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Brexit and its Impact on English Jurisdiction Clauses

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Clauses conferring jurisdiction on the English courts are often included in cross-border contracts, even in cases where the parties have little or no connection with England. There are many reasons for this, including the accessibility of the English language, procedural certainty and the reputation of English judges for commerciality, impartiality and a readiness to uphold the parties' choice of law.

Choice of jurisdiction in the EU is currently governed by the Recast Brussels Regulation[1] (the "**Recast Regulation**") for most civil and commercial matters, with the exception of arbitration, insolvency, consumer and employment matters. The Recast Regulation provides that where the parties have agreed to the jurisdiction of a Member State court:

1. That court will have jurisdiction over those proceedings; and
2. Other Member State courts will respect the parties' agreement and decline to hear those proceedings.

Should the same or related proceedings be brought in more than one Member State court, however, then the court "*first seised*" has the right to determine whether it has jurisdiction over the dispute, and all other courts must stay their own proceedings. This rule has resulted in the prevalence of "torpedo actions" whereby proceedings are commenced in a Member State court in breach of an agreed jurisdiction clause. Such actions inevitably lead to increased delay, uncertainty and expense. However, a new provision in the Recast Regulation[2] modifies the effect of torpedo actions. Under this provision, a court that was not first seised but which has jurisdiction by virtue of an exclusive jurisdiction clause can continue to hear those proceedings.

The post-Brexit landscape

As part of any Brexit negotiations, the UK and the EU may agree that the Recast Regulation will continue to apply. If that happens, the current regime on jurisdiction will remain in force.

In the event that the Recast Regulation does not apply post-Brexit, an alternative jurisdiction regime will need to be implemented. To achieve this, the UK has the following options:

- Accede to the 2007 Lugano Convention, which will provide some protection against EU parallel proceedings;
- Sign and ratify the Hague Convention on Choice of Court Agreements[3], which provides that all of its signatories must give effect to an *exclusive* jurisdiction clause. However, implementing the Hague Convention will not completely fill the gap left by the Recast Regulation on jurisdiction. The Hague Convention is also currently of limited relevance in global terms, having only been ratified by Mexico, Singapore and the EU;
- Negotiate individual bilateral and multilateral agreements on jurisdiction with other states; or
- Revert to using the common law principles of '*forum non conveniens*' in the event that no agreement can be reached with the EU.

The return of anti-suit injunctions?

Anti-suit injunctions have been prohibited in the EU since 2004 because they undermine the principles of mutual trust between Member State courts. However, post-Brexit, an English court may once again be at liberty to issue such an injunction against any party that commences proceedings in a Member State court in breach of an English jurisdiction clause. The same may be true of the Courts of EU jurisdictions.

In addition, anti-suit injunctions may also be available in the context of arbitration, having been prohibited by the European Court of Justice's decision in *West Tankers*[4] since 2009. The decision in *West Tankers* has been often

called into question (most recently by Advocate-General Wathelet in *Gazprom OAO*[5]) and is at odds with the principle of '*kompetenz kompetenz*'. In effect, this principle allows an arbitral tribunal to issue an anti-suit injunction, so the prohibition on a Member State court from doing the same has always been an anomaly.

Key takeaways

English jurisdiction clauses are respected throughout the EU and, even if the Recast Regulation no longer applies post-Brexit, such clauses are still likely to be upheld by Member State courts, even in the worst case scenario where no reciprocal jurisdiction regime is implemented. In addition, many of the other reasons why parties choose to litigate in the UK will still remain, and not be affected by Brexit.

In the majority of cases, therefore, parties should not need to revise or replace their English jurisdiction clauses. However, where enforcement is a concern, it would be advisable to include an *exclusive* English jurisdiction clause to maximise the likelihood of the jurisdiction agreement being enforced in another EU court.

Notes

1. Regulation (EU) 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 (recast)
2. Article 31
3. At present, the EU has ratified the Convention on behalf of all current Member States (except Denmark). The UK will therefore have to ratify the Convention itself post-Brexit.
4. Allianz SpA and Others v West Tankers Inc – Case C-185/07
5. "Gazprom" OAO v Lietuvos Respublika – Case C-536/13

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