead to a reduction in the use of English law by commercial parties, as parties will not want an English law dispute decided by a court unfamiliar with that law.

What steps can the Government take to seek to avoid these outcomes?

There must be a real risk that the issues facing the London litigation market will not be at the top of the Government's list of issues that have to be addressed in light of the vote. The LSLA's position is that they should be; there is no question that international litigation conducted in London generates significant tax and other revenues for the UK, as does the use of English law. Given the risk that such business and revenue may be undermined by Brexit, it is incumbent on lawyers (and the judiciary) to defend the UK's position and our clients, by reaching a consensus on what needs to be done and then presenting to the Government any steps it needs to take.

The LSLA urges the Government to take the following steps.

Jurisdiction and enforcement of judgments

The Denmark Model

To protect the jurisdiction of the UK courts, the most preferable option is for the UK Government

⁷ Rome I Regulation (Regulation (EC) No 593/2008 on the law applicable to contractual obligations and Rome II Regulation (EC) No 864 on the law applicable to non-contractual obligations

⁸Regulation (EU) No. 600/2014

to conclude a treaty with the EU and with Denmark that tracks the provisions of the Recast Regulation, using the jurisdiction agreement between the European Community and Denmark (i.e., [2005] OJ L/ 299/62) as a precedent. This agreement is often referred to as the “Denmark Agreement” or “Denmark Model”.

The only deviation necessary from that precedent would be a provision that the UK, as a non-EU Member State, would pay due account to (rather than be bound by) decisions of the CJEU interpreting the equivalent provisions in the Recast Regulation. This point should not be controversial for the UK Government (if properly understood by those responsible for negotiating any such agreement with the EU) since it is unlikely to have any practical (or material) impact on the sovereignty of the courts of England and Wales. It remains unclear, however, whether the EU will accept a system in which there is no final arbiter on the meaning of the replacement convention.

This would provide certainty and continuity for all parties, as the same rules for the allocation of jurisdiction and the mutual recognition and enforcement of judgments would continue to apply, albeit by way of international treaty rather than directly applicable EU regulation.

Sign and ratify the Lugano II Convention

In order to preserve the present position with the EFTA Member States of Norway, Iceland and Switzerland, who are not part of the Brussels Regulation (Recast) regime, the UK would also need to sign and ratify the Lugano II Convention.

The UK is currently bound by that treaty only by virtue of its membership of the EU. It would need to become a Contracting State in its own right. It might be thought that becoming a Contracting State to the Lugano II Convention could resolve the issues relating to the EU as well, given that the EU is a party. However, the Lugano II Convention contains provisions that have been superseded by improvements in the Recast Regulation and therefore relying upon it to govern matters between the UK and the EU, as well as the EFTA Member States, would not be the best outcome.

Sign and ratify the 2005 Hague Convention on Choice of Court Agreements

One step that the UK Government can take without requiring the consent of the EU Member States is to sign and ratify the 2005 Hague Convention on Choice of Court Agreements. This Convention came into force in 2015 and has to date been ratified by the EU, Mexico and Singapore. It is likely that it will be ratified by a large number of other states over time.

The Convention creates an international legal regime to ensure the effectiveness of exclusive jurisdiction agreements (and only exclusive jurisdiction agreements) in favour of its Contracting States. It also provides for the recognition and enforcement of judgments emanating from proceedings based on those agreements. It would serve as a fall-back measure to ensure the enforceability of exclusive jurisdiction agreements in favour of the English courts, should negotiations over a UK/EU Treaty prove difficult.

It would also provide some comfort pending those negotiations that exclusive jurisdiction clauses in favour of the UK courts will be recognised across the EU in the future, regardless of the outcome of negotiations over a UK/EU treaty.

Again, the UK is presently bound by the Hague Convention only through its membership of the EU and would need to ratify the treaty in order to continue to be bound by it. The UK Government may wish to consider making a declaration or reservation at the time of ratification to ensure that there is no gap in its temporal application.

None of the steps outlined above would be completely effective in isolation. A stand-alone agreement with the EU will not deliver any arrangements with regard to the Lugano Contracting States. Becoming a Contracting State to the Lugano II Convention would only deliver an out-of-date version of the presently applicable jurisdictional regime with respect to EU Member States. Ratifying the Hague Convention would only apply to exclusive jurisdiction agreements within the scope of that treaty. Falling back on common law rules would not be realistic, as it would offer the least certainty and most complexity.

Service of legal documents

As the Service Regulation will cease to be effective when the UK departs from the EU, the UK Government should aim to conclude a treaty with the EU and with Denmark, using the service agreement between the European Community and Denmark (i.e., [2005] OJ L/ 300/55) as a template. This option has the same benefits as the adoption of a treaty tracking the provisions of the Denmark-EC jurisdiction agreement, in that it creates certainty, continuity and flexibility.

Choice of law

The Rome I and II Regulations, which govern parties' choice of law for their disputes, apply across the EU regardless of whether or not the chosen law is that of an EU Member State. This means that EU Member States will continue to give effect to contractual choices of English law after the UK leaves the EU. For the purposes of maintaining certainty and continuity, we believe that the UK Government should legislate to create a domestic law mirroring the terms of the Rome I and Rome II Regulations to ensure the UK courts approach the selection of other governing laws in the same way that they do now, though small modifications would be possible.

Transitional arrangements

The most preferable option is for the UK Government to adopt specific arrangements to clarify the date on which various features of any new regimes come into operation and ensure that these arrangements take effect immediately upon the UK's departure from the EU. There needs to be a seamless transition between the existing and the new regimes. The object should be to preserve the current position until the steps set out above are finalised.

A public statement as to the Government's intentions should be made at an early stage to promote confidence in the continued use of English jurisdiction clauses during the negotiation of the UK's exit from the EU.

Potential impact of Brexit on Court Reforms

The LSLA is concerned that the sheer amount of work now facing the Government as a result of Brexit may result in many of the important reform initiatives currently underway to improve the civil court system in England and Wales being deprioritised or deferred. It is critically important

that this does not happen.

The modernisation of the court system, the move towards paperless working in courts and the proposed reforms in the areas suggested by the Briggs LJ report must not be shelved. Guaranteeing effective civil dispute resolution in London in the future is a key element of preserving the competitive advantage currently enjoyed by England and Wales. It will help to prevent work from moving to other jurisdictions within the EU, which may be perceived by some as being more efficient, user-friendly and cost-effective. Improvement of our court system through innovation will be a part of that, and must continue.

Advising on dispute resolution clauses

LSLA members are likely to be asked to advise clients on choice of law and jurisdiction clauses before clarity has been achieved on what will replace the current EU Regulations. The circumstances of each situation must be examined carefully before any advice is given, and solicitors are of course bound to advise in the client's best interests, without regard to any desire to protect the English courts.

If the parties wish to have their contract governed by English law and to submit disputes to the jurisdiction of the English courts, the following means may be used to achieve that. It is possible that some of what is below will not be necessary due to saving provisions or parallel arrangements negotiated between the UK and the EU as discussed above.

Choice of jurisdiction

1. The best way of ensuring that the English court will take jurisdiction over contractual disputes both before and after Brexit is for the parties to provide expressly in advance that the English courts shall have exclusive jurisdiction over any disputes.
2. The reason why a clause providing for the exclusive (as opposed to non-exclusive) jurisdiction of the English courts is advisable is that such exclusive jurisdiction clauses are likely to be enforceable throughout the EU after the UK's departure. This is because it is expected that, even if no bespoke arrangement is reached with the EU to mirror the Brussels Regulation Recast, the UK will ratify the Hague Convention on Choice of Court Agreements in its own right.
3. If the UK does ratify the Hague Convention post-Brexit, then exclusive English jurisdiction clauses will continue to be enforceable throughout the EU, as all EU Member States except Denmark have ratified the Hague Convention. This also has the consequence that non-chosen EU courts will not be able to take jurisdiction.

Enforcement of judgments in the EU

4. The Hague Convention on Choice of Court Agreements provides for reciprocal enforcement of judgments between signatory states. As the EU has ratified the Hague Convention and it is expected that the UK Government will ratify it in its own right, as noted above, it is likely that judgments of UK courts where the parties selected the exclusive jurisdiction of the English courts, will continue to be enforceable across the EU, subject only to some differences in procedural requirements.

Service of Process

5. Parties choosing to confer exclusive jurisdiction on the English courts should also give consideration to appointing an agent for service of process within the UK, to avoid any delay in service of a counterparty domiciled outside the UK.

Choice of law

6. Post-Brexit, the courts of EU Member States will still be bound to decide choice of law in accordance with the Rome I and Rome II Regulations, which apply to laws of jurisdictions outside the EU as much as those within.
7. The English courts will recognise a choice of English law under common law principles and the older Rome Convention (broadly similar to Rome I), even if no new legislation is passed to mirror the Rome Regulations.
8. A choice of English law to govern obligations will therefore continue to be effective in the UK and across the EU.

Conclusion

There is little doubt that Brexit will present challenges for UK Litigation in the longer term unless the steps recommended in this note are taken forward by the UK Government. As this note has identified, there are clear legal routes that can be taken to maintain the status quo, provided the political goodwill exists on both sides (the UK and EU) achieve this.

If the UK wishes to adopt the Denmark Model and to ratify the Lugano II Convention, the remaining EU Member States will have to be persuaded that maintaining uniformity and reciprocity in this area is mutually beneficial for all participating States, and not just the UK. The LSLA believes that politics and sentiment aside, there are strong legal and commercial reasons why the continuation of such arrangements is in the interests of both the UK and the EU. The practical issues raised by Brexit for jurisdiction, service and enforcement apply equally to parties within the remaining EU Member States (who may be seeking to enforce rights in the UK) as they do to UK parties (seeking to enforce rights in the EU).

Even without the EU's cooperation, there some "quick wins", which will address many of the practical issues identified by this note; such as signing up to the Hague Convention on Choice of Courts Agreements (which will ensure the continued recognition and enforcement of exclusive jurisdiction agreements between convention states) and enacting the provisions of Rome I and Rome II into domestic legislation. Neither requires consent from the remaining EU Member States.

London Solicitors Litigation Association

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