UK/EU jurisdiction issues post Brexit: with chaos, comes opportunity (and the return of the Italian Torpedo)?

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Overview

There was no early Christmas present for those hoping for a comprehensive jurisdiction and enforcement of judgments regime between the UK and EU, mirroring the Recast Brussels Regulation applying between EU Member States. The EU/UK Trade and Cooperation Agreement was silent on this important area, with jurisdiction and enforcement joining financial services regulation equivalence on the cutting room floor. From 1 January 2021, we are left with the 2005 Hague Convention on Choice of Court Agreements (the “Hague Convention”), which provides a partial framework, and the hope of accession to the Lugano Convention 2007 in the coming months (not that the EU seems keen to agree).

This article examines the gaps that arise from the current situation and how parties may try to exploit an opportunity to complicate disputes. At its core, the EU’s Recast Brussels Regulation provided a clear framework as to where disputes should be heard and how Member States courts should respond in order to avoid unnecessary parallel proceedings. Without that framework, the current situation provides more scope for parties to take advantage of jurisdiction issues in the early stages of litigation, including the return of the so-called “Italian Torpedo”. These tactics are used to exert pressure on opponents, whether to encourage early settlement or even deter litigation being pursued.

The ambition (perhaps not universally shared between the UK and EU) will be to close these gaps, but that will take time. Disputes that arise in the interim, for example in relation to finance transactions impacted by current economic conditions, could be ripe for strategic jurisdiction challenges. During the Brexit process, industry organisations such as ISDA and the Loan Markets Association anticipated problems should a comprehensive post Brexit regime not be agreed, proposing Hague Convention compliant symmetric exclusive jurisdiction clauses for example. Although some contracts will have been amended to include these clauses or similar, there will still be many contracts which fail to meet the Hague Convention criteria.

We address proceedings commenced on or after 1 January 2021. Proceedings commenced prior to that date (and new proceedings relating to such proceedings) will still be covered by the Recast Brussels Regulation regime.

In order to illustrate the potential issues that may arise, we have assumed a dispute subject to an English court jurisdiction clause and the involvement of an EU Member State court.

The current situation: the Hague Convention

The UK has acceded to the Hague Convention in its own right with effect from 1 January 2021, having previously been bound via its membership of the EU. The Hague Convention applies only to exclusive choice of court agreements, which are agreements which designate the courts of one contracting state to the exclusion of the courts of any other state.

The UK hopes to accede to the Lugano Convention 2007 and has made the necessary request. However, the EU has not yet given its consent (which is required). Even if consent is eventually provided, accession will take months. This means that the Hague Convention is the only common regime currently in place and, if it does not apply, national laws will apply.

This situation provides opportunity for a party who sees strategic value in commencing proceedings in apparent breach of an exclusive or asymmetric jurisdiction clause:
1. Uncertainty as to when/if proceedings will be stayed by the (non-chosen) EU court in favour of the (chosen) English court

Where there is an exclusive choice of court agreement, Article 6 of the Hague Convention requires the non-chosen courts to suspend or dismiss proceedings unless prescribed exceptions apply, for example, a party lacked capacity to enter into the choice of court agreement or for reasons of public policy.

Depending on the approach of the non-chosen EU court, there could be substantial delay before a stay or dismissal is ordered. There is also the possibility that the non-chosen EU court could be persuaded that one of the exceptions to the requirement to suspend or dismiss the proceedings set out in Article 6 applies. Issues of capacity and public policy seem the most likely area of focus, depending on national law.

2. The Hague Convention only applies to exclusive jurisdiction agreements agreed after 1 January 2021

The UK and the EU differ as to whether choice of court agreements agreed prior to 1 January 2021 are covered by the Hague Convention (UK - yes; EU - no). This depends on whether the Hague Convention entered into force in the UK prior to 2021 by virtue of its then membership of the EU. The EU Commission’s position is that:

“The 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.”¹ [Emphasis added]

This means that exclusive choice of court agreements made between 1 October 2015 and 31 December 2020 would fall outside the Hague Convention. If courts of EU Member States adopt this view (which seems likely), those courts will not be bound by the Hague Convention requirement to stay or dismiss the proceedings. How that will play out in practice will require local law advice, but no doubt some EU domiciled parties with pre-2021 exclusive jurisdiction agreements in favour of the English courts will consider the strategic value of involving their home courts, even if just to slow down and complicate a dispute.

3. The Hague Convention does not apply to asymmetric clauses (commonly found in financial contracts)

The Hague Convention does not refer to asymmetric jurisdiction agreements where one party must sue in one designated jurisdiction, but the other party (often a financial institution) has a choice of where to sue. Are these asymmetric clauses caught within its definition of an exclusive choice of court agreement? The explanatory notes to the Hague Convention state that they are not². The English Court of Appeal has recently indicated that the Convention should “probably” be interpreted as excluding asymmetric clauses, although did not decide the point³.

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² Explanatory Report of Professors Trevor Hartley and Masato Dogauchi at paragraph 106: “It was agreed by the Diplomatic Session that, in order to be covered by the Convention, the agreement must be exclusive irrespective of the party bringing the proceedings. So agreements of the kind referred to in the previous paragraph [i.e. asymmetric agreements] are not exclusive choice of court agreements for the purposes of the Convention.”
³ Etihad Airways PJSC v. Prof. Dr. Lucas Flöther [2020] EWCA Civ 1707, per Henderson LJ at para 85.
On this basis, there is currently no common regime between the UK and the EU for asymmetric jurisdiction agreements. A party bound by an asymmetric clause (often a counterparty based in the EU) may explore the value of pursuing proceedings in its home country, particularly if that home court is likely to refuse to uphold asymmetric jurisdiction clauses (building on prior decisions in various European countries such as France).

This risk has been anticipated by industry organisations such as ISDA and the Loan Markets Association for some time, with Hague Convention compliant symmetric exclusive jurisdiction clauses increasingly being considered rather than asymmetric clauses. However, there will still be many contracts which fail to meet the Hague Convention criteria.

The position under Lugano - a return of the Italian Torpedo?

Even if the UK accedes to the Lugano Convention 2007, the Lugano regime is not as comprehensive as the Recast Brussels Regulation. Most notably, the Lugano Convention does not contain a mechanism to block the Italian Torpedo, with no equivalent to Article 31(2) of the Recast Brussels Regulation.

The Italian Torpedo was a litigation tactic whereby a party to a dispute commenced proceedings in an EU Member State in breach of an exclusive jurisdiction clause in favour of another EU Member State, for example in the Italian courts despite a jurisdiction agreement in favour of the English courts. In these circumstances, under the prior version of the Brussels Regulation, even if the other party subsequently commenced proceedings in the English courts, the English courts would be obliged to stay the proceedings until the first seised court (the Italian court) had determined jurisdiction. The determination by the first seised court could take months or years, with the prospect of delay and additional costs potentially helpful in achieving settlement or deterring the other “torpedoed” party from pursuing the dispute.

Article 31(2) was introduced as a means of stopping this practice, giving primacy to the court specified in the exclusive jurisdiction agreement. If the chosen court was seised, any other Member State court was required to stay its proceedings (even if seised first) until the chosen court declared that it had no jurisdiction under the agreement.

No such provision exists in the Lugano Convention 2007, which has not been updated to mirror the Recast Brussels Regulation. Under the lis pendens rule in Article 27 of the Lugano Convention, the second seised English court would need to wait until the first seised EU court had made its determination on jurisdiction, opening the door for the return of the Italian (or other) Torpedo.

Consequences of breaching English court jurisdiction agreements

Pursuing proceedings in breach of an exclusive jurisdiction clause in favour of the English courts could trigger additional litigation in the English courts, in particular the other party pursuing a claim for damages for breach of that jurisdiction clause. It is also possible that within the current Hague Convention regime, the English courts may be willing to grant an anti-suit injunction, restraining a party from continuing with proceedings commenced in breach of an exclusive jurisdiction clause. However, the prospect of further litigation may have limited deterrent effect if complication and delay is a party’s immediate litigation strategy.

Conclusion

The current situation is clearly a marked departure from a relatively conflict free jurisdiction and enforcement regime enjoyed between the UK and the EU prior to Brexit. In this environment,
parties to brewing disputes involving English jurisdiction governed contracts should consider potential jurisdiction challenges and take appropriate steps. With chaos, comes opportunity.