Linklaters

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UK/EU: The UK has voted to leave the EU – impact on the use of English governing law and jurisdiction clauses in cross-border commercial contracts.

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As the UK has now voted to leave the EU, parties to commercial contracts which would usually have been made subject to English law and/or a jurisdiction clause in favour of the English courts may well be concerned to know whether those choices remain viable. This briefing summarises the issues.

Introduction

A governing law clause and, where the parties wish to resolve their disputes by litigation (as opposed to arbitration), a jurisdiction clause form key, but distinct, provisions in a cross-border commercial contract's dispute resolution provisions.

English law is commonly chosen by parties to govern cross-border commercial contracts and any associated non-contractual claims due to its commerciality and predictability. Similarly, the English courts are a popular choice of venue because of their relative adjudicative attractions.

Do such choices remain viable now that the UK has voted to leave the EU? The reason for the question is because certain important statutes which govern such choices before the English, and EU, courts are instruments of EU law.

These will not disappear overnight. Until the UK formally leaves the EU ("**Brexit**") it remains an EU Member State and the current regime should remain in place. Where, however, the position post-Brexit may be relevant; what do parties need to consider?

For present purposes we assume that the parties are seeking to conclude a cross-border commercial contract in a context within which they are generally free to make such choices.[1]

[1] If, by contrast, EU Law in a relevant area mandates a particular choice or outcome in this regard and enforcement of a judgment is likely to be required in an EU Member State (or, to the extent the relevant law applies therein, an EFTA State) then more bespoke consideration may be required. In particular, whilst the parties may well structure their choice now so that it is compliant with that EU law, consideration may need to be given as to whether it will remain so in the event that the UK is no longer an EU Member State. If not, complications could arise at the enforcement stage.

Choosing English law as a governing law

There are two points. First would Brexit compromise the continued viability of such a choice as a matter of substance? At a very general level it would seem not as many of the advantages of English law (such as its commerciality, predictability and depth of judicial precedent) are not contingent upon EU law. Drafters of English law governed contracts may, however, need to grapple with the potential for change in the event that particular EU laws or concepts are relevant to their situation.

The second issue is whether Brexit would compromise the *enforceability o*f a choice of English law. In other words: can parties be happy that it will continue to be given *effect*?

The question arises if a matter will fall to be litigated before the UK or other EU courts; this is because it is EU Regulations which, before those courts, generally give effect to the parties' choice.

Here, overall, Brexit would likely bring little change. Before the English courts it is possible that provision will be made for similar rules to carry on. Even if not, then, overall, under English rules the parties' choice would generally be upheld.[2] As regards other EU Member State courts, those Regulations will continue to apply to give effect to the parties' choice, even if in favour of English law (under those Regulations it does not matter if the choice is of a non-EU Member State law).

Choosing the English Courts in a jurisdiction clause

Again there are a number of considerations. The first is that the core adjudicative attractions of the English courts are unlikely to be affected by Brexit; the English judiciary would not be affected, nor would England's core civil procedure rules.

The second question is whether the clause would remain effective to *confer* jurisdiction on the English courts, and (to the extent exclusive) require other non-chosen courts to decline to hear a case. Brexit has the potential to affect such matters from the perspective of England, as a chosen court, and other EU courts (as non-chosen courts) because, generally speaking, EU legislation gives such a clause these effects in England and elsewhere around the EU.[3]

Fortunately, from the perspective of the English courts, even assuming nothing takes the place of this legislation (which will turn largely on what happens during the UK's exit negotiations) the English courts would, under English common law, generally accept jurisdiction on the basis of the parties' choice. By contrast, there would be less consistency when it comes to the treatment of the clause (to the extent exclusive) by a non-chosen EU Member State court. However, this may be

[2] Although our focus is on choices of English law, the same would be true before the English courts if the parties' choice was of a foreign law.

[3] And Switzerland, Iceland and Norway as EU Law in the areas of jurisdiction & the recognition and enforcement of judgments is extended to those countries. In cases which fall within the much more limited scope of the Hague Convention on choice of Court Agreements (which, in the EU, is part of EU Law), any non-EU Hague Convention States (currently only Mexico and (as of 1 October 2016) Singapore) can be added to this list.
References to "EU Member State" in the remainder of this note should therefore, to save non-repetition of this point, be read as including references to all the aforementioned countries in this footnote (although, in the case of Mexico and Singapore, this should only be so read in cases to which the Hague Convention would otherwise apply).

off-set by more freedom for the English courts to protect their jurisdiction, principally by way of anti-suit injunction.

The third question is whether Brexit may adversely affect the enforceability of an English judgment in the EU Member States. Again this is a potential question as the aforementioned EU legislation also secures ease of court judgments as between the EU Member States. Again, on the assumption that nothing takes the place of this legislation, following Brexit, the enforcement of an English court judgment in the relevant EU Member State would be left to local law.

Compared to the current regime, this carries the potential disadvantage of English judgments being subjected to national procedural laws (which may be less streamlined), and national substantive tests (which may afford less favourable treatment to English judgments).

Practical consequences for English jurisdiction clauses

So, the main new area of risk for parties to a freely negotiated cross-border commercial contract is likely to be where the English courts have been chosen and enforcement of the resultant judgment in an EU Member State is likely to be required following Brexit. What might parties wish to do in such circumstances where litigating in England would otherwise be first choice?

At the outset, it should be noted that a vote to leave does not necessarily mean that this "least certainty" scenario actually happens. There are a number of possible outcomes from the withdrawal process - although none of them are necessarily fool-proof or guaranteed to happen.

How parties react to this development may therefore partly depend upon their attitude to risk, the nature of the contract to be concluded and whether the position post-Brexit is likely to be relevant. The unfolding of the UK's withdrawal negotiations over time (which may cast more light upon what arrangements, if any, will remain) may also influence matters.

If, however, the concern is to "Brexit-proof" as far as possible the most conservative approach may be to assume that local law will apply and to take local advice to confirm whether enforcement of an English judgment under national law is likely to be possible in the relevant EU Member State.

Where this confirms that the relevant local law is likely to be receptive to enforcement of an English judgment the parties may consider that the English courts remain a suitable choice. By contrast, where there may be difficulties, the parties may then wish to consider other options for their choice of forum. In that regard, if English law is to remain the governing law then the most conservative of these, particularly from an enforcement perspective, is likely to be an arbitration clause with seat in London.[4]

[4] The parties' choice of London seated arbitration and related matters under any such arbitration clause is likely to be unaffected by Brexit as arbitration law is generally regulated by national law (in England, the Arbitration Act 1996) and non-EU international instruments (the New York Convention). An arbitral award made in the UK should remain recognised and enforceable in EU Member States, and vice versa, on the basis of that Convention.

What about jurisdiction clauses in favour of EU Member States?

What about the converse situation where parties using a jurisdiction clause in favour of an EU Member State want to know whether the English courts will decline jurisdiction on the basis of the clause (if exclusive) and/or give effect to a resultant judgment. Assuming, as above, that nothing takes the place of the aforementioned EU legislation in this area, both these issues would generally fall to be determined by English common law. Under the common law, to the extent that a jurisdiction clause is exclusive in favour of elsewhere, the English courts would generally stay proceedings in favour of the chosen court. Likewise, the English common law is relatively receptive to the enforcement of foreign judgments so, although procedurally more cumbersome, there would likely be little practical impact.

This briefing is a summary of a more in depth analysis of these issues which appears on the Linklaters Dispute Toolkit. Our Dispute Toolkit provides free web-based access to precedent jurisdiction and arbitration clauses and other information about dispute resolution. The Dispute Toolkit can be found on the Linklaters Client Knowledge Portal; our free online subscription service, available exclusively to our clients. In addition to the Dispute Toolkit, The Portal enables subscribers to receive the latest legal updates on their chosen topics and search other resources, including downloadable videos and podcasts. If you are not a subscriber and would like access, please e-mail the following address:

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