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Banking litigation post-Brexit: spotlight on jurisdiction clauses

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In this podcast, we take a look at some of the key changes in the jurisdictional landscape following the end of the Brexit transition period on 31 December 2020. In particular, we consider the effect of these changes on jurisdiction clauses, and the potential impact on finance parties. To start, I will briefly summarise the jurisdictional landscape post-Brexit and then examine the key changes in the regimes from a practical perspective.

The jurisdictional landscape

At the end of the transition period, the Recast Brussels Regulation and the Lugano Convention ceased to apply to the UK. They continue to apply to any relevant proceedings issued prior to the end of the transition period but we do not consider that any further in this podcast. Many of you will no doubt already be familiar with these regimes. By way of a very brief summary, the Recast Brussels Regulation laid down a comprehensive framework to determine in which Member State a civil or commercial dispute with an EU element should be heard. One of the main aims of the regime was to provide certainty and to reduce the risks of parallel proceedings in relation to the same dispute being heard in the Courts of two or more Member States at the same time, which in turn gives rise to the risk of irreconcilable judgments. The regime was not perfect but was generally welcomed as an effective system for introducing simplicity and certainty in the allocation of jurisdiction.

Not only did the Recast Brussels Regulation allocate jurisdiction between the Member States, but it also provided that judgments arising out of proceedings to which the Regulation applied were easily enforceable throughout the EU. For example, a Claimant issuing proceedings in England against a Defendant with assets in several EU jurisdictions could generally be confident that any judgment arising out of those proceedings (providing the Regulation applied) would be recognised and enforced by the courts of those Member States.

The 2007 Lugano Convention provided a very similar framework to the Recast Brussels Regulation and applied as between the EU and Iceland, Switzerland and Norway. It was modelled on the predecessor to the Regulation and has not – at least not yet – been updated to reflect the improvements that were made to Brussels Recast. In particular, it lacks the anti-torpedo provisions of the Recast Brussels Regulation. For

anyone unfamiliar with the concept of the "Italian torpedo", I will be looking at this in more detail later on in the podcast.

While neither the Recast Brussels Regulation nor the 2007 Lugano Convention applies any longer to the UK, the 2005 Hague Convention on Choice of Court Agreements does. This Convention is currently in force between the UK, the EU, Mexico, Singapore and Montenegro. Unlike Brussels and Lugano it is not a complete jurisdictional code; Hague only applies when the parties have elected that the courts of one of its contracting states should have exclusive jurisdiction to determine the dispute in question. In such cases, any court other than the chosen court is obliged to stay any proceedings before it, and any judgment arising out of a qualifying dispute must be recognised by the courts of all contracting states. This is clearly a welcome state of affairs, particularly in the banking context, given that finance documentation will in the vast majority of cases contain a jurisdiction clause.

The UK acceded to the Convention as a member in its own right on 1 January 2021. It had previously been a member by virtue of the EU's accession to the Convention on 1 October 2015.

It is important to note that the Convention only applies to jurisdiction clauses entered into after the state whose courts are chosen acceded to the Convention. While the UK deems its membership to have been continuous since 1 October 2015 (when it joined by virtue of its EU membership), the EU Commission considers the relevant date to be 1 January 2021 (when it acceded as a state in its own right). There is no doubt that the English Court will consider that the Convention applies to any qualifying clause entered into after 1 October 2015, but it remains to be seen how the courts of individual EU Member States will treat English jurisdiction clauses entered into between 1 October 2015 and 1 January 2021.

Finally, where the Convention does not apply, the question of whether the English Court will accept jurisdiction will now be determined by reference to English common law principles, and the question of whether the Courts of EU Member States will recognise an English judgment will be a question of the relevant local law and procedure. Furthermore, the UK will become a "third State" for the purposes of the recast Brussels Regulation, meaning that the circumstances in which proceedings in an EU Court may be stayed to allow English proceedings to take precedence will be significantly more limited than was the case previously.

Key changes from a practical perspective

One of the key differences between the Brussels Recast Regulation and the Hague Convention is that the Hague Convention only applies to exclusive jurisdiction clauses. There is a question mark surrounding

whether an asymmetric jurisdiction clause would constitute an exclusive jurisdiction clause for the purposes of the Hague Convention. Asymmetric jurisdiction clauses are very common in the banking context. They essentially provide that one party (in the case of a facility agreement this will typically be the lender) may only be sued in one jurisdiction, but has a choice of where to bring proceedings against the other party (typically the borrower). The clause is therefore exclusive in one direction only. Whilst the English Court considered that asymmetric clauses benefited from the protection of the Recast Brussels Regulation, obiter comments made by the Court of Appeal in the case of *Etihad Airways PJSC v Flöther*[1] suggest that asymmetric jurisdiction clauses may not benefit from the protection of the Hague Convention. Until the position has been confirmed one way or the other, some finance parties are amending their standard documentation to provide for conventional exclusive jurisdiction clauses in cases where the recognition of the clause by the courts of a Hague contracting state is key. The Loan Market Association has recently introduced an optional exclusive jurisdiction clause in light of concerns regarding the enforceability of assymetric clauses under the Hague Convention.

A further issue to be aware of is the relevance of the date on which the contract was entered into. While this had no bearing on the applicability of the Brussels Recast Regulation, it is now a key consideration. As mentioned earlier, the Hague Convention will not apply to any English jurisdiction clause entered into prior to 1 October 2015 and there is some uncertainty how other courts will treat such clauses entered into between 1 October 2015 and 1 January 2021. Where there is any uncertainty whether or not a given clause will be protected by the Hague Convention due to the date on which it was entered into, one option is for the parties to restate the clause so that it is entered into after 1 January 2021.

Another wrinkle in the application of the Hague Convention is that it seems likely that where all the parties to the dispute are domiciled in an EU Member State, the Recast Brussels Regulation will take precedence over the Hague Convention. Where, for example, a French and German party have agreed in their finance documentation to apply English law and to submit disputes to the exclusive jurisdiction of the English Courts, that clause may not be protected by the Hague Convention or by the Recast Brussels Regulation, which only applies to jurisdiction clauses that designate the courts of a Member State. While the English Courts are clearly likely to uphold an exclusive jurisdiction clause in their favour, it is unclear whether EU courts would stay proceedings commenced (in breach of the jurisdiction clause) in their jurisidiction in order to give effect to the English jurisdiction clause. This will now be a question of local law and procedure and, where

[1] [2020] EWCA Civ 1707

applicable (if for example the defendant is domiciled in the EU), the Recast Brussels Regulation, pursuant to which the EU Court in question may have no discretion to stay its proceedings regardless of the existence of a jurisdiction clause in favour of a third State.

In *Perform Content Services Ltd v Ness Global Services Ltd*[2], the Court of Appeal considered the English approach to non-exclusive jurisdiction clauses under Brussels Recast, which still applied because proceedings were commenced prior to the end of the transition period. Here, the parties had agreed to a non-exclusive jurisdiction clause in favour of the English courts. Proceedings were commenced first in New Jersey and the defendant to those proceedings then brought a second set of proceedings in England. The claimant in the New Jersey proceedings sought a stay of the English proceedings under Article 33 Brussels Recast on the grounds that the English courts had a discretion to stay proceedings where prior proceedings had been commenced in the courts of a third state which could be expected to give a judgment capable of recognition and enforcement in the relevant member state. The Court of Appeal ruled, however, that it had no power under Article 33 Brussels Recast Regulation to stay its proceedings in favour of the prior proceedings commenced in New Jersey where jurisdiction was based on an exclusive (or non-exclusive) jurisdiction clause. If this approach were to be followed by EU courts it would mean that they would not have the power to stay proceedings in favour of England where the EU courts' jurisdiction derives from a non-exclusive jurisdiction clause, even where the English proceedings were commenced first and there is no breach of the jurisdiction clause because it is non-exclusive only. There is, therefore, an increased risk of parallel proceedings giving rise to irreconcilable judgments.

In conclusion, one of the key points of difference in the new jurisdictional landscape is the approach to non-exclusive jurisdiction clauses. While many finance parties still perceive the flexibility of such clauses to be an advantage, their attractiveness may well be on the wane as regards recognition and enforcement within the EU.

Finally, in the interests of balance, one positive aspect of the Hague Convention is that it may bring about the return of the English anti-suit injunction in the European context. Whilst the UK was a member of the EU, the English courts were not permitted to grant anti-suit injunctions to restrain proceedings in other EU member states brought in breach of an exclusive English jurisdiction clause. Under Hague, however, there would in principle appear to be nothing to prevent the English Court from granting such relief. This will likely be seen as a welcome development by many, although the position has not yet been tested.

[2] [2021] EWCA Civ 981

In summary, it is clear that the Hague Convention is not perfect, and there are a number of key limitations of which parties will need to be aware. However, for the time being it is the only applicable jurisdiction convention and businesses trading in the EU (and EU businesses trading in the UK) will need to be aware of the key differences arising from the jurisdictional regime change.

As a final point of practice, it is worth noting that where the English Court has jurisdiction pursuant to any form of jurisdiction clause (regardless of whether or not it is Hague compliant), it is no longer necessary to apply for permission from the English Court to serve the proceedings on a Defendant located out of the jurisdiction. This will significantly increase the circumstances in which proceedings can be served out of the jurisdiction without permission, particularly in the finance context, which should mean there is less of a delay in progressing such claims.