

Brexit and what it means for the conflict of laws



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Introduction

The 'B' word and the 'C' word in one article... Brexit and the Conflict of laws. Those familiar with private international law will appreciate the central role played by various EU regulations in harmonising the conflict of laws rules governing jurisdiction, applicable law and the recognition and enforcement of judgments across EU Member States ("**MSs**"). In the commercial context, "**Brussels I**"¹, "**Rome I**"² and "**Rome II**"³ have (for the most part) worked very well in furthering that objective of harmonisation.

The application of jurisdiction principles, the selection of applicable law and the free movement of judgments have all become easier under these various EU regulations. Yet these are regulations applicable only to EU MSs, and the UK is no longer a member of that club. This article considers the ramifications of Brexit for English conflict of laws.

Jurisdiction

Brussels I

Brussels I harmonises the rules of jurisdiction to be applied by the courts of EU MSs to disputes falling within its material scope (defined as civil and commercial matters, excluding those listed in **Art 2**). It provides for defendants domiciled in a MS ("**MS defendants**") to be sued in the courts of that MS (**Art 4**), and largely leaves the rules applicable to non-MS defendants to the 'domestic' conflicts rules of the MS (**Art 6**) – common law and the occasional statute, in England.

¹ Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

² Regulation (EU) No 593/2008 on the law applicable to contractual obligations.

³ Regulation (EU) No 864/2007 on the law applicable to non-contractual obligations.

It goes on to provide alternative bases of jurisdiction against MS defendants. **Art 7** contains bespoke rules for claims relating to contracts, tort, delict or quasi-delict, trust disputes and other more niche situations. **Arts 8, 29** and **30** are aimed at bringing all related proceedings before the same court so as to mitigate the risk of irreconcilable judgments. **Art 24** confers exclusive jurisdiction, overriding all other provisions, in cases relating to rights in rem in immovable property, the constitutional affairs of companies and their dissolution, and certain intellectual property matters. **Art 25** gives effect to exclusive jurisdiction agreements in favour of MS courts, and **Art 31(2)** requires any other MS court to stay proceedings until the nominated court has resolved its jurisdiction (defeating the Italian Torpedo problem which plagued the original regulation and its predecessor Brussels Convention).

These rules have generally operated very well. Legal advisers are familiar with them. The approach of other MS courts can be anticipated by the lawyers of any MS, since the regulation takes direct effect across the EU.

Brexit

The end of the Brexit transition period (31 December 2020) brought with it the end of Brussels I for English courts. It is no longer part of the conflict of laws rules to be applied by the English courts in respect of new proceedings. Nor does a defendant domiciled in the UK have the benefit of its provisions when it comes to the jurisdiction of remaining MS courts. If proceedings are now brought against a UK domiciled defendant before the courts of any MS, **Art 6** is likely to direct the application of the 'domestic' jurisdiction provisions of the *lex fori*.

Brussels I still applies to ongoing proceedings, i.e. those commenced in the English courts prior to the expiration of the transition period (by virtue of **Article 67** of the **Withdrawal Agreement**).

The UK has done two things in response to the loss of Brussels I. First, it has acceded to the Hague Choice of Court Agreements Convention 2005 ("**the Hague Convention**") in its own right; second, it has applied to join the Lugano Convention.

Hague Convention

The Hague Convention is designed to give effect to choice of court agreements (jurisdiction clauses) made between parties to international commercial contracts. The EU itself joined the Hague

Convention in 2015. The other parties are Denmark, Mexico and Singapore.⁴ It is far narrower in scope than Brussels I – it deals only with exclusive jurisdiction agreements and contains no default rules for determining jurisdiction in the absence of such an agreement. It is unknown whether an asymmetric jurisdiction clause constitutes an exclusive jurisdiction clause for the purpose of the Hague Convention. In **Etihad Airways PJSC v Flöther** [2020] EWCA Civ 1707 the Court of Appeal determined that an asymmetric jurisdiction clause constituted an exclusive jurisdiction clause for the purpose of Brussels I (recast). The Court noted it did not have to determine the question of whether asymmetric jurisdiction clauses were covered by the Hague Convention however it indicated it was proceeding on the basis that they did not. This was *obiter* and as such is not binding. There have also been contrary indications from the Commercial Court.⁵

There is a dispute as to when the UK itself became a member of the Hague Convention. This matters because the Hague Convention only applies to choice of court agreements concluded after its entry into force. It deposited its instrument of accession (in its own right) on 28 September 2020 in order to ensure that it *remained* a party following the end of the Brexit transition period. However, it already participated in the Hague Convention via the EU's ratification in 2015 (effective as of 1 October 2015). The UK's position is that it has therefore been a member of the Hague Convention since 2015 (formerly through the EU, latterly in its own right). The EU's position is that the UK (as distinct from the EU) only became a member of the Hague Convention as of 1 January 2021 and the Hague Convention came into force in the UK on said date.^{6 7} In an attempt to protect its position, the UK has enacted the **Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018**⁸, which provide that the Hague Convention applies to exclusive jurisdiction clauses agreed between 1 October 2015 and 1 January 2021. Whether the courts of MSs will agree with that interpretation of events is another matter.

⁴ The United States, China, North Macedonia and Ukraine have all signed the Hague Convention but have not yet ratified it.

⁵ **Commerzbank Aktiengesellschaft v Liquimar Tankers Management and another** [2017] EWHC 161 (Comm); **Etihad Airways PJSC v Flöther** [2019] EWHC 3107 (Comm).

⁶ Interestingly, the Hague Conference on Private International Law (being the depository of the convention and all ratifications by participating states) records that the convention entered into force for the UK in October 2015, consistent with the UK's position.

⁷ Parties whose agreement includes an exclusive jurisdiction clause entered into between October 2015 and January 2021, and who have not yet fallen out with one another, might consider simply executing a fresh exclusive jurisdiction agreement by way of a supplemental contract now to avoid becoming the inevitable test case.

⁸ SI 2018/1124.

Lugano Convention

The Lugano Convention⁹ is something of a throwback to the days of the early Brussels Convention (before it was rewritten into a regulation). It is a convention negotiated by the EU with Iceland, Norway and Switzerland, to harmonise the jurisdictional rules and the recognition and enforcement of judgments across those states. Membership of the Lugano Convention requires the approval of all existing members (i.e. the EU, Iceland, Norway and Switzerland).

The UK applied to join the Lugano Convention on 8 April 2020. Iceland, Norway and Switzerland have all proffered their approval of that application, but the EU has not. The Contracting Parties “*shall endeavour to give their consent*” within a year from the transmission from the Depository to the Contracting Parties of the application. This occurred on 14 April 2020. The application requires unanimous approval of the Contracting Parties.

In accordance with the 1 year time limit, the aim is to procure approval by 14 April 2021. Three questions were submitted to the European Parliament on 22 March 2021 in relation to the Lugano Convention, namely:

1. What is the Commission’s position on the possible accession of the United Kingdom to the Convention?
2. What requirements does the Commission consider that the UK should meet for its application to be accepted?
3. According to the Commission, to what extent would the Hague Conference allow for the same level of cooperation on jurisdiction and recognition and enforcement of judgements in civil and commercial matters?

If the questions are not placed on the European Parliament’s draft agenda they will lapse on 23 June 2021. It is unclear whether the Contracting Parties will agree to the Lugano Convention being applied retrospectively so as to be effective from 1 January 2021. It is notable that no specific question about this is contained within the list submitted to the European Parliament, although it may fall to be considered in response to question 1.

⁹ The original Lugano Convention was created in 1988 (against the backdrop of the then Brussels Convention of 1968). It has since been superseded by a new(er) Lugano Convention dated 2007 (made against the backdrop of the original Brussels I Regulation of 2001). Although the Brussels I regulation was ‘recast’ in 2008, the Lugano Convention has not been updated again, and still suffers some of the shortcomings of the original Brussels I regulation.

The Lugano Convention is probably¹⁰ the next best thing to Brussels I. It does, however, have some shortcomings. Central among them is the return of the ‘Italian torpedo’ – a problematic litigation tactic by which an evasive party seises the courts of a notoriously slow Member State before the counterparty to their exclusive jurisdiction agreement can bring proceedings before the nominated MS court. Under the original Brussels I (and still under the Lugano Convention), the court second seised must stay its proceedings until the court first seised has determined its own jurisdiction, *even* where court second seised is nominated in an exclusive jurisdiction clause. Some courts can take an age to resolve jurisdiction disputes, effectively delaying the litigation for so long as it takes the court first seised to do so. The Brussels I (recast) cured this problem with **Art 31(2)**, but the Lugano Convention did not benefit from that amendment.

Choice of law

The future for English choice of law rules is brighter. The relevant EU regulations (Rome I and Rome II) are not premised on reciprocity at all – they simply operate to define the choice of law rules of every EU Member State, and are perfectly capable of selecting non-MS laws as the applicable law. Consequently the UK has simply transposed Rome I and Rome II directly into English law.¹¹

Equally, the universal application of the principles in Rome I and Rome II mean that when MS courts apply those rules post-Brexit, they must still respect the outcome where those rules select English law as the applicable law. Brexit is therefore ultimately unlikely to have any effect on issues of applicable law.

Recognition and enforcement of judgments

The recognition and enforcement of judgments was also the province of Brussels I (indeed the purpose of harmonising jurisdictional rules was ultimately to facilitate the free movement of judgments between MSs). Consequently, Brexit and the loss of Brussels I poses real problems.

¹⁰ Denmark actually has its own bilateral treaty with the EU which gives effect to the Brussels I (recast) regulation as between Denmark and the MSs.

¹¹ By the **Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019**.

Brussels I will continue to apply to the enforcement of judgments given in proceedings which commenced before 1 January 2021 (even if the judgment itself was not given until after that date). However, the European Enforcement Order (“**EEO**”) regime will not be available unless the application for an enforcement certificate had already been made by 31 December 2020.

If the UK’s application to accede to the Lugano Convention succeeds then its provisions on recognition and enforcement will apply to English judgments, conferring similar rights to recognition and enforcement as those contained in Brussels I.

Absent accession to the Lugano Convention, a handful of bilateral treaties existed between the UK and some MSs prior to the Brussels Convention, some of which might now be revived. However, excluding the Lugano Convention, it is impossible for the UK to negotiate new bilateral treaties with other MSs because each MS has ceded exclusive competence in such matters to the EU (hence the central importance of obtaining the EU’s approval of the UK’s accession to the Lugano Convention).

Independently of the Lugano Convention, the Hague Convention provides some comfort by requiring all contracting states to recognise and enforce a judgment granted by the court nominated in an exclusive jurisdiction clause (and those contracting states include the EU). But the Hague Convention (unlike Brussels I or the Lugano Convention) only applies to final orders, and does not confer any right to recognition and enforcement of provisional measures such as interim injunctive relief.

Assuming that no bilateral or multilateral treaty applies, the matter becomes one of the *lex fori* of the state in which recognition or enforcement is sought. English common law readily recognises and enforces foreign judgments in most cases (excluding penal and tax matters). Some MSs are similarly willing to recognise most foreign judgments under their own domestic rules, but others are more restrictive in their approach. In any event, the relevant process will be prescribed by rules of national law, and will inevitably vary between countries.

Summary

The loss of Brussels I is problematic, both in terms of jurisdictional rules and for the free movement of judgments between MSs. Accession to the Lugano Convention will improve matters, but brings with

it some of the old baggage of the original (non-recast) Brussels regime, such as Italian torpedoes. The risk that English proceedings might find themselves plagued by such delays could provide the impetus to reform the Lugano Convention once more, to bring its provisions fully in line with those of the recast Brussels I. Failure to do so could seriously impact the attractiveness of English courts for nomination in exclusive jurisdiction clauses.

Thankfully the choice of law rules embodied in Rome I and Rome II remain essentially unaffected. Consequently the attraction of English choice of law clauses should be undiminished.

The uncertainty surrounding jurisdiction and the recognition and enforcement of judgments, coupled with the impact of the Covid-19 pandemic on court backlogs, may well spur increased interest in arbitration as an alternative means of dispute resolution. The New York Convention remains among the most widely ratified and effective mechanisms in private international law. Its geographical scope far exceeds that of Brussels I and its substantive content deals (for the most part) comprehensively with the key issues concerning recognition and enforcement of arbitral awards.

Coupled with well-established and widely adopted international arbitral rules (such as the UNCITRAL Model Law) and a sophisticated array of international arbitral institutions (the ICC, LICA, ICSID etc), arbitration becomes an increasingly attractive option both in the negotiation of contractual dispute mechanisms and in the ad hoc resolution of disputes. Members of our Commercial Team have considerable experience of domestic and international arbitrations, ad hoc and before most key institutions across a variety of sectors. We would be happy to assist in such matters.

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