Brexit

Key issues for governing law and jurisdiction clauses

1 February 2020

Background

On 31 January 2020 (at midnight CET, 11pm UK time, **exit day**), the UK ceased to be a member state of the EU, and the European Communities Act 1972 – the statutory basis for giving effect to EU law in the UK – was repealed. This is a profound change, but its immediate impact on UK law and regulation is limited in two important ways.

- Under the UK-EU agreement on the UK's withdrawal from the EU (the **Withdrawal Agreement**), virtually the whole of EU law remains "applicable to and in the UK" from exit day until at least 31 December 2020. The Withdrawal Agreement calls this the "transition period". Here, we call it the "**implementation period**", following terminology used in the European Union (Withdrawal Agreement) Act 2020 (the Act **2020**). The 2020 Act implements the Withdrawal Agreement into UK domestic law.

- Under the European Union (Withdrawal) Act 2018 (the **2018 Act**), all the EU law that applies in and to the UK immediately before the end of the implementation period(a substantial proportion of all UK regulation) will continue in force as UK domestic law (with some modifications) unless and until it is replaced or amended by new UK legislation. Under powers contained in the 2018 Act, the UK government has already issued a large number of statutory instruments to amend that "on-shored" body of law, and make it fit for purpose as domestic UK legislation in a post-Brexit environment. These statutory instruments are due to come into force at the end of the implementation period.

The Withdrawal Agreement provides for the implementation period to end on 31 December 2020, unless the UK and EU agree, by 1 July 2020, that it should be extended for a further one or two years. The UK government has indicated that it does not wish to seek such an extension, and the 2020 Act states that the implementation period ends on 31 December 2020.

The implementation period gives the UK and EU a time-limited opportunity to negotiate, against a stable background, the terms of their future relations in respect of trade and the other areas that are currently regulated by EU law. At the end of the implementation period, it is possible that the UK and EU will have reached agreement on all the aspects of their future relations that will be governed by bilateral agreements (a **future relationship agreement**). It is also quite likely that the UK and EU will have reached agreement on some aspects of the future relationship, but not on others. Therefore, the "deal or no deal" question is likely to revive on a sector-by-sector or topic-by-topic basis.

In this note, we consider the implications on English governing law and jurisdiction clauses.

1. Choice of law

The Rome I and Rome II Regulations (respectively) deal with the law applicable to contractual and non-contractual obligations. The Withdrawal Agreement provides that the Rome I and Rome II Regulations will continue to apply in respect of contracts concluded before the end of the implementation period and, in respect of events giving rise to damage, where such events occurred before the end of the implementation period (Article 66).

The arrangements to apply from the end of the implementation period are yet to be negotiated. Yet, there is little cause for concern when it comes to choice of law provisions. This is because, subject to some specific exclusions, EU courts (other than in Denmark) uphold the parties' choice of law regardless of whether the stipulated governing law is that of an EU member state or not. In other

words, after the end of the implementation period, courts of EU member states should continue to respect a choice of English law in the majority of cases (unless an exclusion applies). As far as the UK courts are concerned, the draft Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 is expected to incorporate the provisions contained in Rome I and Rome II into the law in the UK at the end of the implementation period.

The key benefits of choosing English law as the governing law in commercial contracts remain and are largely unaffected by Brexit. These include: (i) the certainty and commercial focus of English law; (ii) the flexibility of the common law system and its ability to adapt to business and other changes; and (iii) the reputation of the English courts and the independence and commercial expertise of the judiciary.

2. Jurisdiction and enforcement of judgments

The Recast Brussels Regulation provides the main set of rules concerning which EU member state courts have jurisdiction to deal with disputes in civil and commercial matters. Except where limited exceptions apply, EU courts respect an express choice made by contracting parties that the courts of another member state should have jurisdiction. The Recast Brussels Regulation also provides a system of reciprocal recognition and enforcement of judgments within the EU.

The Withdrawal Agreement provides that the Recast Brussels Regulation will continue to govern matters of jurisdiction and the recognition and enforcement of judgments in legal proceedings instituted before the end of the implementation period (Article 67).

The UK and EU are expected to seek to negotiate a future relationship agreement regarding jurisdiction and enforcement but that may not be finalised in the short time available before the end of the implementation period (particularly if that is December 2020). In the event no new agreement is reached before the end of the implementation period, the 2005 Hague Convention on Choice of Court Agreements (the Hague Convention) may have an important role to play. The Hague Convention provides a regime as between the UK and the EU plus Montenegro, Mexico and Singapore for the validity and effectiveness of exclusive jurisdiction agreements and the reciprocal enforcement of resulting judgments made by courts in these jurisdictions. The UK currently participates in the Hague Convention by virtue of its EU membership. Brexit will bring this participation to an end. During the implementation period, the UK is to be treated as an EU member state for the purposes of membership of the Hague Convention. Following the end of the implementation period, it is expected that the UK will accede to the Hague Convention as an independent party and apply the Hague Convention's provisions in relations between it and the EU member states. The Hague Convention is more cumbersome to rely on than the Recast Brussels Regulation but it provides a more streamlined process than domestic rules, which will otherwise apply in the absence of a new agreement.

The Hague Convention is prospective and, therefore, there is a risk that contracting parties may not be able to rely on its provisions in respect of agreements entered into prior to the end of the implementation period. The UK has addressed this issue in the draft Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements) 2005 (EU Exit) Regulations 2018, which (if enacted) will provide that English courts will continue to apply the Hague Convention to agreements to which it would have applied but for the UK leaving the EU. However, the EU Commission has taken the view that the Hague Convention will only apply to exclusive English jurisdiction clauses entered into after the UK rejoins the Convention as an independent state. While the EU Commission's view is not determinative of the approach EU courts will take (and some believe there is an argument that the Hague Convention is already in force in the UK), it highlights the risk that exclusive jurisdiction clauses in contracts entered into prior to the end of the implementation period may not be covered by a cross-border framework in the absence of a deal.

A further option is for the UK to join the 2007 Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, which provides a jurisdiction and enforcement regime between the EU member states and the additional countries within EFTA (Norway, Switzerland and Iceland). Lugano also provides a more streamlined process than domestic rules. However, the process is not as streamlined as that under the Recast Brussels Regulation. For example, it does not provide protection against the so-called “Italian torpedo” – the tactical commencement of proceedings in one member state, usually a state whose courts are slower to progress proceedings, in breach of an exclusive jurisdiction clause. Such a step usually causes inconvenience and increases cost and delay, sometimes substantially. The Lugano Convention's ratification process requires the UK to gain the approval of all of its members who have up to a year to respond. The UK has recently received statements from Norway, Iceland and Switzerland in support of its intention to accede to the Lugano Convention.

In the event that a deal on ongoing civil and judicial co-operation is not reached by the end of the implementation period (and the Hague Convention does not apply), judgments would need to be enforced in an EU member state based on each state's domestic rules on enforcement. EU member states would enforce most foreign judgments under their domestic rules, but the processes have varying degrees of complexity and will usually take significantly longer than under the Recast Brussels Regulation. Similarly, the UK's domestic common law and statutory rules, which currently apply in cross-border cases concerning the rest of the world, will govern the enforcement in the UK of judgments of the courts of EU member states.

Practical steps

There remain many good reasons to choose English law and jurisdiction unless the potential uncertainties represent an unacceptable level of risk in the specific circumstances of their contract. An example could be a contract with no real connection

with the UK where the English courts could apply forum non conveniens grounds to decide in which forum the case could most suitably be tried. But a party can mitigate even this risk, for instance by choosing an exclusive English jurisdiction clause and including a forum non conveniens waiver in the contract.

Contact us if you would like to understand how these issues may impact you.

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