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Brexit & cross-border dispute resolution

Will the English courts still be top choice post-Brexit, asks Jonathan Harris QC

IN BRIEF

▶ It is unlikely that the reputation and attractiveness of litigating in the English courts will disappear post-Brexit.

Amid the myriad legal issues and uncertainties generated by Brexit, a key question is how the litigation market in England, and the supremacy that London enjoys as a centre for cross-border dispute resolution, might be affected. The recent government announcement that EU laws will, wherever possible, be enacted into domestic law pending further review might assuage that uncertainty, at least in the medium term. That exercise is not, however, as straightforward as it might appear, particularly where reciprocity with member states is required to render EU laws effective.

The landscape of English civil litigation is unrecognisable from that which existed in 1972 prior to the UK joining the then-EEC. In large measure, there is now a set of harmonised EU rules for cross-border dispute resolution. For instance, there are harmonised rules on jurisdiction, enforcement of judgments, choice of law for contractual and non-contractual obligations, cross-border insolvency, service of documents and the taking of evidence. For better or for worse, those rules typically favour predictable solutions over judicial discretion, representing a significant departure from common law principles. The EU has also legislated in areas of cross-border family law (for example, on jurisdiction over cross-border divorces and on maintenance obligation). Indeed, one reason for the volume of high profile divorce cases in England is the relative ease with which a spouse can invoke the jurisdiction of the English courts.

Two particular tools are indispensable to litigators seeking to bring civil or commercial law claims on behalf of, or against, foreign domiciled defendants: the ability to choose the English courts as the forum for dispute resolution; and the ability to choose English law to govern contractual (and also non-contractual) relationships between the parties. Both of these are almost entirely regulated by European regulations. It is on these areas that this article will focus.

Choosing English courts

Those choosing to litigate civil and commercial law disputes in England have, for almost 30 years, benefited from free circulation of judgments in the EU under the Brussels Convention and its successor Regulations (most recently, the recast Judgments Regulation, which applies to proceedings commenced on or after 10 January 2015), making it easier to reach assets located overseas. There are also harmonised rules of jurisdiction, ultimately subject to interpretation by the Court of Justice of the European Union (CJEU), which largely remove the courts' discretion whether to hear cross-border disputes.

The recast Judgments Regulation also offers extensive protection for English jurisdiction clauses in commercial contracts. The English court is typically obliged to accept jurisdiction (regardless of the connections of the parties or the dispute to England). Equally, other member state courts are normally required to give effect to such a clause and decline jurisdiction.

The recast Judgments Regulation, however, *requires* reciprocity and the *mutual* enforcement of judgments; it cannot simply be enacted into domestic law, with everything continuing as before. It may be possible to conclude a parallel Convention in the same substantive terms as the recast Judgments Regulation, which would, as far as possible, enhance predictability and continuity. The role that the CJEU might play in interpreting any such instrument would require careful thought. Otherwise, the regulation will no longer apply in the UK. This, it might be thought, will lead to a seismic change.

Norway, Switzerland and Iceland are, however, along with the EU member states, parties to the Lugano Convention, which contains similar (albeit not identical) rules on jurisdiction and enforcement to the recast Judgments Regulation. The core principle that a jurisdiction clause for a contracting state must be respected is also contained in the Lugano Convention. Admittedly, the protection in the recast Judgments Regulation is superior: where there is an English jurisdiction clause, the courts of other member states *must* defer to the English court's decision whether the clause is valid even if they were seised first; whereas the Lugano Convention contains no such principle, giving rise to the risk of "torpedo" actions overseas in breach of an English jurisdiction clause. It seems unlikely that the Lugano Convention will continue to apply in the UK either upon Brexit, in the absence of a specific agreement; but it is possible that a similar agreement will be reached in due course between the UK, the EU member states and the existing Lugano states.

Even if no arrangement akin to the Lugano Convention comes to fruition either, however, the Hague Choice of Court Convention 2005 offers a way forward. The UK is bound by this convention as a member state but its practical significance is currently limited (the only other contracting states being Mexico and Singapore). While the UK will cease to be bound by the Convention by virtue of the EU's ratification, there is nothing to prevent it ratifying the Convention in its own right post-Brexit, and it may then enter in little more than three months. The Convention's effect is generally to compel the enforcement of jurisdiction clauses in favour of contracting states and, as importantly, to require other contracting states to decline jurisdiction. A judgment given by a court of a contracting state designated in an exclusive choice of court agreement shall normally be enforced in other contracting states. The Convention is, however, limited to exclusive jurisdiction clauses (unless there are reciprocal declarations extending it to non-exclusive clauses). This leads to greater uncertainty as to whether courts of member states would be required to respect an English

non-exclusive jurisdiction clause unless the recast Judgments Regulation and/or Lugano Convention (or similar arrangement) still applied to relations with the UK.

Even without any international arrangement, the principle that English jurisdiction clauses should be respected is enshrined in the English common law. Moreover, if courts of other member states should purport to override an English jurisdiction clause, it is likely that the English courts would revive the use of anti-suit injunctions and extend the award of damages relief to enforce such clauses robustly. Indeed, the English courts may have *enhanced* common law powers to enforce such clauses. As to enforcement, where the parties have concluded an English jurisdiction clause, many or most member states are likely to regard this as conferring competence on the English courts by consent. The judgment may well be enforceable under national law principles in other member states, even if the process is less streamlined.

Moreover, one should perhaps not overstate the overall effect of the harmonised jurisdiction and enforcement rules on the English litigation market. It may be suspected that a substantial proportion of litigants do not have in mind, for instance, the ability to enforce any English judgment that they might obtain in EU member states when choosing to litigate here. Indeed, many of the highest profile cross-border cases heard in England have involved claims against defendants domiciled outside of the EU, where European rules have not been applicable and enforcement might subsequently be required in a non-member state.

That is not to say that there may not be additional procedural complexities. There will, almost certainly, be more circumstances in which permission to serve out of the jurisdiction is required. Parties may wish to consider mitigating such effects, for instance through the use of process agent clauses. The EU Service Regulation and Evidence Regulation will presumably no longer facilitate assistance from member states; although, equally, in both cases, long established and widely ratified Hague Conventions are in force which will soften the impact.

Choosing English law

As to the ability to choose English law, the Rome I Regulation enshrines the principle of party autonomy for commercial agreements, subject to limited derogations. In considering the effects of Brexit on this area of law, there are crucial differences from the recast Judgments Regulation. First, the Rome I Regulation applies irrespective of the domicile of the parties and of whether the chosen law is that of a member state. This means that other member states will continue to respect a choice of English law. Second, there is no precedent for extending the Rome I Regulation to non- member states, or analogous arrangement with EFTA countries. But third, unlike the recast Judgments Regulation, the Rome I Regulation does not require reciprocity, or the enforcement of judgments in other member states. Arguably, it could simply be enacted into English law. Even if it were not, the predecessor to the Rome I Regulation, the Rome Convention, which was enacted into English law by the Contracts (Applicable Law) Act 1990, would revive in England upon Brexit. Fourth, however, even if the UK were to revert to its prior common law position, party autonomy to choose the governing law of a contract is long enshrined in English law. In the vast majority of commercial cases, an English choice of law clause will be effective irrespective of which rules apply.

There may, however, be greater uncertainty in respect of "one-stop" English choice of law clauses, insofar as they purport to extend to the parties' non-contractual obligations. The advent in the Rome II Regulation of an express power to choose the governing law for non-contractual obligations in relation to commercial activities was a significant advancement on the prior law. Again, the courts of member states will continue to uphold such a clause, since the regulation applies even where the chosen law is that of a non- member state and regardless of the domicile of the parties. Furthermore, the Rome II Regulation does not require reciprocity, and so could be enacted into English law. If, however, English law were to revert to the pre-regulation position, then such a choice would not be effective in England: it might at most, be a relevant factor in rebutting the default rules in favour of the country in which the events constituting the tort occur. This would be something of a retrograde step.

Conclusion

Hence, the core freedom to choose the English courts, and English law to govern contractual disputes, is likely to be preserved in a post-Brexit era. Attention will, however, need to be given to the terms on which English non-exclusive jurisdiction clauses and English choice of law clauses purporting to extend to non-contractual obligations are enforced.

Of course, parties also choose English courts for reasons that have nothing to do with the EU and its laws. They do so for the procedural and substantive rules of English law, its pre-eminence in commercial law, the quality of its lawyers and the independence of its judiciary. In other words, notwithstanding the international nature of much of the work in the London courts, many or most of the reasons for choosing to litigate here relate to the quality of English *domestic* law and English courts. Those core reasons for the choice of English law, and English courts, remain; and whatever else may happen once Brexit occurs, it is unlikely that the reputation and attractiveness of litigating in the English courts will disappear with them. **NLJ**

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