GIBSON DUNN

Procedural Implications for Cross-Border Litigation: A Post-Brexit Briefing Note

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The start of a new year is often greeted with the phrase “out with the old, in with the new”. For those involved in cross-border litigation, the phrase has rarely seemed as appropriate as it does at the start of 2021.

It will have escaped no-one’s attention that 1 January 2021 marked the end of the Brexit transition period. This has resulted in a number of significant changes to the applicable cross-border procedural rules which litigators and those responsible for drafting commercial contracts will need to have in mind. This note provides a high level overview of the key developments. It is worth noting at the outset that the Trade and Cooperation Agreement between the UK and the EU, which was announced on 24 December 2020, is silent on each of the topics discussed below.

1. Governing law

The old: EC Regulations No 593/2008 on the law applicable to contractual obligations (Rome I) and No 864/2007 on the law applicable to non-contractual obligations (Rome II)

Rome I allows parties to choose the law which will govern a contract, and provides a series of rules to determine which law should apply in the event that the contract does not make this clear. Rome II sets out rules which govern the law applicable to non-contractual obligations arising in a number of different contexts including unfair competition, infringement of intellectual property rights and in tort, and also allows parties to agree the governing law. The regulations require the courts of each Member State (apart from Denmark) to apply those rules to determine the applicable law in a dispute.

The new: still Rome I and II

Post-Brexit, for the remaining EU Member States the Rome regulations continue to apply. Importantly, both Rome I and Rome II make clear that parties can choose as governing law the law of a non-Member State. Subject to the existing exceptions contained within the regulations, therefore, EU courts ought to continue to respect parties’ choice of English law.

While the UK may no longer be a Member State, the UK government has already enacted domestic legislation which provides that the rules set out in Rome I and Rome II continue to apply in the UK too. Nothing in the Trade and Cooperation Agreement changes that.

What does this mean for our clients?

In the current, shifting legal landscape, it is of some comfort that the rules on governing law remain unchanged. There is no reason to stop using English law as the choice of law in your contracts: the reasons which would have led you to do so in the first place, such the well-developed body of law and the reputation for delivering legal certainty and fairness, are unaffected by Brexit.

2. Jurisdiction

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The old: EC Regulation No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Recast)

Brussels Recast sets out rules governing which Member State's courts can hear a dispute, and what happens when the courts in two different Member States are both seised of a claim involving the same parties and cause of action.

The new: the Hague Convention of 30 June 2005 on choice of court agreements, failing which national law

As a result of Brexit, Brussels Recast no longer applies in the UK. What happens now is not straightforward.

The first thing to establish in any new dispute is whether there is an exclusive jurisdiction clause in favour of courts in the UK or in a Member State. If there is, the Hague Convention on choice of court agreements may apply: the UK was previously a party to the convention in its capacity as an EU Member State, and has acceded in its own right as of 1 January 2021. The convention also applies to Singapore, Mexico and Montenegro.

However, there is already a dispute between the UK and the EU about when the Hague Convention will apply: the UK believes that it will apply where there is an exclusive jurisdiction clause in a contract entered into after 1 October 2015, which is the date on which the UK acceded to the convention in its capacity as an EU Member State; the EU's position is that the convention will only apply where the contract has been entered into after 1 January 2021, when the UK acceded in its own right. How the courts in the UK and in the EU deal with this in practice remains to be seen.

If the convention does apply, the courts designated in the exclusive jurisdiction clause are required to hear the case, and if a court in another contracting state is seised of the matter, it will have to suspend or dismiss the proceedings.

If the convention does not apply, then it is the local law of the state(s) in question which will apply. This may arise because of the date on which the contract was entered into, because there is no jurisdiction clause at all, or because the jurisdiction clause is non-exclusive (it provides for proceedings to be heard in a particular jurisdiction, but does not prevent the parties from beginning proceedings in any other jurisdiction) or is asymmetric (it provides that one party must bring proceedings in a particular jurisdiction, but allows the other party to begin proceedings in any jurisdiction).

The position may yet change again. In April 2020, the UK applied to accede to the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This would result in a very similar set of rules to those in force before Brexit under Brussels Recast. Note that one key difference is that, unlike Brussels Recast, the Lugano Contention has no solution to the infamous "Italian Torpedo", whereby a party subject to an exclusive jurisdiction clause first brings proceedings before a court in a different country with a reputation for taking a long time to rule that it does not have jurisdiction, in order to delay and frustrate proceedings before the court designated in the exclusive jurisdiction clause. By contrast, Brussels Recast provides that the court designated in the exclusive jurisdiction clause must hear the dispute, and any other court seised of the matter must stay the proceedings, even if those proceedings began before those in the jurisdiction designed in the clause. We may therefore see the return of the Italian Torpedo, regardless of whether the UK accedes to the Lugano Convention.

The UK's application to accede to the Lugano Convention must first be approved by all existing contracting parties: Switzerland, Iceland and Norway have indicated their support, but as at the time of writing the EU and Denmark (a contracting party in its own right) are yet to consent.

What does this mean for our clients?

Having previously been able to rely on a single set of rules, we are now left with a different set of rules, potential disputes about whether those rules apply, defaulting to the national laws of each different EU Member State when the rules do not apply. This lack of clarity will inevitably give rise to litigation.

When drafting contracts, clients may wish to opt for exclusive jurisdiction clauses if seeking certainty about the body of rules which will apply, and therefore about the courts which will hear any future dispute. However, it goes without saying that care must be taken in deciding whether this is the right option in all the circumstances, and legal advice should be taken as appropriate.

3. Enforcement of judgments

The old: EC Regulations No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Recast) and No 805/2004 creating a European Enforcement Order for uncontested claims (EEO Regulation)

Under Brussels Recast, a judgment handed down by the courts of one Member State is enforceable not only in that Member State but also in any other Member State, as if it were a judgment of a court of that other Member State. The EEO Regulation sets out a simple process by which an uncontested judgment from one Member State can be enforced in another Member State (except Denmark). For proceedings brought from 1 January 2021 onwards, Brussels Recast and the EEO Regulation no longer apply in the UK.

The new: the Hague Convention of 30 June 2005 on choice of court agreements, failing which national law

The post-Brexit position for the enforcement of judgments is similar to that described above in relation to jurisdiction. Where an exclusive jurisdiction clause is involved, and subject to the date of the contract, the Hague Convention on choice of court agreements will apply and will mean that a judgment granted by the court designated in the exclusive jurisdiction clause must be recognised and enforced in the other contracting states.

In all other circumstances, it is the local law of the state(s) in which the judgment is being enforced which will apply. Note that, before joining the EU, the UK entered into a number of bilateral treaties for the reciprocal recognition and enforcement of judgments with certain current EU Member States, including France, Germany, Italy and the Netherlands: it may be that these can be revived and relied upon once again.

As mentioned above, the UK has applied to accede to the 2007 Lugano Convention and if that application is successful, the position would once again be very similar to the way it was under Brussels Recast. It remains to be seen if the EU (and Denmark) allow this to happen.

What does this mean for our clients?

Where the Hague Convention does not apply, the enforcement of judgments is likely to be slower, more cumbersome and ultimately more expensive than it was under Brussels Recast.

When drafting contracts, as things stand exclusive jurisdiction clauses may lead to judgments which are easier to enforce in the future. Of course, there is likely to be a significant gap between the entering into of a contract and the obtaining of a judgment following a related dispute, and the rules may well have changed several times in the intervening period.

4. Service of documents

The old: EC Regulation 1393/2007 on the service in EU countries of judicial and extrajudicial documents in civil or commercial matters (Service Regulation)

Following Brexit, the Service Regulation will no longer apply between the UK and the EU. The regulation aims to establish a standardised and speedy procedure for the service of documents between parties in different Member States. Each Member State designates transmitting and receiving agencies, with the transmitting agency in one country sending the documents to the receiving agency in another, and the receiving agency is then responsible for service. Member States are also permitted to serve directly on a party in another Member State by registered post.

The new: the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil and commercial matters

As of 1 January 2021, the Hague Convention of 15 November 1965 will apply instead in the UK. This instrument already applied to the service of documents between the UK and Denmark and the EFTA countries (apart from Lichtenstein), as well as between the UK and the USA and many other countries: there are some 78 contracting parties in total.

The good news is that all 27 EU Member States are signatories to the convention: you will not need to consider if some instrument other than the convention applies, regardless of which EU Member State you are dealing with. The bad news is that each of the 27 Member States has made reservations and declarations in relation to the convention. You will therefore have to look closely at the rules which apply in the relevant country.

In practice, the means of service may not turn out to be terribly different under the Hague Convention. Contracting states are required to designate a central authority to which requests for service can be addressed, and that authority will then arrange for service in accordance with the national laws of its country. Service by mail is also possible under the Hague Convention, although some contracting countries have objected and do not allow this.

Notably, as the UK reverts to a piece of legislation enacted in 1965, the EU is already looking to the future: a new regulation on the service of documents will come into force on 1 July 2022 and seeks to streamline the service process further, including allowing for electronic service.

What does this mean for our clients?

The main impact you are likely to notice is on the time it takes to serve documents. Under the EC Regulation, receiving agencies were expected to serve documents within one month of receipt. In due course, electronic service ought to speed things up further. The Hague Convention contains no similar provision. We will have to wait to see how quickly EU Member States will deal with requests for service under the Hague Convention as opposed to the EC Regulation, but from experience, delays of several months would not be uncommon.

Bear in mind, too, the need to consider the rules applied by the country in which you are seeking to serve: it may be that you need to seek local advice, which could add further delay and expense.

If entering into a new contract with a counterparty in the EU, you would be well advised to include a process agent clause in the contract which makes clear who has authority to accept service on the counterparty's behalf: this could save time and cost if you are later required to issue proceedings.

5. Obtaining evidence

The old: EC Regulation 1206/2001 on cooperation between the courts of the EU countries in the taking of evidence in civil or commercial matters

As of 1 January 2021, EC Regulation 1206/2001 no longer applies in the UK. This regulation aims to speed up the process of obtaining evidence located in one Member State for use in proceedings in another, and allowed courts to make requests directly to the court in the other Member State.

The new: Hague Convention of 18 March 1970 on the taking of evidence abroad in civil and commercial matters

The UK is a contracting party to the Hague Convention of 18 March 1970, as are 24 of the remaining EU Member States (i.e. all but Austria, Belgium and Ireland). This convention will now govern requests for evidence between the UK courts and the courts of those 24 Member States. As with the Hague Convention on service discussed above, all of those Member States bar Slovenia have made reservations and declarations to the convention, so again you will have to look closely at the rules which apply in the relevant country.

In practice, as with service and subject to each Member State's reservation, the process of obtaining evidence from an EU Member State which is a signatory to the convention may not be very different. A letter of request must be sent by the judicial authority of one state to the competent authority of the other state. The evidence sought must be for use in contemplated or commenced judicial proceedings. Note in particular Article 23, which permits a contracting state to declare that it will not execute letters of request issued for the purpose of obtaining pre-trial discovery: while documents can be obtained for the purposes of proceedings not yet commenced, these cannot take the form of fishing expeditions designed to establish what documents an opponent might hold.

In the cases of Austria, Belgium and Ireland, letters of request will need to be sent to the courts of those countries via diplomatic channels, which will almost certainly add further delay. You may need to take local advice if trying to obtain evidence form one of those countries.

This new state of affairs can be contrasted with the former position under the EC Regulation, which aims for requests to be executed within 90 days of receipt. There is no such expectation under the convention.

What does this mean for our clients?

As with service, the main differences are likely to be the speed with which evidence can be obtained, which could result in delays in beginning or progressing proceedings, and the potential need for local advice in the country in which the evidence is sought, which will also add delay and expense. If seeking evidence from Austria, Belgium or Ireland, the potential for such delay and expense is even greater.

It remains to be seen if EU Member States will execute requests made under the convention by a UK court more quickly than they currently respond to requests from other contracting parties such as the US, but our experience in dealing with such requests is that they can often be long, inefficient and cumbersome processes.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding the above developments. Please contact the Gibson Dunn lawyer with whom you usually work, or the following authors in London:

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