

JURISDICTION AND ENFORCEMENT POST BREXIT – THE ENGLISH AND SWISS PERSPECTIVES

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On 31 December 2020 the transition period for the UK's exit from the EU ended and the EU-UK Trade and Cooperation Agreement was finalised.¹ As the UK has not yet acceded to the Lugano Convention 2007,² from 1 January 2021³ questions relating to the jurisdiction of courts and the recognition and enforcement of judgments involving new cases commenced in the UK will either be governed by the Hague Convention on Choice of Court Agreements 2005 (the “**Hague Convention**”)⁴ or by domestic law regimes.

This article summarises the key regimes and the impact of Brexit on jurisdiction and enforcement of court judgments, from both English and Swiss perspectives. Importantly, arbitration is unaffected by these changes and therefore may offer a more certain and predictable regime.

¹ The agreement can be found here: <https://www.gov.uk/government/publications/agreements-reached-between-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-european-union>.

² Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed in Lugano on 30 October 2007 and published in the Official Journal on 21 December 2007 (L339/3). The Lugano Convention applies to most private law disputes involving EU Member States, and for example Switzerland, with respect to jurisdiction and recognition and enforcement of judgments.

³ This article focuses on the position for proceedings commenced from 1 January 2021. For transitional cases, i.e., those with legal proceedings having already commenced or judgments already rendered before the end of the transition period, Brexit has minimal impact but legal advice, nonetheless, is advisable.

⁴ Convention of 30 June 2005 on Choice of Court Agreements. Current contracting parties to the Hague Convention are the UK, the EU, Singapore, Mexico and Montenegro. This article focuses on the impact of Brexit and the UK's relationship with the EU and not the UK's relationship with other jurisdictions, such as Commonwealth countries, where different regimes apply.

What regime is now applicable as between the UK and the EU?

The Brussels Recast Regulation⁵ and the Lugano Convention no longer apply with respect to new civil and commercial cases commenced in England and Wales on or after 1 January 2021. While the UK applied to join the Lugano Convention in April 2020 in its own right, and the EU vetoed the UK's accession, it remains to be seen whether the EU will give its approval in due course. Notably, Switzerland, among other contracting states, declared its support for the UK's accession.⁶

Subject to certain exceptions and limitations, explained further below, from 1 January 2021 the jurisdiction and enforcement of court judgments as between the UK and EU – where there is a choice of court agreement – will be governed by the Hague Convention. There is, however, ongoing uncertainty over the temporal scope of the Hague Convention. The English Ministry of Justice's guidance is that the Hague Convention will apply uninterrupted to exclusive jurisdiction clauses concluded after 1 October 2015,⁷ i.e., from its original entry into force. On the other hand, the EU Commission's position is that the Hague Convention only applies "to exclusive choice of court agreements concluded after the Convention enters into force in the United Kingdom as a party in its own right to the Convention",⁸ i.e., from 1 January 2021. If the EU Commission's position were to be followed, this would mean that exclusive jurisdiction clauses agreed, or judgments rendered prior to 1 January 2021, would not fall under the scope of the Hague Convention.

⁵ Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

⁶ <https://www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007>.

⁷ <https://www.gov.uk/government/publications/cross-border-civil-and-commercial-legal-cases-guidance-for-legal-professionals/cross-border-civil-and-commercial-legal-cases-guidance-for-legal-professionals>.

⁸ European Commission, Notice to Stakeholders -Withdrawal of the United Kingdom and EU Rules in the Field of Civil Justice and Private International Law - https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/civil_justice_en.pdf.

How are issues of jurisdiction and enforcement dealt with under the Hague Convention?

The Hague Convention offers the following reciprocal regime with respect to jurisdiction and enforcement of court judgments:

1. **Jurisdiction.** Courts of contracting states are to uphold exclusive jurisdiction agreements in favour of the chosen contracting court. For example, if litigation is commenced in the French courts in breach of an English exclusive jurisdiction clause, subject to certain exceptions (such as where the jurisdiction agreement offends French public policy), the French court could be required to suspend or dismiss the proceedings.
2. **Enforcement.** Courts of contracting states are to also recognise and enforce judgments issued by courts of other contracting states that result from proceedings based on exclusive jurisdiction agreements. By way of example, the English courts are required to recognise and enforce a German court judgment that derived from a German exclusive jurisdiction clause, again subject to certain exceptions.

What are the key limitations of the Hague Convention?

For the Hague Convention to apply, there must be an exclusive jurisdiction clause in favour of the courts of a contracting state; the Convention does not apply to non-exclusive jurisdiction clauses. Moreover, there is uncertainty over its application to asymmetric or unilateral clauses, such as where only one party is given a choice of a range of courts to sue and the other's choice of court is limited.

The Hague Convention does not apply to interim protection measures such as interim freezing orders.

What is the position if the Hague Convention is not applicable?

If the Hague Convention is not applicable, for example where non-contracting parties are concerned or there is no exclusive jurisdiction clause, the relevant domestic law applies, and local advice should be obtained.

From an English common law perspective, English courts usually uphold the parties' contractual intentions, including their jurisdiction clause.

However, an English court may assert its jurisdiction, even if contrary to the terms of an exclusive jurisdiction clause, if, applying the *forum non conveniens* test, it finds that the English courts are a more appropriate and convenient forum to hear the case.

With respect to enforcement, the regime under the English common law is less straightforward than under the Hague Convention or, previously, the Brussels Recast Regulation. Among other things, a judgment is not directly enforceable in the UK but will be treated as a debt requiring the commencement of fresh proceedings (usually resulting in summary judgment). In addition, provided it meets certain criteria, a foreign judgment will be enforceable only if the foreign court has jurisdiction according to the rules under English law.

What regime is applicable as between the UK and Switzerland?

Switzerland is a contracting party to the Lugano Convention but is not a party to the Hague Convention. By contrast, the UK is a party to the Hague Convention and currently not to the Lugano Convention. In addition, there is no bilateral treaty between Switzerland and the UK with respect to the reciprocal enforcement of judgments.

Accordingly, the English common law rules will be applicable in the English courts when considering issues of jurisdiction and enforcement of a Swiss court judgment, and the Swiss Private and International Law Act (“PILA”) will be applicable in the Swiss courts when considering issues of jurisdiction and enforcement of English court judgments. Consequently, the enforcement of English worldwide freezing orders in Switzerland, previously governed by the Lugano Convention, is uncertain. While it is a matter of debate, the prevailing view is that such orders will be unenforceable in Switzerland.

Is arbitration impacted by these changes and should I include an arbitration agreement in my contract?

The jurisdiction of arbitral tribunals and the recognition and enforcement of arbitral awards are governed by entirely separate regimes to court judgments. Rules on jurisdiction derive from the law of the seat of arbitration and any applicable arbitral rules, and the recognition and

enforcement of awards is governed by the New York Convention.⁹ Accordingly, the validity of arbitration agreements and the parties' ability to have arbitral awards recognised and enforced in the UK or elsewhere remain largely unaffected by Brexit. Parties concerned about the uncertainties outlined above may therefore wish to consider selecting arbitration as a means for dispute resolution.

Comment

Although we now have greater certainty regarding the applicable regime post-Brexit, much remains unclear. While the English courts will likely apply the Hague Convention to exclusive jurisdiction clauses agreed after 1 October 2015, it remains to be seen how courts of EU Member States will apply the Hague Convention in light of the EU Commission's position. In addition, careful consideration and legal advice with respect to a given jurisdiction clause in an agreement will be necessary when determining whether it is an "exclusive" jurisdiction clause within the meaning of the Hague Convention. Both areas of uncertainty may also lead to an increase in jurisdictional challenges.

Parties are therefore advised to always seek legal advice with respect to their dispute resolution clauses in order to avoid unintended consequences. In particular, parties should take due care when negotiating contracts and choosing between exclusive and non-exclusive (or asymmetric) clauses.

There may however also be certain benefits to the Brussels Recast Regulation no longer applying, at least in most cases. Indeed, the English Courts may no longer be restricted with respect to anti-suit injunctions and awarding damages for breach of jurisdiction clauses. In addition, where the common law rules on jurisdiction are applicable, the jurisdiction of the English courts may be more widely available. This may provide welcome advantages.

⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958).

Moreover, the attraction of English law as the governing law and London as the seat in international arbitration proceedings remains intact. There is no reason to doubt that London will continue to be a popular and trusted arbitral seat or that English law will continue to offer a predictable and transparent regime post-Brexit, with the enforcement of arbitral awards still governed by the New York Convention.

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