

# **BREXIT AND CROSS-BORDER LITIGATION: IMPLICATIONS AND ACTIONS**

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# Overview

- Brexit
- Jurisdiction
- Choice of Law Clause
- Jurisdiction Clause

# Overview

- Enforcement of Judgments
- The Hague Convention
- Anti-Suit Injunctions
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# Brexit

- EU Referendum – 23<sup>rd</sup> June 2016
- Gina Miller case
- European Union (Notification of Withdrawal) Act 2017
- Article 50 – 29<sup>th</sup> March 2017
- General Election – 8<sup>th</sup> June 2017
- Negotiations on Withdrawal Agreement with EU commence – June 19<sup>th</sup> 2017

# Brexit

- The Joint Report – 8<sup>th</sup> December 2017
- European Union (Withdrawal) Act 2018
- Withdrawal Agreement & Political Declaration – 25<sup>th</sup> November 2018
- Parliament rejects deal – (‘meaningful vote’ or ‘MV’) – 15<sup>th</sup> January 2019
- Joint Instrument (Strasbourg) – 11<sup>th</sup> March 2019 (AG advice)
- Parliament rejects MV2 – 12<sup>th</sup> March 2019
- EC meeting – 21<sup>st</sup> and 22<sup>nd</sup> March 2019 – short extension agreed
- 12<sup>th</sup> April 2019 (unconditional) and 22<sup>nd</sup> May 2019 (conditional)

# Brexit

- Parliament rejects MV3 (Withdrawal Agreement only) – 29<sup>th</sup> March 2019
- New extension agreed to 11pm on 31<sup>st</sup> October 2019 – ‘flexible extension’ (with option for UK to leave earlier if Parliament approves Withdrawal Agreement)
- ‘Get Boris’ - new PM – 24<sup>th</sup> July 2019
- Gina Miller and Supreme Court (Part 2) – 24<sup>th</sup> September 2019
- UK and EU agree draft agreement on the withdrawal – 17<sup>th</sup> October 2019
- No significant differences from Theresa May’s deal
- Extensive protocol on Northern Ireland

# Brexit

- UK government publishes its Withdrawal Agreement Bill (WAB) or EU (Withdrawal Agreement) Bill on 21<sup>st</sup> October 2019
- EU agreed to extend Brexit until 31<sup>st</sup> January 2020 on 28<sup>th</sup> October 2019
- "*Flextension*" – meaning the UK could leave before the deadline if a deal was approved by Parliament

# Brexit

- Political deadlock
- General Election – 12<sup>th</sup> December 2019
- The Commons votes 330 to 231 in favour of the Withdrawal Agreement Bill – 9<sup>th</sup> January 2020
- The EU (Withdrawal Agreement) Bill is now awaiting Royal Assent
- Withdrawal Agreement subject to ratification by EU parliament

# Brexit

## Preparations

- Government paper – ‘*Providing a Cross-Border Civil Jurisdiction Cooperation Framework*’ (August 2017)
- Government confirmed that it is its intention to incorporate into domestic law the Rome I and II instruments on choice of law and applicable law
- To avoid parallel proceedings in different jurisdictions

# Brexit

- Government should try to conclude a treaty with the EU which mirrors Brussels I (Recast) Regulation
- Rely on common law rules?
- Provision that the UK would take into account decisions of the Court of Justice of the European Union
- On interpretation of the Recast Regulations whilst not being bound by these
- Government should seek to conclude a treaty with the EU to ensure continuity of the rules of service

# Brexit

Government guidance on cross-border litigation (13<sup>th</sup> September 2018)

- *‘Any party to a cross-border legal dispute, including businesses, consumers and families would need to consider the effect that these changes would have on any existing or future cases involving parties in EU countries. Where appropriate you may wish to seek professional legal advice on the implications of these changes for your individual circumstances’.*

# Jurisdiction

## Direct EU Legislation

- The Brussels I (Recast) Regulations (EU) No 1215/2012 (since 10<sup>th</sup> January 2015); and
- The Brussels I Regulation (EC) No 44/2001 (from March 2002 to 9<sup>th</sup> January 2015)

# Jurisdiction

Brussels I (Recast) Regulation (EU) No 1215/2012 regulates:

- Where proceedings can be brought in different Member States
- Proceedings are stayed across the EU Member States until the question of jurisdiction is decided
- Normal rule – proceedings must be brought where a defendant is domiciled

# Jurisdiction

Are notable exceptions:

- Where there is a close connection between the court and the action
- Where the court would better serve the overall administration of justice
- Where the parties have entered into a jurisdiction agreement – any dispute to be referred to a court in a particular Member State

# Jurisdiction

International Conventions entered into by EU (on behalf of Member States):

- The Lugano II Convention (2007) (EU and Iceland, Norway and Switzerland)
- The Hague Convention on Choice of Court Agreements (2005)
- The EC / Denmark Agreement (19<sup>th</sup> October 2205) – use of Brussels I Regulation

# Jurisdiction

- EU-related international conventions
- The Brussels Conventions (various)
- The Lugano Convention (1988)

# Jurisdiction

Domestic UK Legislation that implements or facilitates the Brussels / Lugano regime in UK:

- The Civil Jurisdiction and Judgments Act 1982;
- The Civil Jurisdiction and Judgments Order 2001 (re Brussels I Regulation); and
- The Civil Judgments and Judgments Regulations (2009) (Lugano II Convention)

# Jurisdiction

Domestic UK statutes that give effect to international conventions that contain jurisdictional provisions:

- Carriage by Air (Warsaw / Montreal Conventions)
- Carriage by Road (CMR Convention)
- Carriage of Passengers and Luggage by Sea (Athens Convention)
- Carriage by Rail (Berne Convention, COTIF)
- Arbitration (New York Convention 1958)

# Jurisdiction

Common law jurisdiction rules:

- Residual;
- Only for cases that fall outside material scope of the Brussels / Lugano Regime;  
and
- Any other private international law instrument

# Jurisdiction

What happens on exit day – No-deal Brexit or at end of transition period?

- New provisions come into force:
  - The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019
  - Applies to jurisdiction and recognition of judgments

# Jurisdiction

- The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018 (S.I. 2018 No. 1124)
- The Civil Procedure Rules 1998 (Amendment) (EU) Exit) Regulations 2019 (Revisions)

# Jurisdiction

- The Service of Documents and Taking Evidence in Civil and Commercial Matters (Revocation and Saving Provisions) (EU Exit) Regulations 2018
- The European Union (Withdrawal) Act 2018 (Consequential Modifications and Repeals and Revocations) (EU Exit) Regulations 2018 (Interpretive Amendments)

# Jurisdiction

## Practical Implications

- Brussels / Lugano Regime ceased to apply in UK courts for new actions
- Brussels I (Recast) Regulation (No 1215/2012) has been revoked
- Lugano Convention and EU / Denmark Treaty cease to have effect as participation depends on UK status as a Member State
- UK cannot restore lost reciprocity and mutual cooperation that underpins regime
- No mutual recognition of UK by reference to Brussels / Lugano Regime

# Jurisdiction

## Savings provisions:

- The Civil Procedure Rules 1998 (Amendment) (EU Exit) Regulations 2019 (Revisions)
- Proceedings of which UK court *seised* before exit day and which are not concluded before exit day
- Regulation 92 – courts in England and Wales will continue to apply the existing jurisdiction rules to cases where the proceedings were commenced but not concluded before exit day

# Jurisdiction

Where one of relevant Brussels / Lugano Regime instruments applied immediately before exit day

To determine questions relating to jurisdiction of a UK court to hear proceedings (with minor modifications):

- The relevant instrument continues to have effect in relation to question of jurisdiction as if that instrument had not been revoked and the UK remained a Member State
- Any EU-derived domestic legislation relating to the relevant instrument continues to have effect in relation to questions of jurisdiction

# Jurisdiction

EU Position on transitional provisions:

- Notice to Stakeholders – ‘Withdrawal of the UK and EU rules in the field of civil justice and international law’ (18<sup>th</sup> January 2019)
- If proceedings involve defendant domiciled in UK which are pending with a court in EU 27 Member States on exit day:
  - EU rules for international jurisdiction continue to apply; but
  - Take note of Jurisdiction agreements, *Lis Pendens* rule and exclusive jurisdiction claims

# Jurisdiction

## New Cases

- Rules governing jurisdiction in all cross-border disputes regardless of domicile of the defendant:
  - Will be governed by the law of each UK jurisdiction
  - Common law, various statutory provisions and Part 6 of the Civil Procedure Rules 1998
  - But for cases involving a choice of court agreement:
    - Hague Convention of 30<sup>th</sup> June 2005 may be relevant depending on the country in which chosen court is established

# Jurisdiction

## Service

- Applicants will need to apply for permission to serve out of the jurisdiction under Civil Procedure Rules (CPR) 6.37
- Court will not give permission unless:
  - It is satisfied that the claim falls properly within a jurisdiction
  - England and Wales is the proper place to bring the claim
- The court can decline jurisdiction in more situations than under Brussels / Lugano regime

# Jurisdiction

## Consequences

- An increase in *forum non-convenient* challenges under CPR Part 11; and
- A consequent need to reconsider the ‘*anchor defendant*’ litigation strategy

# Choice of Law Clause

- A choice of law clause otherwise known as:
  - Applicable Law clause or
  - Governing Law clause
- The choice of law clause is one of the boilerplate clauses of an agreement
- Allows the parties to specify the substantive law that will apply to the interpretation of an agreement and in the event of a dispute, in relation to it

# Choice of Law Clause

- An English or Welsh party to an agreement may choose:
  - The law of England and Wales as the governing law of an agreement, or
  - A foreign law as the governing law of an agreement
- Advantages of English choice of law clause
- Recognition by EU Courts

# Choice of Law Clause

- Rome I
- Contractual claims (civil and commercial matters)
- Questions of interpretation and performance
- Where a contractual obligation falls within the scope of Rome I, its rules will be applied by the courts of Member States
- Even if the application of those rules results in a non-EU law (e.g. Indian law) being the governing law of any contractual obligations

# Choice of Law Clause

What happens if no choice of law clause specified?

- If no choice of law clause in the event of a dispute, the governing law will be determined by a court applying the conflict of law principles of its jurisdiction
- The parties to an agreement that do not specify a governing law will face:
  - uncertainty about its interpretation, performance and the consequences of a dispute; and
  - additional costs and delay in the event of a dispute

# Choice of Law Clause

## Example

- *‘This agreement and any dispute or claim arising under it shall be governed by, and construed in accordance with, the laws of [England and Wales / insert details of alternative governing law]’*
- If the intention of the parties is to restrict the governing law clause only to contractual claims, the wording of the clause should be amended to refer only to disputes or claims arising under the agreement.

# Choice of Law Clause

- Brexit is unlikely to have a significant impact on the enforceability of a choice of English law to govern parties' contractual (and non-contractual) relations
- Nor should it affect the underlying rights and obligations which arise out of such a choice
- The EU Member States will continue to be bound after Brexit by:
  - Regulation (EC) 593/2008, Rome I; and
  - Regulation (EC) 864/2007, Rome II
- These regulations do not require reciprocity

# Choice of Law Clause

- Choice of law clauses identifying English law as the choice of law for a contract will continue to be upheld by those EU Member States
- UK bound by Rome I and Rome II?
- Namely, during the transition period set out in any withdrawal agreement entered into between the UK and the EU
- Or by virtue of those regulations becoming retained EU law

# Jurisdiction Clause

- A jurisdiction agreement is an agreement by which parties agree which court or courts will have jurisdiction to adjudicate disputes that may arise between them
- This form of agreement between the parties can limit the risks arising from their disputes
- A jurisdiction can be entered into in conjunction with other types of agreement that serve the same aim

# Jurisdiction Clause

- Set out the agreed method for service of the claim form, known as service of suit clauses
- Provide for the procedure to be adopted in litigation between the parties
- Limit the remedies available to the parties should they litigate against one another
- Submit disputes to alternative dispute resolution, e.g. arbitration agreements

# Jurisdiction Clause

- Parties entering into a jurisdiction agreement can limit two types of risk that arise in litigation:
  - **First risk** – the risk of either being sued, or being obliged to sue in an unfavourable forum
  - A forum may be viewed more or less favourable for any number of reasons
  - **Second risk** – the risk in relation to the enforcement of any judgment obtained in the litigation
  - There is little point in obtaining a judgment if it cannot be enforced

# Jurisdiction Clause

- A jurisdiction agreement does not guarantee that one of the parties will not start proceedings in a court other than an agreed court
- Even where the parties have agreed a jurisdiction agreement, one party may seek to dispute the authenticity of that agreement before the court – *Ashley v Jimenez (2019)*

# Jurisdiction Clause

- An exclusive jurisdiction agreement:
  - Positive aspect – the parties agree to settle their disputes in the agreed forum
  - Negative aspect – parties are promising not to settle their disputes in a forum other than the agreed forum

# Jurisdiction Clause

- Article 25 of Regulation (EU) 1215/2012, Brussels I (Recast) provides:
  - A jurisdiction agreement shall be exclusive unless the parties have agreed otherwise
  - It is however to be doubted that this creates a presumption in favour of exclusivity

# Jurisdiction Clause

- *Hin-Pro International Logistics v Compania Sud Americana De Vapores* where the absence of the word ‘exclusive’ did not preclude the Court of Appeal from construing the relevant provision as an exclusive jurisdiction clause:
  - ‘*This Bill of Lading and any claim or dispute arising hereunder shall be subject to English law and the jurisdiction of the English High Court of Justice in London. If, notwithstanding the foregoing, any proceedings are commenced in another jurisdiction, such proceeding shall be referred to ordinary courts of law.*’

# Jurisdiction Clause

- A non-exclusive jurisdiction clause (generally):
  - **Positive aspect** – like an exclusive jurisdiction clause, the parties agree to settle their disputes in the agreed forum
  - **Negative aspect** – none. A party to a non-exclusive jurisdiction clause is not (generally) prevented by the agreement from bringing proceedings in a forum other than the agreed forum

# Jurisdiction Clause

- *Standard Chartered Bank v Independent Power Tanzania 2015*
  - '(B) Courts of England and Malaysia: For the benefit of the Arranging Banks, the Facility Agent and each Bank, all parties irrevocably agree that the courts of England and Malaysia are to have jurisdiction to settle any disputes which may arise out of or in connection with this Agreement and that, accordingly, any legal action or proceedings arising out of or in connection with this Agreement ("Proceedings") may be brought in those courts and each party irrevocably submits to the jurisdiction of those courts'

## Jurisdiction Clause

- *(C) Other Competent Jurisdiction: Nothing in this Clause 33 shall limit the right of any party to take Proceedings against any other party in any other court of competent jurisdiction nor shall the taking of Proceedings in one or more jurisdictions preclude a party from taking Proceedings in any other jurisdiction, whether concurrently or not*
- *(D) Venue: Each party irrevocably waives any objection which it may have to the laying of the venue of any Proceedings in any court referred to in this Clause 33 and any claim that any such Proceedings have been brought in an inconvenient forum'*

# Jurisdiction Clause

- Asymmetric jurisdiction agreements
- Often found in financial instruments
- An example of such a clause may be: *‘X may sue Y only in the courts of England and Wales but Y may sue X in France.’*
- English courts are given exclusive jurisdiction to decide disputes, subject to the option of the bank to sue the counter-party in any jurisdiction it wishes

# Enforcement of Judgments

- Currently:
  - Once a judgment is obtained in an EU country, it is possible to apply to the court for a European Enforcement Order
  - Judgment can be enforced in a different Member State
  - No requirement for formal recognition from its Courts

# Enforcement of Judgments

- Recast Regulation enables judgments to be automatically enforced in other EU Member States
- Service Regulation (Regulation (EC) No 1393/2007)
- Rome Convention
- The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019
- Applies to recognition of judgments

# Enforcement of Judgments

- Post exit, regulation 92 provides that courts in the UK will continue to apply the exiting recognition and enforcement of judgment rules to:
  - Judgments obtained in proceedings commenced before exit day
  - In an EU Member State or Lugano State
- Applies where parties have come to a court settlement or registered an '*authentic instrument*' before exit day and one party wishes to obtain recognition and enforcement after that date in UK

# Enforcement of Judgments

## New Cases

- Cases instituted after exit day
- Post-exit rules governing jurisdiction in all cross-border disputes will apply
- Regardless of the domicile of the defendant
- Will be the law of each UK jurisdiction
- Common law, statutory provisions including Part 6 of the CPR 1998 (Notably Practice Direction 6B)

# Enforcement of Judgments

- Commission guidance states that judgments of a UK court which have been *exequatur* but not yet enforced in the EU27 before exit day can still be enforced in EU27
- EU rules will not otherwise apply and enforcement will be a matter for the national rules of the relevant EU member State in which enforcement sought

# The Hague Convention

- Choice of court agreements
- Provides a framework of rules on exclusive jurisdiction agreements
- Recognition and enforcement of judgments in civil and commercial matters
- Came into force on 1<sup>st</sup> October 2015 in all EU member states (except Denmark)
- Applies to exclusive choice of court agreements contained in business-to-business contracts

# The Hague Convention

- Does not apply to unilateral or asymmetric jurisdiction agreements
- Chosen court will have jurisdiction unless the agreement is null and void under the law of that state
- Court that has exclusive jurisdiction under an exclusive choice of court agreement cannot decline jurisdiction
- Any other court of a contracting state must suspend or dismiss proceedings to which a choice of court applies unless:

# The Hague Convention

- The agreement is null and void;
- Lack of capacity;
- Manifest injustice / contrary to public policy;
- Exceptional reasons agreement cannot be reasonably performed (beyond the control of the parties);
- Chosen court decided not to hear the case;

# The Hague Convention

- Judgment given by a court of contracting state designated in an exclusive choice of agreement shall be recognised and enforced in other contracting states;
- The enforcing court is not allowed to review the merits of the judgment;
- A judgment is recognised and enforceable only in the state of its origin; and
- Enforcement may be postponed or refused if judgment is under review in the state of its origin

# The Hague Convention

- Hague Convention designed to bring about an international legal regime that provides certainty in the recognition and enforcement of court judgments
- Intention of Government to sign Hague Convention (1st November 2019)
- And now?

# Anti-Suit Injunctions

- English courts long had power to grant anti-suit injunctions
- Restrain a party from commencing or continuing proceedings in a court or tribunal overseas
- Where those proceedings were being conducted in breach of a contractual agreement as to where disputes should be resolved
- Breach of an exclusive jurisdiction or arbitration agreement
- Power limited as a result of the Brussels Regulation (44/2001) and then from 10<sup>th</sup> January 2015 – Recast Brussels Regulation

# Anti-Suit Injunctions

Application needs to address four issues:

- Whether the English court has personal jurisdiction over the respondent;
- Whether the English court has a sufficient interest in the proceedings to justify restraining foreign proceedings;
- Whether an appropriate ground for obtaining relief can be made out; and
- Whether as a matter of discretion it is appropriate to grant the injunction

# Anti-Suit Injunctions

- Some uncertainty as to whether decision in *Allianz SpA v West Tankers Inc* ('*West Tankers*') [2012] EWCA Civ 27 would apply after Recast Brussels Regulation
- Court held that an anti-suit injunction issued by a member state (rather than an arbitral tribunal) in order to restrain proceedings brought in breach of an arbitration agreement was incompatible with the Brussels Regulation

# Anti-Suit Injunctions

- Decision of CJEU in *Gazprom (Case C -536/13) (2015)*
- *Recital 12*
- *Court was to consider whether it is compatible with the Brussels Regulation for the court of an EU member state to ‘recognise and enforce an arbitral award ordering a party to arbitration proceedings to reduce the scope of the claims formulated in proceedings pending before a court of that Member State’.*
- *Court relied on Article 1(2) (d) of the Brussels Regulation (not recast Brussels Regulation)*

# Anti-Suit Injunctions

- Court held that proceedings for the recognition and enforcement of arbitral awards are covered by applicable national and international law in the member State and not by the Brussels Regulation
- Judgment did not revisit *West Tankers* (distinguished on basis of it being in relation to an injunction issued by a court of the member State instead of the arbitral tribunal)

# Anti-Suit Injunctions

- *Nori Holding and others v Public Joint-Stock Company Bank Otkritie Financial Corporation [2018]*
  - Position under the Recast Brussels Regulation put to the test
  - Claimant sought anti-suit injunctions restraining:
    - Proceedings brought by the defendant bank in the courts of Russia and Cyprus
  - Claimant met with mixed success

# Anti-Suit Injunctions

Males J confirmed that the claimant could:

- Seek an anti-suit injunction from the arbitral tribunal (the CJEU in *Gazprom* confirmed that the (old) Brussels Regulation would allow the enforcement of such an injunction in the EU Courts); and
- Seek to recover damages in respect of any losses caused to it as a result of the Cyprus proceedings from the arbitral tribunal

# Anti-Suit Injunctions

- Impact of Brexit on English Courts' ability to grant anti-suit injunctions unclear
- Lugano convention (which mirrors the wording of the (old) Brussels Regulation)
- If no comparable terms are agreed, anti-suit injunctions restraining proceedings in EU Member State courts could be under the spotlight
- May not arise until 2021 at the earliest

# Arbitration Agreements

- International arbitration is a popular mechanism for resolving commercial disputes
- Common dispute resolution clause in insurance and construction contracts
- Main advantages are :
  - Flexibility
  - Neutrality
  - Privacy
  - Finality

# Arbitration Agreements

- Ease of enforcement that it offers compared to litigation
- Recent survey – 97% of respondents indicated that international arbitration is their preferred method of dispute resolution
- Commercial arbitration is a creature of contract in terms of the agreement to arbitrate and the applicable procedures
- The law of the seat of the arbitration will also continue to apply post-Brexit to the supervisory jurisdiction of the courts

# Arbitration Agreements

- Arbitration will not be affected by Brexit
- That is the case in a situation of a deal or a no-deal scenario
- The recognition and international enforcement of arbitration awards is governed by the New York Convention
- Arbitration Act 1996

# Arbitration Agreements

- As the Withdrawal Agreement has been passed by Parliament:
  - Article 89 provides that the decisions and orders of the CJEU remain binding on the UK during the transition period (to 31 December 2020)
  - Anti-suit injunctions to restrain proceedings in breach of an arbitration agreement will not be available during the transition period

# Arbitration Agreements

- Effect of UK leaving EU (after transition period ends) - UK will not be bound by decisions of the CJEU:
  - The UK courts could therefore resurrect the use of anti-suit injunctions
  - Including to prevent parties commencing court proceedings in an EU Member State in breach of an arbitration agreement
  - The courts of EU Member States would also be free to grant anti-suit injunctions restraining a party from bringing an action in the English courts

# Arbitration Agreements

Possible question-marks over:

- whether such injunctions would be enforced; and
- the enforceability of an arbitration award obtained after the granting of such an injunction

# Arbitration Agreements

- Position post-Brexit remains the same and may in fact lead to a greater use of arbitration given potential uncertainties around the enforceability of UK judgments
- Popularity of London as a seat of arbitration strengthens
- Overseas businesses consider choosing a dispute resolution clause which elect to any dispute resolved by arbitration in London
- Arbitrators in London known for their expertise and commerciality

# Conclusion

- How will disputes be dealt with in future?
- EU legislation on choice of law and jurisdiction fall away?
- Increasing use of exclusive jurisdiction clauses
- Arbitration the winner?
- Same game but different rules?

# Disclaimer

- This Brexit presentation contains general advice and comments only and therefore specific legal advice should be taken before reliance is placed upon it in any particular circumstances