BRIEFING

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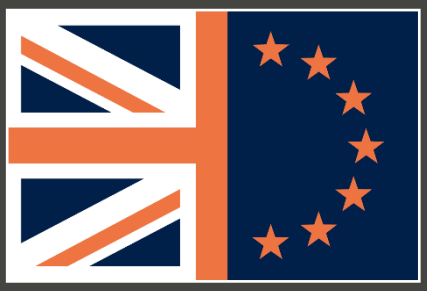
Beyond Brexit: Dispute Resolution



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1 Introduction

This briefing note, which represents an updated version of an earlier note circulated in September 2020, addresses the impact of Brexit, including the end of the transition period, on matters relevant to civil judicial co-operation between the English courts and the courts of EU member states (and, where relevant, the courts of EFTA[1] member states).

In particular, it provides:

- some background on the process which has led us to this point;
- an explanation of why Brexit should not significantly affect the continued attraction of English law as a law to govern international contracts, or London as an international dispute resolution centre; and
- practical guidance on the key technical areas, namely: choice of law, jurisdiction, enforcement and service of process. These areas are complex and fact-sensitive and only a high-level summary in respect of them is given.

The law is stated as at 1 September 2021. Should you require further information on the matters addressed in this note, please speak to a member of our Dispute Resolution department.

BREXIT: KEY POINTS FOR DISPUTE RESOLUTION

English law – the benefits of using English law to govern international commercial transactions remains generally unchanged by Brexit.

English courts – the attraction of using the English courts to resolve international disputes also remains generally unchanged by Brexit.

Choice of law – English choice of law clauses continue to be respected both here and in the EU in the same way that they were previously. As a result, there is no need to replace or change the drafting of such clauses.

Jurisdiction – some types of English jurisdiction clause have ceased near-automatically to be respected throughout the EU in the way that they were previously. This includes: (i) exclusive English jurisdiction clauses concluded prior to 1 January 2021; (ii) non-exclusive English jurisdiction clauses; and (iii) asymmetric or sole option English jurisdiction clauses. There is as a result an increased risk that courts in EU states will allow proceedings to go forward before them in breach of such clauses in a way that could not have happened previously (although in that situation the English courts should be free to issue anti-suit injunctions, which may help to rectify matters). Exclusive English jurisdiction clauses concluded on or after 1 January 2021 and satisfying certain other criteria should continue to be respected in the same way that they were previously.

[1] The EFTA member states relevant to this note are Norway, Iceland and Switzerland. Liechtenstein, while an EFTA member, is not party to the relevant international agreements on civil judicial co-operation.

Enforcement – some types of English court judgment may now be less readily enforceable in the EU than was previously the case. This includes: (i) judgments arising from disputes governed by exclusive English jurisdiction clauses concluded prior to 1 January 2021; (ii) judgments arising from disputes governed by non-exclusive English jurisdiction clauses; and (iii) judgments arising from disputes governed by asymmetric or sole option English jurisdiction clauses. As a result, if obtaining a judgment that is quickly and easily enforceable in the EU is an important factor for a party, then consideration must be given to the best dispute resolution mechanism for their contract. Judgments arising from disputes governed by exclusive English jurisdiction clauses concluded on or after 1 January 2021 and satisfying certain other criteria should be treated in a broadly similar way to the way in which they were previously, and so exclusive English jurisdiction clauses will remain an attractive option in certain cases.

Service – it is now more difficult to serve English legal proceedings on EU-based counterparties. It therefore remains strongly recommended that an agent for service of process clause is included in any contracts with such counterparties (and indeed with international counterparties more generally).

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2 Beyond Brexit: where matters stand

BACKGROUND

On 31 January 2020, after 47 years of membership, the United Kingdom ("**UK**") left the European Union ("**EU**").

The terms of the UK's exit were agreed in a Withdrawal Agreement between the UK and the EU[2] (the "**Withdrawal Agreement**"), which was implemented into English law by two Acts of Parliament: the EU (Withdrawal) Act 2018 and the EU (Withdrawal Agreement) Act 2020.

A key feature of the Withdrawal Agreement was an agreement by the UK and the EU to a transitional period lasting from 31 January 2020 until 11pm on 31 December 2020 (the "**Transition Period**"). The purpose of the Transition Period was to allow both parties some breathing space to reach agreement as to how their future relationship would look. During it, EU law largely continued to apply in and to the UK as if it had remained an EU member state.

On 24 December 2020, the EU and the UK reached agreement on the text of a new trade and co-operation agreement (the "**Trade and Co-operation Agreement**")[3], intended to govern their relationship across various areas following the end of the Transition Period. However, the Trade and Co-operation Agreement is largely silent on civil judicial co-operation, only touching on it in limited respects concerning the enforcement of intellectual property rights. In particular, the Trade and Co-operation Agreement does not address either allocation of jurisdiction as between English and EU courts in civil proceedings, or the mutual recognition and enforcement of any judgments arising out of those proceedings.

IMPLICATIONS FOR CIVIL JUDICIAL CO-OPERATION

The fact that the Transition Period has ended without any form of agreement being concluded between the UK and the EU in relation to civil judicial co-operation means that the various EU-wide sets of rules which govern this area no longer apply to or in the UK (although they do of course still apply intra-EU).

In particular, the Recast Brussels Regulation (the "**Recast Regulation**")[4], which governs both allocation of jurisdiction between EU member state courts in civil proceedings, and recognition and enforcement by EU member states of each other's civil court judgments, no longer applies to or in the UK. Equally, the 2007 Lugano Convention (the "**Lugano Convention**")[5], which governs allocation of jurisdiction and recognition and enforcement of judgments in civil proceedings as between EU member states and Iceland, Norway and Switzerland, no longer applies to or in the UK. Neither does the EU Service Regulation (the "**Service Regulation**")[6], which governs the process for service of proceedings commenced in one EU member state on a party based in another EU member state.

This means that there is no longer a comprehensive reciprocal regime in place governing allocation of jurisdiction in civil proceedings between the English courts and EU member state courts (or indeed between the English courts and the courts of Norway, Iceland and Switzerland). Equally, there is no longer a comprehensive reciprocal regime in place requiring the English courts and EU member state courts (or the courts of Norway, Iceland and Switzerland) near-automatically (i.e. subject to limited grounds for refusal) to recognise and enforce each other's judgments. Neither is there a comprehensive reciprocal regime in place allowing service of English proceedings on parties in EU member states, and vice versa. Instead, parties facing new or ongoing legal disputes with a cross-border UK/EU element will now have to contend with a more fragmented body of laws and rules. These include transitional provisions for civil proceedings commenced prior to 11pm on 31 December 2020, various international treaties and conventions, and the domestic rules which apply in these areas in default of any applicable international agreement. The most important international agreement in this area is the 2005 Hague Convention on Choice of Court Agreements[7] (the "**2005 Hague**

[2] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 19 October 2019.
[3] The EU-UK Trade and Cooperation Agreement, 31 December 2020.
[4] Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).
[5] 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[6] Regulation 1393/2007 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters.
[7] The 2005 Hague Convention on Choice of Court Agreements.

Convention") and its accompanying Explanatory Report[8], which does not have force of law but is nonetheless likely to be accorded significant weight by the English courts.

[8] The 2005 Hartley/Dogauchi Explanatory Report.

3 English law and London as a dispute resolution centre

Brexit should not significantly affect the inherent attractions of English law as a law to govern international contracts or London as a leading commercial dispute resolution centre.

English law has historically been viewed as providing sophistication and certainty, while maintaining flexibility in various key areas, in comparison to many of its international counterparts. This looks set to continue. From a commercial perspective, English law gives parties greater freedom in determining the terms of a contract than some of the major codified civil law systems in Europe; it is also relatively unaffected by European law concepts such as good faith, and it emphasises the upholding of commercial bargains.

Equally, Brexit should not affect the reasons why many parties, both domestic and international, view the English courts as a world-leading forum for resolving disputes. High regard is given to the independence and quality of the judiciary, the commerciality and relative speed of dispute resolution, the quality of English law firms and counsel and the sophisticated infrastructure of the English courts – with the Commercial Court, the Technology and Construction Court and the Financial List being some of the major attractions.

International arbitration in London should also be unaffected. The quality of the arbitral institutions based in London, such as the LCIA, accompanied by the responsive legal infrastructure provided by the Arbitration Act 1996 and the English courts' relative reluctance to interfere with the arbitral process, are independent of any Brexit impact. Furthermore, the fact that the UK is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards means that international enforcement of arbitral awards handed down in London-seated arbitrations has not been affected by Brexit.

The innate quality of English law and London courts and arbitral tribunals, together with London's position as a global legal services hub, the pervasiveness of the English language in international commerce, and London's location between the Americas and Eurasia suggest that English law will remain popular for international businesses and that London is well-positioned to remain a leading global dispute resolution centre.

4 Key technical areas for Dispute Resolution

CHOICE OF LAW

Previous position

Prior to the end of the Transition Period, the position in this jurisdiction as regards choice of law was as follows:

- **Law applicable to contractual obligations**: The rules the English courts would apply to determine the law applicable to contractual claims were contained in the Rome I Regulation ("**Rome I**")[9], which had direct effect in both the EU[10] and the UK. Rome I applied to contracts entered into on or after 17 December 2009[11]. It gave primacy to the law the parties had chosen to govern any claims arising out of such contracts. It was therefore the basis on which parties could be confident that English choice of law clauses in contracts would be respected throughout the EU.
- **Law applicable to non-contractual obligations**: The rules the English courts would apply to determine the law applicable to non-contractual (i.e. particularly tortious) claims were contained in the Rome II Regulation ("**Rome II**")[12], which also had direct effect in both the EU[13] and the UK. Rome II applied to torts occurring on or after 11 January 2009[14]. It gave the parties the ability to make an express and binding choice as to the law that would govern any such torts. It was therefore another key part of the framework which underpinned English choice of law clauses in contracts, given that such clauses usually extend to non-contractual (i.e. tortious) obligations.

Transitional arrangements

Immediately upon the conclusion of the Transition Period, both Rome I and Rome II ceased to apply to and in the UK. However, the Withdrawal Agreement provides that both Rome I and Rome II will continue to apply on a reciprocal basis in both the UK and the EU[15] with respect to any contracts concluded and any torts committed prior to the end of the Transition Period[16].

The position now

The rules in both Rome I and Rome II (which do not generally speaking require reciprocity to operate) have, as from the end of the Transition Period, been incorporated into domestic law (with some very minor, non-substantive amendments)[17]. Rome I and Rome II continue to apply (via direct effect) in the EU[18] and, because the rules they contain do not discriminate as between member states and third countries, Brexit should generally not bring about a different result in their application by EU member state courts.

As a result, even post-Transition Period, as regards both contractual and non-contractual obligations, English choice of law clauses in contracts will continue to be respected both in this jurisdiction and the EU in the same way that they were previously[19].

Risks

Brexit and the ending of the Transition Period has had little impact in this area and English choice of law clauses as typically formulated in commercial contracts will not need to be replaced or changed.

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[9] Regulation 593/2008 on the law applicable to contractual obligations.
[10] Except in Denmark, which has opted out of Rome I.
[11] Contracts entered into before that date were governed by the Rome Convention, which was incorporated into English law by the Contracts (Applicable Law) Act 1990 (the "**1990 Act**").
[12] Regulation 864/2007 on the law applicable to non-contractual obligations.
[13] Except in Denmark, which has opted out of Rome II.
[14] Rome II replaces the previous regime in the Private International Law (Miscellaneous Provisions) Act 1995, which has continued to apply otherwise.
[15] With the exception of Denmark.
[16] See Article 66 of the Withdrawal Agreement.
[17] See The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019, which came into force at the end of the Transition Period.
[18] With the exception of Denmark.
[19] Although the UK automatically left the Rome Convention upon the conclusion of the Transition Period, the 1990 Act has remained in place with appropriate amendments, so the position with respect to contracts concluded prior to 17 December 2009 remains the same now as it was previously.

Checklist: questions to consider

- ☐ What is your preferred choice of law (if any) and why?
- ☐ Are there any potential commercial or other obstacles to an express choice of law clause and what leverage is there to overcome these and make an express election?
- ☐ Does your preferred choice of law match your preferred dispute resolution mechanism?

JURISDICTION

Previous position

EU member state courts

Until the end of the Transition Period, the rules applied by both EU member state courts and the English courts to determine which court should take jurisdiction over a civil dispute were contained in the Recast Regulation, which had direct effect in both the UK and the EU[20].

The starting point under the Recast Regulation was that a person domiciled in an EU member state (which, during the Transition Period, was taken to include the UK) must, whatever their nationality, be sued in the courts of that member state, subject to the following exceptions:

- where the parties (including non-EU parties) had agreed that the courts of another member state should have jurisdiction, that choice would be respected;
- where the parties had agreed that their dispute should be subject to arbitration, that choice would be respected and the rules in the 1958 New York Convention would apply instead; and
- where the dispute involved certain "reserved" subject matters (e.g. rights in rem in immovable property, certain matters relating to companies and cases involving employment, consumer or insurance contracts), the courts of certain member states were given exclusive jurisdiction to deal with it.

The Recast Regulation therefore in most circumstances gave primacy to the parties' choice of forum.

In support of this, the general rule in the Recast Regulation was that when multiple member state courts were seised in respect of a dispute, all courts other than the court first seised had to stay their proceedings while the court first seised determined whether or not it has jurisdiction to hear the dispute. There was, however, an exception to this where a member state court had been seised pursuant to an exclusive jurisdiction clause. In those circumstances, it was for that court, not the court first seised, to take the initial step of determining whether or not it has jurisdiction, with all other courts staying their proceedings in the meantime. The reasoning behind this was to prevent parties from initiating 'Italian torpedo' actions (i.e. initiating proceedings in another jurisdiction in breach of an exclusive jurisdiction clause as a delaying tactic, on the basis that it would take that court a long time to determine whether or not it had jurisdiction, during which time the hands of the court which should be dealing with the dispute were tied).

Norwegian, Icelandic and Swiss courts

Until the end of the Transition Period, the rules applied to determine jurisdiction as between the English courts and the Swiss, Norwegian and Icelandic courts were contained in the Lugano Convention.

The rules in the Lugano Convention were very similar to those in the Recast Regulation, with both regimes giving primacy to the court the parties had chosen, and the one significant difference being that, in circumstances where multiple contracting state courts were seised of the same dispute, under Lugano it was the court which was first seised in time which must first determine whether it had jurisdiction to hear the dispute, rather than the court seised pursuant to an exclusive jurisdiction clause.

Transitional arrangements

At the end of the Transition Period, the Recast Regulation ceased to apply to and in the UK. However, the Withdrawal Agreement provides that the rules in the Recast Regulation for determining which court has jurisdiction to deal with a civil dispute will continue to apply on a reciprocal basis in both the UK and the EU with respect to any proceedings instituted before the end of the Transition Period[21].

The Lugano Convention also ceased to apply to and in the UK at the same point. The Withdrawal Agreement does not contain any equivalent transitional provisions concerning the Lugano Convention. Instead, the UK has implemented a very limited **unilateral** transitional provision concerning the stance that the English courts should take after the end of the Transition Period if they have been seised of proceedings pursuant to the Lugano Convention, and a court in Switzerland, Norway or Iceland is subsequently seised of parallel proceedings. However, none of Switzerland, Norway or Iceland have reciprocated in this regard[22]

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[20] Denmark has opted out of the Recast Regulation but its provisions nonetheless apply as between it and other EU member states by virtue of the 2005 EU/Denmark Agreement.
[21] See Article 67(1) of the Withdrawal Agreement.
[22] See section 93(2) of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019.

The position now

As set out above, immediately upon expiry of the Transition period, both the Recast Regulation and the Lugano Convention ceased to apply to and in the UK[23]. **As a result, there is no longer a comprehensive reciprocal regime in place between either the UK and EU member states, or the UK and Norway, Iceland and Switzerland, for determining which local court should take jurisdiction over any given civil dispute. The UK government has sought partially to plug this gap, at least as regards EU member states, via the 2005 Hague Convention.**

The key point to be aware of in relation to the 2005 Hague Convention, discussed in further detail below, is that it requires contracting states to give effect to *exclusive* jurisdiction clauses in favour of other contracting states (provided always that those clauses meet certain qualifying criteria). The 2005 Hague Convention does not require contracting states to give effect to *non-exclusive* jurisdiction clauses[24] in favour of other contracting states[25]. Although the position is not entirely free from doubt, it should also be assumed that it does not require contracting states to give effect to *asymmetric* or *sole option* jurisdiction clauses[26] in favour of other contracting states. Where disputes are governed by non-exclusive or asymmetric/sole option jurisdiction clauses (or indeed by exclusive jurisdiction clauses outside the ambit of the 2005 Hague Convention), the English courts, and any relevant local EU courts, will therefore need to apply their own local rules to determine whether they can take jurisdiction over the dispute in question.

The 2005 Hague Convention

From 1 October 2015 until the expiry of the Transition Period, the UK was a member, by virtue of its membership of the EU, of the 2005 Hague Convention. That membership technically expired upon conclusion of the Transition Period. However, immediately upon the conclusion of that prior period of membership, the UK re-joined the 2005 Hague Convention as a contracting state *in its own right*.

The aim of the 2005 Hague Convention, like that of the Recast Regulation and the Lugano Convention, is to deal with both allocation of jurisdiction as between contracting states in relation to civil disputes, and the recognition and enforcement of any resulting judgments. It is, however, as a general matter, much more limited in scope than those two latter regimes. In particular, as set out above, **the 2005 Hague Convention is concerned only with the allocation of jurisdiction over disputes which are governed by a jurisdiction clause (and even then only certain types of such clauses)**. By contrast, both the Recast Regulation and the Lugano Convention contain a comprehensive system for the allocation of jurisdiction based on various different grounds, of which jurisdiction clauses are but one example[27].

In very broad terms, the 2005 Hague Convention requires the courts of contracting states to give effect to qualifying *exclusive* jurisdiction clauses in favour of the courts of other contracting states. The current parties to it are the UK, the EU, Mexico, Singapore and Montenegro.

The 2005 Hague Convention will therefore, to an extent, fill the gap left by the Recast Regulation. It should, however, be noted that it likely only applies where both:

- a qualifying *exclusive* jurisdiction clause has been concluded in favour of a contracting state (i.e. non-exclusive jurisdiction clauses expressly fall outside its scope and, although the point has never been tested, asymmetric or sole option jurisdiction clauses are also likely to fall outside its scope[28]); and
- that exclusive jurisdiction clause was *concluded after the Convention entered into force for the contracting state upon which jurisdiction has been conferred*.

[23] As has the 2005 EU/Denmark Agreement.
[24] i.e. clauses which seek to ensure that the parties have a choice as to where to litigate but cannot validly object if proceedings are first commenced in the courts on which non-exclusive jurisdiction has been conferred.
[25] The 2005 Hague Convention does contain a mechanism, in Article 22, by which it can be extended to non-exclusive jurisdiction clauses, but no contracting state has yet chosen to take this up.
[26] i.e. clauses which seek to give one party a choice as to where to litigate but confine the other to the courts of one jurisdiction, sometimes also referred to as "one-sided exclusive jurisdiction clauses".
[27] See the Court of Appeal's decision in *Etihad v Flöther* [2020] EWCA Civ 1707 at [87], per Henderson LJ.
[28] The Explanatory Report to the Hague Convention by Professors Trevor Hartley and Masato Dogauchi notes at paragraphs 105-106 that asymmetric or sole option jurisdiction clause are often used in international loan agreements but that the relevant Diplomatic Session agreed that they "*are not exclusive choice of court agreements for the purposes of the Convention*". The Court of Appeal has also suggested, on an *obiter* basis, that asymmetric or sole option clauses are not covered by the 2005 Hague Convention (see the comments of Henderson LJ in *Etihad v Flöther* [2020] EWCA Civ 1707 at [85]).

The 2005 Hague Convention also contains a number of other limitations as to when it will apply. These include that:

- unlike the Recast Regulation and the Lugano Convention, the 2005 Hague Convention only applies to "choice of court agreements" (i.e. exclusive jurisdiction clauses) – for example, it does not apply to tortious claims where no exclusive jurisdiction clause features;
- even where one is dealing with an exclusive jurisdiction clause, there are certain specific subject matters that the 2005 Hague Convention is expressly stated not to cover. These include consumer and employment contracts, insolvency matters and certain company law matters, unless such matters arise only as a preliminary question. The 2005 Hague Convention's applicability in any given case must therefore always be considered by reference to the subject matter of the dispute; and
- contracting states can also make individual declarations that the 2005 Hague Convention is inapplicable to other specific subject matters, beyond those stated above. By way of example, both the EU and the UK have declared that the 2005 Hague Convention will not apply to most insurance contracts (although reinsurance contracts are still within scope). It is therefore important always to check the 2005 Hague Convention status table, which sets out all declarations made by contracting states.

The regime that the 2005 Hague Convention contains for dealing with parallel proceedings (i.e. for determining which court shall proceed to determine jurisdiction in the first instance in the event that multiple courts are seised) is also both less detailed, and less tried and tested, than that contained in the Recast Regulation, although it does seek to prevent "Italian torpedo" style actions via the same mechanism as the Recast Regulation uses.

Finally, there remains a question mark as to the status of qualifying exclusive English jurisdiction clauses concluded between 1 October 2015 and 31 December 2020, given that there was a (theoretical at least) "break" between that period of the UK's membership and the UK re-joining the Convention as a standalone state in its own right. The UK government has implemented domestic legislation to the effect that any exclusive jurisdiction clauses which would have been caught by the 2005 Hague Convention between 1 October 2015 and 31 December 2020 will continue to be treated as such, despite the break in the UK's membership[29]. However, that legislation is not something that EU member states will necessarily be prepared to replicate (or otherwise it might not be the approach that would be taken by member state courts and, ultimately, the CJEU). In short, therefore, there can be no guarantee as to how exclusive English jurisdiction clauses concluded before the UK re-joined the 2005 Hague Convention in its own right will be treated.

The common law

To the extent that the 2005 Hague Convention does not apply to any given civil or commercial dispute, the English courts will instead need to revert to their own common law rules for determining jurisdiction (which have of course always applied in cross border cases concerning the rest of the world). Those rules will usually result in the English courts taking jurisdiction over a dispute where the parties to it have agreed that they should do so. The courts of EU member states (and of Iceland, Norway and Switzerland) will also need to apply their own domestic rules in this area.

The future

Looking to the future, the UK government has made an application for the UK to re-join the Lugano Convention as soon as possible. The current parties to the Lugano Convention are the EU, Iceland, Norway and Switzerland. If the UK were to re-join the Lugano Convention in its own right, that Convention would therefore apply as between the UK and the EU, as well as between the UK and Iceland, Norway and Switzerland. Unlike the 2005 Hague Convention, however, the UK needs the agreement of all of the existing signatories to the Lugano Convention before it can re-join it. Iceland, Norway and Switzerland have all formally endorsed the UK's application. The EU is yet to either consent to or refuse the application, but the European Commission has recommended that it be refused on the basis that the Lugano Convention should only be open to states which are a part of the internal market (which the UK is not). The Commission has also deposited a Note Verbale with the Federal Department of Foreign Affairs of Switzerland (in its capacity as Depository for the Lugano Convention) stating that the EU is not in a position to give its consent to the application at this time. A final decision on the issue will likely be made at some point by the European Council (i.e. effectively by the EU member states themselves), but in view of the European Commission's recommendation, and the reasons for it, it appears unlikely that the EU will be prepared to approve the UK's application at this time.

If the UK does ever re-join the Lugano Convention, it would take precedence over the 2005 Hague Convention as regards allocation of jurisdiction and recognition and enforcement of judgments as between both the UK and EU member states, and the UK and Iceland, Norway and Switzerland. The provisions of the Lugano Convention are very similar to those of

[29] See The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018, which came into effect upon the conclusion of the Transition Period.

the Recast Regulation, and in many ways it would provide a like-for-like replacement for that Regulation. In particular, the Lugano Convention gives precedence to the parties' choice of forum to resolve their dispute in the same way that the Recast Regulation did. There is, however, one key difference, in that the Lugano Convention provides, in the event of parallel proceedings, that it is the court first seised which must take the initial step of determining whether it has jurisdiction while all other proceedings are stayed: it does not allow courts seised of claims on the basis of exclusive jurisdiction clauses to take this initial step in the way that the Recast Regulation did. It is, as a result, less effective than both the Recast Regulation and the 2005 Hague Convention in preventing the use of 'Italian torpedo' style claims as a delaying tactic.

Risks

Now that the Transition Period has concluded, there are some types of English jurisdiction clause which are no longer near-automatically (subject to limited grounds for refusal) respected throughout the EU, or in Norway, Iceland and Switzerland, in the way that they would have been previously. As regards the EU, that includes exclusive English jurisdiction clauses concluded prior to 1 January 2021 or otherwise not within the ambit of the 2005 Hague Convention, and all non-exclusive or asymmetric/one-sided English jurisdiction clauses, no matter when they were concluded, on the basis that such clauses either are not, or should be assumed not to be, caught by the 2005 Hague Convention. There is no longer a comprehensive EU-wide bar on parallel proceedings being commenced in EU states in breach of such clauses.

That said, the fact that the Recast Regulation and the Lugano Convention have now fallen away means that the implicit restrictions they contain on the issuing by national courts of anti-suit injunctions should no longer apply. Although the point has not yet been tested in the context of the 2005 Hague Convention, the English courts should therefore once again be free to issue injunctions prohibiting proceedings being brought in other jurisdictions, while proceedings are live in this jurisdiction. The success of these injunctions relies upon the counterparty having some form of presence in the UK, such that it is in its interests not to act in defiance of an English court order.

Exclusive English jurisdiction clauses in contracts with EU counterparties which have been concluded on or after 1 January 2021, and which are within the scope of the 2005 Hague Convention, should benefit from the protection of that convention, and as a result continue to be treated in a very similar way to the way that they would have been previously.

In light of the above, parties must continue to pay very close attention to the dispute resolution mechanism that they include in any new contracts with an EU element. Exclusive English jurisdiction clauses will now in some cases have become more attractive than they were previously, because they will, generally speaking, benefit from the protections afforded by the 2005 Hague Convention. However, an analysis should always be made of: (a) whether the 2005 Hague Convention does in fact apply in the particular circumstances; and (b) even if it does, whether the protection it affords is trumped by other factors, such as the flexibility afforded by a non-exclusive/asymmetric/one-sided jurisdiction clause (which will allow a party to choose the best courts in which to pursue any proceedings necessary at the point at which a dispute actually arises[30]). For example, if a contractual counterparty has (or may in the future have) assets located in many jurisdictions, then it may well be in the other party's best interests to preserve the ability to take action in any one of those jurisdictions in the event of a breach of contract. Equally, if the contract is of a type where speedy interim relief may need to be sought in multiple jurisdictions in the event of a breach (for example because the contract in question is a Non-Disclosure Agreement and confidential information may be disseminated in the EU jurisdiction in which the counterparty is located, or because it contains restrictive covenants which may need to be enforced locally), then, all other things being equal, a non-exclusive/asymmetric/one-sided jurisdiction clause may be preferable to an exclusive English jurisdiction clause, notwithstanding that the benefits of the 2005 Hague Convention will fall away. For a summary of the potential options, see the section below entitled "Dispute Resolution Mechanisms in Contracts: the Options".

Checklist: questions to consider

- ☐ Do you want to be able to initiate proceedings in the courts of a particular country?
- ☐ Have you considered the respective benefits and risks of entering into an exclusive vs a non-exclusive English jurisdiction clause, from the perspective of both allocation of jurisdiction (see this section) and enforcement (see the Enforcement section below)? In particular:

[30] Assuming in the case of asymmetric/one-sided jurisdiction clauses that these are enforceable as a matter of relevant local law – see the below section entitled "Dispute Resolution Mechanisms in Contracts: the Options".

- Is enforcement in the EU of any judgment obtained a key consideration? If so, consider the benefits conferred in this regard by the 2005 Hague Convention on judgments arising from qualifying *exclusive* jurisdiction clauses (as outlined in the Enforcement section below).
- Alternatively, is flexibility to choose the best jurisdiction in which to bring proceedings at the point at which a dispute actually arises a significant consideration? This could be the case where a counterparty has (or may in the future have) assets located in multiple jurisdictions, or where the contract is of a type where quick local action may need to be taken to avert the consequences of a breach (such as a cross-border Non-Disclosure Agreement or other agreement containing restrictive covenants which may need to be enforced locally). If so, consider whether a non-exclusive/asymmetric/sole option jurisdiction clause would be the best option, notwithstanding that such clauses will, or should be assumed to, fall outside the scope of the 2005 Hague Convention[31].

☐ Have you considered that an arbitration clause may represent a potential alternative and, if so, the key differences between litigation and arbitration?

☐ Does local advice need to be obtained as to how any proposed English jurisdiction clause will be treated in any relevant EU/EFTA states?

[31] It is necessary to distinguish two different situations: (1) Where urgent interim protective measures (such as injunctions) need to be taken in a *foreign* jurisdiction, this should be allowed by non-exclusive/asymmetric/sole option clauses permitting proceedings in that jurisdiction. (2) In the case of an exclusive English jurisdiction clause, an interim injunction could be sought from the *English* court, but even if that clause falls within the ambit of the 2005 Hague Convention that injunction would not be enforceable under the convention for the reasons set out in the Enforcement section below: consequently, the enforceability of such an English court injunction in a *foreign* jurisdiction would be a matter of the relevant foreign law.

ENFORCEMENT

Previous position

The topic of recognition and enforcement of court judgments is distinct from, but closely related to, the topic of jurisdiction.

EU member state courts

Prior to the end of the Transition Period, recognition and enforcement of judgments as between the EU and the UK was governed by the Recast Regulation[32]. The Recast Regulation provided that English judgments must be recognised and enforced in EU member states, and that judgments given in EU member states must be recognised and enforced in the UK, via a relatively simple and informal procedure[33]. Importantly from the perspective of London as an international dispute resolution centre, this meant that judgments given by the English courts were recognised and enforceable near automatically (i.e. subject to limited grounds for refusal) across the EU regardless of the nationality of the parties to the dispute. This was doubtless an attractive feature of England as a jurisdiction.

Norwegian, Icelandic and Swiss courts

Recognition and enforcement of judgments as between Norway, Iceland and Switzerland on the one hand, and the UK on the other, was governed by the Lugano Convention. The Lugano Convention provided that English judgments must be recognised and enforced in Norway, Iceland and Switzerland, and that judgments given in Norway, Iceland and Switzerland must be recognised and enforced in the UK, again via a relatively simple and informal procedure.

Transitional Arrangements

As from the end of the Transition Period, the Recast Regulation has ceased to apply to and in the UK[34].

The Withdrawal Agreement does, however, provide that the rules in the Recast Regulation which ensured that the UK and the EU would recognise and enforce each other's judgments on a reciprocal basis will continue to apply in both the UK and the EU to any judgments handed down in proceedings commenced before the end of the Transition Period[35]. As a result, any judgments arising out of proceedings commenced before the English courts on or prior to 31 December 2020 will remain readily recognisable and enforceable throughout the EU in the same way that they would have been previously, even though the Transition Period has expired.

The Lugano Convention has also ceased to apply to and in the UK as from the end of the Transition Period, but the Withdrawal Agreement does not contain any equivalent transitional provisions concerning it. Instead, the UK has implemented **unilateral** transitional provisions to the effect that the rules in the Lugano Convention will continue to be applied by the English courts to judgments handed down in proceedings commenced before the Icelandic, Norwegian and Swiss courts on or prior to 31 December 2020, in the same way that they would have been previously[36]. However, only Norway has reciprocated those provisions[37].

The position now

Following the end of the Transition Period, there is no longer a comprehensive reciprocal regime in place between the UK and the EU (or indeed the UK and Iceland, Norway and Switzerland) for the recognition and enforcement of each other's civil court judgments.

The 2005 Hague Convention

As discussed in the "Jurisdiction" section above, the 2005 Hague Convention will hopefully provide a partial solution to this issue, at least as regards EU member states.

The 2005 Hague Convention provides that, subject to limited grounds for refusal described in the convention, contracting states must recognise and enforce each other's civil court judgments, provided that those judgments arise from proceedings commenced pursuant to a qualifying *exclusive* jurisdiction clause in favour of a contracting state,

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[32] The Recast Regulation applied to judgments handed down in proceedings commenced on or after 10 January 2015. Regulation 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (the "**Brussels Regulation**") applied to judgments handed down in proceedings commenced prior to that date. The rules in the Brussels Regulation and the Recast Regulation were very similar, save that the process for recognition and enforcement in the Recast Regulation was even quicker and simpler than that in the Brussels Regulation.

[33] Denmark has opted out of the Recast Regulation but its provisions nonetheless apply as between it and other EU member states by virtue of the 2005 EU/Denmark Agreement.

[34] As has the 2005 EU/Denmark Agreement.

[35] See Article 67(2) of the Withdrawal Agreement.

[36] See section 92 of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019.

[37] See the 2020 UK-Norway Convention (discussed in further detail in the Non-2005 Hague Judgments section below).

and that exclusive jurisdiction clause was *concluded after the Convention came into force for the state in question*. The Convention will therefore be of assistance on a forward looking basis for parties which after the end of the Transition Period have concluded exclusive English jurisdiction clauses falling within the scope of the Convention, but may not assist parties which have concluded such clauses prior to that date[38]. Judgments arising from proceedings commenced pursuant to non-exclusive or asymmetric/sole option jurisdiction clauses should also be assumed to fall outside its scope.

For the purposes of the 2005 Hague Convention, a "judgment" means any decision on the merits given by a court[39]. This excludes interim measures of protection (i.e. temporary measures, such as interim injunctions, granted to protect the position of one of the parties pending judgment)[40], as these are not decisions on the merits[41]. It is also worth noting that recognition or enforcement may be postponed if the decision in question is a first instance judgment subject to appeal[42].

Non-2005 Hague Convention judgments

To the extent that the 2005 Hague Convention does not apply to any particular English court judgment (i.e. that judgment is a "non-2005 Hague Convention judgment"), parties will need to obtain local law advice as to whether and how that judgment can be recognised and enforced in any relevant EU or EFTA states.

In some cases, there may be a separate bilateral agreement applicable between the UK and the relevant EU or EFTA state which may assist in ensuring that the non-2005 Hague Convention judgment can be quickly and easily recognised and enforced in the relevant EU or EFTA state (although even if such an agreement exists, the position should still be checked with local counsel as to how it will operate in practice).

By way of example, a number of bilateral arrangements existed between the UK and certain EU and EFTA member states regarding the mutual recognition and enforcement of each other's judgments prior to the advent of the Recast Regulation and Lugano Convention. These were implemented into UK law at the time they were concluded and remain on the UK's statute book now that the Recast Regulation and Lugano Convention have fallen away. They include:

- the Administration of Justice Act 1920, which is based on historic arrangements as to mutual recognition and enforcement of judgments as between the UK and each of Cyprus, certain sovereign bases located on Cyprus, and Malta, and which remains on the UK statute book post-Brexit; and
- the Foreign Judgments (Reciprocal Enforcement) Act 1933, which is based on historic arrangements as to mutual recognition and enforcement of judgments as between the UK and each of Austria, Belgium, France, Italy, the Netherlands and Norway, and which also remains on the UK statute book post-Brexit.

The current status of these historic arrangements and the question of whether the relevant contracting states will be prepared to treat them as having been reignited now that the Recast Regulation and Lugano Convention have fallen away is a matter of some doubt. However, they remain on the UK statute book and it therefore seems possible that the UK courts will treat them as still applicable, even if relevant overseas courts do not.

There is also (as at the date of writing) one post-Brexit example of a bilateral agreement between the UK and an EU/EFTA state as to the mutual recognition and enforcement of each other's judgments: the "2020 UK-Norway Convention"[43]. The 2020 UK-Norway Convention is effectively an agreement between the two states that a bilateral convention concluded between them in 1961 concerning the mutual recognition and enforcement of each other's judgments (one of the many historical bilateral arrangements underpinning the Foreign Judgments (Reciprocal Enforcement) Act 1933), remains in effect now that the Lugano Convention has fallen away. It thus removes in this one instance the doubt that surrounds the other bilateral arrangements which underpin the Foreign Judgments (Reciprocal Enforcement) Act 1933.

If no bilateral agreement applies, the courts of the relevant EU or EFTA state will need to apply their own domestic rules to determine whether to recognise and enforce the relevant non-2005 Hague Convention judgment.

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[38] The UK government has legislated to the effect that, immediately upon expiry of the Transition Period, exclusive jurisdiction clauses which would have been caught by the Hague Convention when the UK was a party to it in its capacity as a member of the EU (or by virtue of the Transition Period) will be treated in exactly the same way as exclusive jurisdiction clauses concluded once the UK had become a member of the Hague Convention it its own right. However, there can be no guarantee that EU states will take the same approach.

[39] See Article 4. The Explanatory Report states that this includes a default judgment. But note that in the case of a default judgment the court of the enforcement jurisdiction is not bound by the findings of fact on which the court of origin based its jurisdiction – see Article 8(2).

[40] See Article 7.

[41] Courts in contracting states could enforce interim measures under their national law, but would not be obliged to do so under the convention. If an interim measure such as an injunction is subsequently made permanent, it will be enforceable under the convention in other contracting states.

[42] See Article 8(4).

[43] See the Agreement between the UK and Norway on the continued application and amendment of the Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters 1961.

The future

As set out above, in the longer term, the UK government has applied for the UK to re-join the Lugano Convention in its own right. If that were to happen, the Lugano Convention would then apply as between both the UK and the EU, and as between the UK and Norway, Iceland and Switzerland, as regards the recognition and enforcement of each other's civil court judgments. It would effectively replicate the quick and efficient regime for mutual recognition and enforcement contained in the Recast Regulation. However, this eventuality is dependent on the EU giving its consent to the UK acceding to the Lugano Convention, which presently appears unlikely.

Looking further ahead, another international convention was concluded in 2019, the "2019 Hague Judgments Convention"[44], which may ultimately form part of the legal architecture which governs this area as between the UK and the EU/EFTA member states. The 2019 Hague Judgments Convention provides for contracting states to recognise and enforce each other's civil court judgments in a wider range of circumstances than the 2005 Hague Convention. However, neither the UK nor the EU (nor any EFTA member state) has yet acceded to it (although the European Commission has recently adopted a proposal for the EU to accede, as a first step towards it doing so).

Risks

The changes post-Transition Period to the previous EU-wide regime for recognising and enforcing judgments are arguably the most important consequence of Brexit from a dispute resolution perspective.

As noted above, while the English courts are nonetheless likely to remain an attractive forum for the resolution of international disputes, one of their advantages to date has been the ease and relative speed of recognition and enforcement of their judgments across the EU and in EFTA member states. **There is now no longer an EU/EFTA-wide "one stop shop" enforcement process for English court judgments. As regards the EU, the 2005 Hague Convention will provide a partial solution to this in some cases** (i.e. where the English courts have handed down judgment in a dispute governed by a qualifying exclusive English jurisdiction clause concluded on or after 1 January 2021). **However, where the 2005 Hague Convention (or any applicable bilateral agreement reached between the UK and the relevant EU/EFTA member state) does not apply, parties will need to be prepared to deal with local law and procedure when enforcing English court judgments in the EU and in EFTA member states, in the same way that they have always had to do when enforcing English judgments in, say, the United States, China or Japan. This does not mean that non-2005 Hague Convention judgments will necessarily be unenforceable in EU and EFTA member states. Local laws in EU and EFTA member states do generally allow for the enforcement of such judgments, just not in such a straightforward manner as under the Recast Regulation (or the Lugano Convention). However, local law advice should ideally always be obtained to assess the potential enforceability or otherwise of a non-2005 Hague Convention judgment in the relevant member state pursuant to the relevant local law. Parties are likely to encounter a diverse spectrum of experiences in different EU and EFTA states, including as to timescales for enforcement, depending on the efficiency and complexity of local law and procedure. In some EU and EFTA jurisdictions, this could potentially include having to re-argue the merits of a claim in order to obtain an order for enforcement.**

These issues will be allayed if the UK is permitted by the EU to re-join the Lugano Convention. In the meantime, however, **quick and easy recognition and enforcement of English court judgments in the EU and in EFTA member states is likely to be something which parties have hitherto taken for granted, and parties negotiating new contracts will need to consider carefully which is the most appropriate dispute resolution mechanism for them**. If quick and easy recognition and enforcement in the EU of any English court judgment they may obtain is a critical factor (for example because of the location of counterparties or assets), then an exclusive English jurisdiction clause benefitting from the protection of the 2005 Hague Convention, or alternatively an arbitration clause, should be strongly considered. For further information, see the section below entitled "Dispute Resolution Mechanisms in Contracts: the Options".

Checklist: questions to consider

- ☐ Is any court judgment obtained likely to need to be enforced in one or more EU states (e.g. by reference to the location of the counterparty or its assets)? If so, consider the benefits conferred in this regard by the 2005 Hague Convention on judgments arising from qualifying *exclusive* jurisdiction clauses (as outlined in the Enforcement section above).
- ☐ Alternatively, is flexibility to choose the best jurisdiction in which to bring proceedings at the point at which a dispute arises the more important consideration? This could be the case where, for example, the contract is a facility agreement with an EU element, and the borrower has assets located in multiple EU jurisdictions, or where the contract is of a type where quick local action may need to be taken to avert the consequences of a breach (such as a

[44] The 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

cross-border Non-Disclosure Agreement or other agreement containing restrictive covenants which may need to be enforced locally). If so, consider whether a non-exclusive/asymmetric/sole option jurisdiction clause would be the best option, notwithstanding that such a clause will, or should be assumed to, fall outside the scope of the 2005 Hague Convention[45].

- ☐ Does local advice need to be sought as to how any English court judgment obtained will be treated in any relevant EU/EFTA jurisdictions?

[45] It is necessary to distinguish two different situations: (1) Where urgent interim protective measures (such as injunctions) need to be taken in a *foreign* jurisdiction, this should be allowed by non-exclusive/asymmetric/sole option clauses permitting proceedings in that jurisdiction. (2) In the case of an exclusive English jurisdiction clause, an interim injunction could be sought from the *English* court, but even if that clause falls within the ambit of the 2005 Hague Convention that injunction would not be enforceable under the convention for the reasons outlined in the Enforcement section: consequently, the enforceability of such an English court injunction in a *foreign* jurisdiction would be a matter of the relevant foreign law.

DISPUTE RESOLUTION MECHANISMS IN CONTRACTS: THE OPTIONS

In summary, the Transition Period has now expired without a long term comprehensive reciprocal regime being agreed between the EU and the UK in relation to either jurisdiction or the recognition and enforcement of judgments. It is therefore vital to continue to give close attention to the dispute resolution mechanism included in any new contracts with an EU element. There will never be any one size fits all "perfect" solution, but the key options and some of their pros and cons are set out below.

Please speak to a member of our Dispute Resolution team for any additional guidance that may be needed. Note also that certain of the options below will require local law advice.

- ***Exclusive jurisdiction to the English courts***: A clause of this type is intended to prevent the parties from bringing proceedings anywhere other than the English courts. It remains an attractive option in many cases. In particular, an exclusive English jurisdiction clause concluded on or after 1 January 2021 falling within the scope of the 2005 Hague Convention (as to which see the above sections) should continue near-automatically to be respected by both the English and EU member state courts in the same way that such clauses were respected pre-Brexit, minimising the risk of parallel proceedings being started both in this jurisdiction and in the EU. An English court judgment arising from a dispute governed by such a clause should, as a general matter, also continue to be quickly and easily enforceable throughout the EU.
- ***Non-exclusive jurisdiction to the English courts***: A clause of this type is intended to enable the parties to bring proceedings in any court save that, if proceedings are first commenced in the English courts, no valid objection can be made to that choice. It therefore allows a choice as to jurisdiction to be made further down the line, at the point at which proceedings are actually commenced. This flexibility will, however, come at the expense of the certainty provided by an exclusive jurisdiction clause. Non-exclusive jurisdiction clauses will also fall outside the scope of the 2005 Hague Convention, meaning that they will not near-automatically (i.e. subject to limited grounds for refusal) be respected throughout the EU. Neither will an English court judgment arising from a dispute governed by such clauses be, as a general matter, quickly and easily enforceable throughout the EU. Instead, local law advice will need to be taken as to how such judgments will be treated. Examples of circumstances in which non-exclusive jurisdiction clauses may be considered attractive, notwithstanding that they fall outside the scope of the 2005 Hague Convention, include where there is a facility agreement with an EU element and the borrower has (or may in the future have) assets located in multiple EU jurisdictions, or where a contract with an EU element is likely to require quick local action upon breach (e.g. a Non-Disclosure Agreement or other agreement containing restrictive covenants). All other things being equal, non-exclusive English jurisdiction clauses are likely to be a particularly attractive option in the latter case.[46]
- ***Asymmetric/sole option jurisdiction clauses***: If a party has sufficient bargaining power, it could also try to insert an "asymmetric" or "sole option" jurisdiction clause that allows it to sue in multiple jurisdictions, while the other party is only permitted to start proceedings in one jurisdiction (here, the English courts). It is, however, worth bearing in mind that an asymmetric clause may suffer from enforceability issues in other jurisdictions quite apart from Brexit – for example, such a clause was held to be incompatible with the Lugano Convention by the French Cour de Cassation in 2015[47] – and that appropriate local law advice should therefore always be considered to assess the likely enforceability of such structures. It should also always be borne in mind that an asymmetric/sole-option jurisdiction clause should be assumed to fall outside the scope of the 2005 Hague Convention, and so will not benefit from the protections that convention affords. Asymmetric/sole option English jurisdiction clauses are likely to be attractive in similar scenarios to those set out above for non-exclusive English jurisdiction clauses.
- ***Arbitration***: A clause of this type is intended to ensure that the parties will resolve their dispute by way of arbitration. Both the UK and the EU continue to be signatories to the 1958 New York Convention. As a result, arbitration clauses continue post-Brexit to be respected both here and in the EU (as well as in many other jurisdictions) in the same way that they were previously. Arbitral awards also continue to be readily enforceable in the EU (as well as in many other jurisdictions) in the same way that they were before. As a result, if enforcement in the EU is a material consideration, for example because counterparties or assets are based there, then an appropriate arbitration clause may, at least in this respect, be an attractive option. **It should, however, be remembered that there are a number of significant differences between litigation and arbitration, and there may be good reasons to litigate not arbitrate (or vice versa)**. In particular, there are important differences in relation to ability to appeal, general procedure, approach to disclosure, ability to obtain summary judgment or strike out, ability to obtain interim relief, ability to join in third

[46] See footnotes 31 and 45 for more detail.
[47] French Supreme Court, First Civil Chamber, 25 March 2015, ICH v Crédit Suisse, No. 13-27264.

parties, confidentiality and costs. These different features should be considered before a final decision is made (including, if arbitration is chosen, as regards the precise arbitral structure, given the different available options).

- ***Exclusive jurisdiction to an EU state***: if conduct of a case, and subsequent enforcement, in the EU is an absolute priority, and none of the other options set out above are desirable, then a clause conferring jurisdiction on the courts of a suitable EU state may be necessary. It is, however, crucial to seek advice from local counsel in the chosen jurisdiction if seriously contemplating this option, including, if the law that the parties have chosen is English law, as to the likely ability of the local courts to apply that law correctly. In most cases, it will be highly undesirable to split governing law and jurisdiction clauses such that a foreign court is required to decide matters of English law.

SERVICE OF PROCESS

Previous position

Until the end of the Transition Period, service of English proceedings on defendants and their lawyers domiciled in EU member states was governed by the Service Regulation, which had direct effect in both the UK and the EU[48]. The Service Regulation contained a relatively quick and simple process for effecting service of proceedings in EU member states, via designating "transmitting agencies" and "receiving agencies" in each state. It was also historically the case that permission from the English courts was not required prior to effecting service in EU member states.

Transitional arrangements

The Service Regulation has, post-Transition Period, ceased to have effect in the UK. The UK government has, however, implemented domestic legislation which ensures that any outstanding requests for service of EU proceedings received by the UK transmitting agency prior to expiry of the Transition Period will be complied with[49].

The position now

Now that the Service Regulation no longer applies, the UK must instead fall back on the provisions of the 1965 Hague Service Convention[50], to which it is currently a party alongside all EU member states. The Hague Service Convention contains a procedure for service of proceedings in contracting states which is similar to, but less satisfactory than, the procedure contained in the Service Regulation[51]. A key difference is that the Hague Service Convention does not impose any time limits within which contracting states must ensure that service is effected, which means that there is scope for the process to take a significant amount of time, and limited recourse for parties should it do so. In contrast, the Service Regulation provided for a one-month timeframe.

A further consequence of the expiry of the Transition Period is that prior permission of the English courts to effect service out of the jurisdiction in EU member states will be necessary in different circumstances than previously. The Civil Procedure Rules provide that permission to serve out of the jurisdiction is not required where the English courts have jurisdiction over a dispute as a result of the 2005 Hague Convention (i.e. from the perspective of the English courts, where a dispute is governed by a qualifying exclusive English jurisdiction clause concluded on or after 1 October 2015). Those rules were amended on 6 April 2021 to state that permission is also not required to serve out of the jurisdiction when the English courts have jurisdiction over the dispute as a result of an English jurisdiction clause of any type (i.e. regardless of whether that clause falls within the scope of the 2005 Hague Convention). However, in other circumstances, permission to serve out of the jurisdiction will still be necessary.

Risks

Aside from the extra administrative hurdle of applying to court for permission to serve out of the jurisdiction in certain circumstances (albeit limited now that the rules regarding when permission to serve out is required have been amended), the key risk for parties to existing contracts, and those entering into new contracts, with EU-based counterparties is that they may now face procedural challenges and delays when effecting service in the EU, where previously no such problem would have existed.

The best way to counteract this risk is to include agent for service of process clauses in any new contracts with EU counterparties, stating, in effect, that the counterparty irrevocably appoints an entity in this jurisdiction to accept service of proceedings on their behalf albeit that this shall not affect the right to serve process in any other manner permitted by law. Such clauses are in fact strongly recommended in contracts with international counterparties more generally, particularly if there are circumstances in which a party might want or need to act quickly and aggressively (e.g. enforcing against a borrower in respect of a loan in default) and time is of the essence. Ideally, one would also always seek local counsel confirmation that the agent for service of process clause is valid and effective in the jurisdiction in which any English proceedings would need to be served (and if this is not practicable such a confirmation should be sought after a dispute has arisen and before proceedings are served on the process agent). This will cover off any risk that the courts in that local jurisdiction refuse to recognise and enforce any subsequent English court judgment on the basis that the English proceedings were improperly served (a possibility envisaged, for example, in the 2005 Hague Convention[52]).

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[48] Except for in Denmark, which has however notified the European Commission of its intention to treat itself as bound by it.
[49] See The Service of Documents and Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provisions) (EU Exit) Regulations 2018.
[50] The 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters. See also the webpage for the Hague Service Convention, which contains useful practical information regarding service by the Central Authority for each contracting state.
[51] The Hague Service Convention is exclusive in the sense that it must be applied in all cases where a judicial or extrajudicial document is to be served in a civil or commercial matter in another contracting state, unless one of the exceptions contained in the convention itself applies.
[52] See Article 9(c).

Checklist: questions to consider

☐ Are any of the parties to a contract based outside of the UK? If so, a clause appointing an agent for service of process based in this jurisdiction should, whenever possible, be included.

FOR FURTHER INFORMATION, PLEASE CONTACT

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