

JURISDICTION CLAUSES AND ARBITRATION AGREEMENTS AFTER BREXIT

With no provision for civil judicial cooperation in the Trade Agreement between the UK and the EU, the Brussels Recast Regulation no longer applies to cases commenced in England & Wales after 31 December 2020. The UK has also, effective 1 January 2021, acceded to the 2005 Hague Convention on Choice of Court Agreements in its own right. Previously the UK had been a party to the Hague Convention by virtue of membership of the EU.

In this alert, Rupert Reece and Daniel Holman from the International Dispute Resolution team at Gide Loyrette Nouel discuss the consequences of these changes for English jurisdiction clauses and judgments in cross-border matters involving EU Member States - and the options available for parties in this new post-Brexit regime.

Introduction

Two of the main benefits under the EU "Recast" Brussels Regulation¹ were the primacy given to choice of court agreements designating Member State courts, and the near automatic recognition and enforceability of judgments of Member State courts across the Union. While the UK remained a Member State, English jurisdiction clauses and judgments benefitted from the application of these rules on jurisdiction, recognition and enforcement across 27 EU nations (EU27).

Following the departure of the UK from the EU, the Brussels Recast Regulation however no longer applies to proceedings in English courts commenced after 31 December 2020.² The question for parties to English jurisdiction clauses, or those considering them, is therefore what rules will Member States now apply for English jurisdiction clauses and for the recognition or enforcement of English judgments in the absence of the Brussels Recast Regulation?

The answer, in short, is that this is now a matter of the national laws of the Member State(s) concerned in each case. With 27 separate Member States and legal systems in the EU, this however presents a potentially laborious and expensive solution for parties faced with parallel proceedings or enforcement across multiple jurisdictions.

One instrument that may be able to assist in this situation is the Hague Convention of 2005 on Choice of Court Agreements (Hague Convention). The UK and EU27 are each contracting states who have given effect to this instrument.³

The Hague Convention on Choice of Court Agreements 2005

Speaking broadly, the Hague Convention requires contracting states to uphold exclusive choice of court agreements designating courts of other contracting states and to recognise and

¹ Regulation (EU) No.1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

² The Withdrawal Agreement provides that the Brussels Recast Regulation continues to apply to proceedings in the English courts commenced before the end of the transition period, i.e. by 31 December 2020 (and to judgments of the English courts in those proceedings). Article 67 of the Withdrawal Agreement provides "*in respect of legal proceedings instituted before the end of the transition period ... the following acts or provisions shall apply ... the provisions regarding jurisdiction of Regulation (EU) No 1215/2012*" and, further, "*Regulation (EU) No 1215/2012 shall apply to the recognition and enforcement of judgments given in legal proceedings instituted before the end of the transition period.*"

³ The Hague Convention also currently applies in Mexico, Montenegro and Singapore.

enforce judgments given in proceedings based upon those agreements. For example:

- In relation to jurisdiction agreements, the Hague Convention provides that courts of a contracting state seised of proceedings where an exclusive court agreement designates the courts of another "shall suspend or dismiss" the proceedings.⁴
- On recognition and enforcement, contracting state courts may refuse recognition or enforcement of judgments of another only on the (limited) grounds set out in the Hague Convention - and without any "review of the merits" of the judgment.⁵ Grounds for refusal include fraud, an invalid jurisdiction clause, an inconsistent prior judgment, and reasons of public policy. The Hague Convention also prescribes the documents that parties need to submit in order to obtain recognition and/or enforcement.⁶

Though not as streamlined or comprehensive, by the above provisions the Hague Convention goes (at least) some way to filling gaps created by the absence of the Brussels Recast Regulation.

Conditions of application

The Hague Convention is however narrower in scope than the Brussels Recast Regulation:

- First, as noted, the Hague Convention applies only to proceedings in (and judgments given by) courts of contracting states designated in an exclusive choice of court agreement. Non-exclusive or asymmetric jurisdiction clauses, as often favoured in finance transactions, are not covered.
- Second, excluded subject-matters under the Hague Convention are wider than under the Brussels Recast Regulation. The Hague Convention, for instance, does not apply to consumer or employment contracts, nor to certain company-related issues.
- Third, in order to apply, the Hague Convention must be in force both (1) in the contracting state of the designated court before the choice of court agreement is concluded, and (2) in the contracting state of the enforcement, or parallel proceedings, before the enforcement or parallel proceedings commence.

It is this third condition which is potentially the most problematic. The UK and the European Commission diverge significantly as to when the Hague Convention entered into force in the UK.

Following approval by the EU, the Hague Convention entered into force in Member States generally - which included the UK at the time - on 1 October 2015.⁷

⁴ Hague Convention Article 6.

⁵ Hague Convention Article 8.

⁶ Note that the Hague Convention does not provide that judgments are recognised or enforceable "automatically" in the same way as the Brussels Recast Regulation (i.e. recognised "without any special procedure" and enforceable "without any declaration of enforceability"). Instead, the Hague Convention defines (limited) grounds for which contracting state courts may refuse recognition or enforcement, and prescribes the documents that parties need to provide to obtain it.

⁷ Denmark (where the Hague Convention entered into force on 30 May 2018) is an exception. The Hague Convention is also currently in force in Mexico (entry into force on 26 September 2007), Montenegro (18 April 2018) and Singapore (2 June 2016). China, Israel, North Macedonia, Ukraine and the USA are also signatories, though have not yet put the Hague Convention into force.

On 31 January 2020, the UK however left the EU and entered into a "transition period" under the terms of the Withdrawal Agreement which continued until 31 December 2020. How does this affect the status of the UK as a contracting party to the Hague Convention?

Firstly, the Withdrawal Agreement provides that during the transition period international agreements concluded by the EU (such as the Hague Convention) continue to apply to the UK.⁸ Further, as noted above, immediately following the end of the transition period, with effect from 1 January 2021, the UK acceded to the Hague Convention in its own right.

The position of the UK is therefore that the Hague Convention has continued in force in the UK since 1 October 2015 without interruption.⁹ The European Commission on the other hand has issued guidance stating that the Hague Convention entered into force in the UK only on 1 January 2021, when the UK joined in its own right.¹⁰

At the time of writing, we are not aware of any case offering a decision on this point. The consequences may be significant.

If EU27 courts follow the position of the European Commission then when, for example, seised of proceedings brought in breach of an English exclusive jurisdiction clause, or asked to enforce an English judgment, the Hague Convention rules may apply only if the jurisdiction agreement designating the English court was concluded on or after 1 January 2021. This significantly reduces the temporal scope of the Hague Convention for English jurisdiction clauses and judgments.

If the UK position is correct (as appears to the authors to be the better view, given the terms of Article 129 of the Withdrawal Agreement and the status of the UK as a Member State before the transition period), the Hague Convention should apply provided that the English exclusive jurisdiction clause was concluded on or after 1 October 2015.

What to do in the meantime?

In light of the above, parties with English jurisdiction clauses who want to make sure that the Hague Convention applies, may therefore wish to consider the following options:

- First, if the jurisdiction clause is non-exclusive, amending the clause to one that is exclusive.

The Hague Convention requires a choice of court agreement that designates the courts of a contracting state which is exclusive in order to apply. The Hague Convention explains that this means an agreement that *"designates, for the purpose of deciding disputes which have arisen*

⁸ Article 129 of the Withdrawal Agreement provides that "... during the transition period, the United Kingdom shall be bound by the obligations stemming from the international agreements concluded by the Union ..."

⁹ See for example the [UK notification of 28 September 2020](#) accompanying the instrument of accession to the Hague Convention, and the [Ministry of Justice Guidance of 31 December 2020](#) on Cross-border civil and commercial legal cases.

¹⁰ See European Commission Notice to Stakeholders of 27 August 2020: *"The [Hague] Convention will apply between the EU and the United Kingdom to exclusive choice of court agreements concluded after the Convention enters into force in the United Kingdom as party in its own right to the Convention"* (page 9).

or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State".¹¹

Parties therefore may wish to consider an exclusive jurisdiction clause along the lines of the following for example:

"The courts of England and Wales shall have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement."

- Second, if the clause (even if already exclusive) was concluded before 1 January 2021, re-executing the clause so that it is "concluded" after that date (e.g. by an addendum to the contract re-affirming the exclusive jurisdiction clause).

As noted, if EU27 courts follow the position of the European Commission, the Hague Convention rules may only apply if the English jurisdiction agreement is concluded on or after 1 January 2021. Re-executing the exclusive jurisdiction clause should ensure that it falls within this timeframe in the event that the view of the European Commission is upheld.

- Third, arbitration.

Arbitration remains largely unaffected by the departure of the UK from the European Union. Awards rendered in the UK remain readily enforceable in other jurisdictions under the New York Convention of 1958. Similarly, with the UK Supreme Court no longer strictly bound by the CJEU decision in *West Tankers*,¹² English courts may once again be able to grant anti-suit injunctions to restrain parties from pursuing proceedings in EU27 courts in breach of an arbitration agreement.

Parties looking to submit their disputes to arbitration may wish to consider, for example, the rules of the International Chamber of Commerce and a clause in line with its model as follows:

"All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by [one arbitrator / three arbitrators] appointed in accordance with the said Rules. The place of arbitration shall be [city, country]. The language of the arbitration shall be [language]."

Or the rules of the London Court of International Arbitration with a recommended clause as follows:

"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be [one/three]. The seat, or legal place, of arbitration shall be [City and/or Country]. The language to be used in the arbitral proceedings shall be [language]."

CONTACTS

RUPERT REECE

Barrister | Partner

Avocat au Barreau de Paris

Tel: +44 (0)20 7382 5757

reece@gide.com

DANIEL HOLMAN

Solicitor | Associate

Tel: +44 (0)20 7382 5662

daniel.holman@gide.com

¹¹ Hague Convention Article 3(a). Note that Article 3(b) provides further that "a choice of court agreement which designates the courts of one Contracting State ... shall be deemed to be exclusive unless the parties have expressly provided otherwise."

¹² Case C-185/07 *Allianz SpA & Anor v West Tankers Inc* [2009] ECR I-663.

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