WINSTON & STRAWN LLP

CLIENT ALERT

Brexit: Key Dispute Resolution Considerations for In-House Counsel

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Overview

Many international contracts select English law and English courts (or English law together with international arbitration). The reasons influencing this selection are unlikely to change as a result of Brexit. However, from 1 January 2021, the UK and the European Union have entered a new phase in their international legal relationship. This alert addresses what that means for governing law and dispute resolution clauses in international contracts, and what it means for the enforcement of UK court judgments within the EU (and EU court judgments within the UK).

The changes from 1 January 2021 make this a good time for businesses to conduct a "health check" of their typically used governing law and dispute resolution clauses, and we include at the end of this note a list of key considerations when deciding on governing law and dispute resolution clauses.

Brexit in 2020 and 2021 – The Broader Context

The UK formally withdrew from the EU on 31 January 2020.

However, the UK and EU agreed a transitional arrangement which remained in place for all of 2020, whereby for the most part the UK continued to be treated as if it was still an EU member state including in the application of EU law both within the UK and within the remaining 27 EU Member States (the "EU27"). [1]

The EU–UK Trade and Cooperation Agreement ("TCA") was signed on 30 December 2020. The TCA is, however, silent on future arrangements as regards cross-border civil litigation. Accordingly, from 1 January 2021 onwards, the international legal relationship between UK and EU has changed and, in certain areas, will be governed by different international agreements.

At a high level, what stays the same from 1 January 2021 onwards for the purposes of choice of law and/or dispute resolution

clauses?

The remainder of this briefing focuses on the changes from 1 January 2021. However, it is important to highlight the following important matters which do not change as a result of Brexit and the TCA:

- **Governing Law of a Contract**: Nothing will change and the selection of English law as the governing law of a contract (or of an EU27 national law as the governing law of a contract) will be enforced in the UK and EU27 pursuant to the same rules already in place.
- **Arbitration and Enforcement of Arbitral Awards Worldwide**: The same rules will apply to the enforcement of arbitral awards in the UK and EU27 (and worldwide), and are governed by an entirely different international treaty unconnected to the EU treaties.
- **Exclusive Jurisdiction Clauses Selecting English or EU27 National Courts:** Exclusive jurisdiction clauses will be upheld by the English and EU27 national courts, and resulting judgments will be enforced pursuant to an international treaty to which both the UK and EU are now parties.

Should I stop selecting English law as the governing law of contracts?

No. None of the core advantages of English law change as a result of Brexit. English contract law principles have been independently developed by the English judiciary and, outside of the regulatory context, such principles are largely unaffected by EU law. Regardless of Brexit, English law continues to be a commerce-friendly legal system, with the fundamental principle of freedom of contract meaning that businesses and individuals can tailor their contracts, allowing for flexibility in concluding contractual terms with minimal interference by the courts in commercially negotiated terms. Furthermore, due to the common law doctrine of precedent and hundreds of years and a high volume of international commercial disputes, English law can also help commercial parties to predict the outcome of a dispute with a greater degree of certainty.

Furthermore, the system for enforcing parties' contractual choice of governing law will remain in place and aligned in both the UK and EU27, regardless of whether the parties have selected English law, an EU27 national law or a non-EU law. (This set of rules is contained in EU Regulation 593/2008 on the law applicable to contractual obligations, commonly referred to as "Rome I")

Should I stop selecting English courts in my dispute resolution clauses?

No, although consideration should be given to using exclusive jurisdiction clauses so as to result in enforceable judgments within the EU27 (see below).

The factors which lead international businesses to select the jurisdiction of the English courts will not change. The English judiciary is respected internationally for its skill, experience and impartiality and the evidential and procedural rules of the English litigation system will be unaffected. The courts are accustomed to handling complex, sector-specific and multi-jurisdictional matters. Many parties agree to the jurisdiction of the English courts where there is no connection to the UK at all and this trend has continued in the four years following the Brexit referendum. Currently around two-thirds of cases in the High Court involve non-UK parties and there is no reason to expect this to change.

Will Brexit affect the enforceability of English court judgments?

Outside of the EU (for example in the US), an English court judgment will be enforced in exactly the same way as it was prior to 1 January 2021. Similarly, non-EU court judgments will be enforced in the UK courts in the same way.

Within the EU, the UK previously benefited from a European legislative regime, in particular Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (commonly referred to as the "Recast Brussels Regulation"), which provides a streamlined process for the reciprocal enforcement of judgments between the courts of EU member states. From 1 January 2021, this regulation no longer applies to the UK.

However, in circumstances where a contract contains an exclusive jurisdiction clause, from 1 January 2021 onwards significant comfort is provided by the Hague Convention on Choice of Court Agreements 2005 (the "Convention").

The Convention provides that a judgment given by a court designated in an exclusive choice of court agreement shall be recognised and enforced in other contracting states in accordance with the terms of the Convention. The EU is a contracting state to the Convention. The UK deposited its instrument of accession on 28 September 2020, bringing the Convention into force for the UK on 1 January 2021. There is some unresolved debate as to whether the Convention applies to exclusive jurisdiction clauses concluded prior to 1 January 2021 (i.e. when the UK was an indirect party to the Convention by virtue of its membership of the EU, and before the UK independently acceded to the Convention), and this may need to be resolved by UK and European courts in due course.

The Convention is thus an important mechanism to maintain the enforceability of most UK court judgments in EU member states (and to maintain the enforceability of most court judgments from EU27 courts within the UK) from 1 January 2021 onwards.

However, whilst exclusive jurisdiction clauses fall within the scope of the Convention, particular care should be taken when using any non-exclusive jurisdiction clauses (including asymmetrical clauses, as found in many lending agreements, allowing the lender to commence proceedings in any jurisdiction but binding the borrower to a specific jurisdiction). Such non-exclusive and asymmetrical clauses will likely still be upheld by English courts, but there is some potential for divergence between the English and EU27 courts in upholding such clauses, staying proceedings in favour of court proceedings commenced in the EU27 or UK, and in the enforcement of judgments arising from such clauses.

Finally, the UK has also applied to become a party to the "Lugano Convention" (the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed in Lugano on 30 October 2007), which convention is agreed between the EU, Norway, Iceland, Switzerland and Denmark. The Lugano Convention sets out a system for jurisdiction and enforcement of judgments which is very similar to that set out under the Recast Brussels Regulation. However, the consent of all parties to the Lugano Convention is required to permit the UK to accede to that convention, and the EU has not yet given its consent.

Does Brexit affect arbitration?

No. As stated above, arbitration will not be affected by Brexit. Arbitration is not regulated by EU law, and the UK and all EU27 states (together with most other countries worldwide) are signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (commonly referred to as the "New York Convention"). Arbitration clauses will remain effective and arbitral awards will continue to be enforceable in the same manner as currently applies.

As an aside, notwithstanding the unlikelihood of the enforceability of UK court judgments being affected by Brexit, we are seeing a trend whereby multinationals (including financial institutions) are becoming more open-minded to including arbitration clauses in their contracts. However, this seems to be driven by other perceived benefits of arbitration in certain circumstances (including confidentiality, the ability to control the process and to select an industry expert arbitrator) rather than specific concerns about the post-Brexit enforceability of UK court judgments within the EU.

What practical steps should I be taking right now?

- Even without Brexit, it is prudent to conduct periodic reviews of the approach to the drafting of dispute resolution and governing law clauses. Clauses should be drafted to make it clear and unambiguous which court (or arbitral tribunal) is to have jurisdiction in the event of a dispute and which law is to govern the contract. The approach should be tailored to the relevant contractual context and counterparty, including thinking ahead to where any judgment or arbitral award would need to be enforced.
- If your counterparty is domiciled outside of the UK, but your contract contains a jurisdiction clause in favour of the English courts, to avoid service complications you should ensure that your contract contains a clause requiring your counterparty to appoint a process agent in the UK to accept legal proceedings.
- For the reasons set out above, whilst English governing law clauses will continue to be recognised by the EU27 courts, we would generally recommend using exclusive jurisdiction clauses (rather than non-exclusive or asymmetrical clauses) to improve the enforceability of a resulting UK judgment within the EU27 (or to improve enforceability of EU27 court judgments within the UK).
- In view of the ambiguity as to whether the Convention applies to exclusive jurisdiction clauses concluded prior to 1 January 2021, for business-critical contracts, a prudent approach would be to consider whether the ambiguity can be removed through supplemental agreement with your counterparty.
- If you have an ongoing dispute in the English courts or any EU27 courts, or proceedings which are commenced in 2021, advice should be taken as to the impact of Brexit on the enforcement of any resulting judgments. Similarly, if you are in possession of a judgment from the English courts or any EU27 courts, advice should be taken as to the impact of Brexit on the enforcement of such judgments.

[1] In alphabetical order: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden.

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