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Will You Be Caught In The 'Wrong' Law Or Courts Post-Brexit?

Law360, New York (September 26, 2016, 9:24 AM EDT) --


Gemma Anderson

The European Union legal regime currently provides contracting parties with significant predictability and stability. The United Kingdom's election on June 23, 2016, to exit the EU presents a potential affront to such certainty, and has understandably ruffled the feathers of contracting parties doing business in the U.K. and the EU and worried about being caught in the "wrong" law or courts post-Brexit.

The reality is that the Brexit process is likely to take a long time and it is difficult to predict the impact of Brexit on any area, including contracting and disputes, until we know what post-Brexit model the U.K. will choose to adopt. That said, there are some practical steps that parties revisiting existing contracts or negotiating new ones can take now to seek to insulate themselves against the impact of Brexit and the intervening uncertainty.

The Risk of Being Caught in the 'Wrong' Law Post-Brexit

The law that will govern the contract, and disputes arising under it, is an important consideration for contracting parties, particularly in cross-border situations. English law has traditionally been a popular and arguably "safe" choice, even for contracts with no real connection to the jurisdiction, due to its emphasis on freedom of contract and commerciality and relative predictability.

What's the risk and what can you do about it?

Current Regime

Under the Rome I and Rome II Regulations, the EU courts will uphold parties' choice of law with respect to contractual and noncontractual obligations. This means that the governing law provision in a contract will generally be respected for both contractual and other (e.g., tort) claims.

Post-Brexit Options

Post-Brexit, Rome I and Rome II will still apply in other EU member states, meaning that the courts in those countries will continue to recognize parties' choice of English law.

In the U.K., however, Rome I and Rome II will cease to apply. Unless equivalent rules are agreed on

between the U.K. and EU, the English courts will likely revert to the rules in place before Rome I and Rome II.

- For contractual obligations, it is unlikely that Brexit will impact the effectiveness of parties' choice of governing law. The previous regime, the Rome Convention, is similar to Rome I and also respects parties' choice of law in relation to contractual claims.

- For noncontractual obligations, it is possible that the English courts will find a different governing law applies than that chosen by the parties. The previous rules are contained in the Private International Law (Miscellaneous Provisions) Act 1995, which (unlike Rome II) does not give parties an express right to choose the law applicable to noncontractual obligations. The applicable law will instead be the law of the country in which the tort, or the most significant event, occurred. For example, if a claim for negligence arises in relation to a contract for the provision of depository services in Germany with an English governing law clause, the English courts may find that German law governs the dispute.

The risk of getting stuck in the "wrong law" post-Brexit is low. Where you have agreed for English law to govern your disputes, that choice will continue to be respected in other EU member states. Similarly, Brexit is unlikely to have any impact on the willingness of the English courts to uphold parties' choice of law in relation to contractual claims. You should, however, be aware that there is a risk that your choice of law with respect to non-contractual obligations may not be upheld by the English courts post-Brexit. As ever, best practice is nonetheless to always to include a governing law provision in contracts.

The Risk of Being Caught in the 'Wrong' Courts Post-Brexit

The choice of court is of critical importance and can influence the length and cost of any proceedings, and, crucially in a financing context, the reliability and enforceability of any resulting judgment. Brexit has the potential to impact some of the key factors contracting parties are interested in by deciding which courts will determine their disputes, including: (1) the reliability that their choice will be upheld by the courts in which proceedings are likely to be commenced (and the risk of parallel proceedings avoided); (2) the ease with which judgments and other (e.g., interim) remedies obtained in their chosen courts can be enforced in the jurisdiction(s) in which their opponent has assets; and (3) the speed with which proceedings can be commenced.

Will your choice of jurisdiction be upheld post-Brexit?

<u>Current Regime</u>

The Recast Brussels Regulation currently ensures that the English courts, and the courts of other EU member states, will uphold an agreement conferring jurisdiction on an EU member state court (regardless of whether the parties are located inside or outside the EU). Where proceedings are commenced in the courts of another EU member state, that court will cede jurisdiction to the chosen court, and stay its proceedings for the chosen court to determine jurisdiction if proceedings have also been commenced in that court. As a result, the risk — and associated time and cost implications — of parallel proceedings and inconsistent judgments is largely avoided.

<u>Post-Brexit Options</u>

Although it is theoretically possible for the U.K. and the EU to agree that the Recast Brussels Regulation will continue to apply post-Brexit, the more likely scenario is for the U.K. to adopt either the Lugano Convention or the Hague Convention on Choice of Court Agreements:

The Lugano Convention contains a similar regime to the Recast Brussels Regulation with two notable exceptions:

(1) The question of jurisdiction is always determined by the court in which proceedings are first commenced, regardless of whether it is the chosen court. It is therefore possible that the "Italian torpedo" — where parties tactically rush to commence proceedings first in a jurisdiction with a slow and complicated judicial process, so as to delay the progress of the substantive proceedings — could rear its head again.

(2) A jurisdiction agreement will only be enforced if one or more of the parties is domiciled in a Lugano Convention contracting state. This could cause difficulties for parties outside the EU.

The Hague Convention currently applies in all EU member states (except Denmark), Mexico and (from Oct. 1, 2016) Singapore. Hague Convention contracting states' courts will give effect to exclusive jurisdiction agreements in favor of the courts of another Hague Convention contracting state entered into after Oct. 1, 2015. This means that it will not apply to nonexclusive jurisdiction agreements or exclusive jurisdiction agreements entered into before that date.

If the U.K. does not enter into any international agreements, the potential for uncertainty and risk of parallel proceedings will be greater. This is because the courts of each EU member state will apply their own rules of private international law to determine if they have jurisdiction over a particular dispute. It is nonetheless likely that many EU member states (including France and Germany) will continue to respect English jurisdiction clauses under their national rules. In addition, the English courts will once again be able to grant anti-suit injunctions to restrain a party from pursuing proceedings in EU member state courts in breach of an English jurisdiction clause, which should serve as a useful deterrent to companies with a U.K. connection.

Will you be able to enforce English court judgments in EU member states (and vice versa) post-Brexit?

Current regime

The Recast Brussels Regulation currently provides a robust and streamlined method of automatically recognizing and enforcing judgments and interim remedies in civil and commercial matters across the EU.

Post-Brexit Options

If the U.K. adopts the Lugano Convention or the Hague Convention (or some other international treaty), there should still be a clear framework for the mutual recognition and enforcement of judgments across the U.K. and EU. Notably, however, the Hague Convention will only capture judgments obtained pursuant to exclusive jurisdiction agreements and will not extend to the enforcement of interim protective measures, such as interim injunctions or freezing orders.

If the U.K. does not enter into any international agreements (which seems unlikely), the enforceability of English judgments within the EU will depend on the law of the EU member state in which enforcement is

being sought (and vice versa). This could make enforcement of judgments across the EU a slower, more expensive and uncertain process, including for lenders seeking to enforce against an English judgment against a borrower's assets in other EU jurisdictions.

Service of Proceedings

Current Regime

Under the Recast Brussels Regulation, permission to serve English proceedings in another EU member state is generally not required. In addition, the EU Service Regulation provides a clear and predictable process for effecting service in EU member states.

Post-Brexit Options

If the U.K. adopts the Lugano Convention (or an equivalent international treaty), a similar exemption to the requirement to obtain permission to serve out of the jurisdiction will apply. If no such convention is adopted, parties will likely face the additional hurdle of having to apply to the English court for permission to serve proceedings in EU member states under English law civil procedure rules.

Whatever international treaty (if any) the U.K. adopts, the process of effecting service in EU member states is also likely to be slower and less predictable post-Brexit.

The probability that English jurisdiction clauses will be respected and English judgments recognized and enforced across the EU have contributed to the attractiveness of the English courts as a forum for international commercial disputes. While these factors are highly unlikely to fall away entirely post Brexit, they may not be as robust as before in at least some other EU member states, particularly in relation to enforcement.
While there is no need for those who have or are contemplating English jurisdiction clauses to panic, and the degree of risk will be context-dependent, the following points should be borne in mind:

- If you are negotiating a contract with a connection to the U.K. and one or more other EU member states with an English jurisdiction clause, be alive to the potential increased risk of parallel proceedings, and consider taking local law advice in other EU member states in which it is likely that proceedings could be commenced.

- If you are entering a new contract or revising an existing one, consider adopting an exclusive jurisdiction clause, to ensure that it will be covered by the Hague Convention.

- Obtain local advice in any EU member state jurisdiction in which enforcement of English interim remedies or final judgments is likely to be sought (and vice versa) before entering into a contract.

- Consider accelerating any existing or pending litigation, so as to take advantage of the automatic recognition and enforcement mechanism currently available under the Recast Brussels Regulation.

- Ensure that an agent for service of process clause, providing an address for service in England, is included in all contracts with EU parties (so as to avoid the need to apply for permission to serve out of the jurisdiction).

- If certainty and/or enforcement are paramount, consider adopting arbitration as your chosen dispute-resolution mechanism as Brexit is unlikely to have any adverse effect on arbitration.

Conclusion

While in the short-medium term there is perhaps a greater need for those contracting in the U.K. and the EU to take stock with respect to their governing law and jurisdiction clauses, particularly if enforcement across the EU is a consideration, there is in reality very little risk of being caught in the "wrong" law or courts post-Brexit.

In the longer-term, it is quite possible that the status quo (or something close to it) will be preserved. Brexit is also unlikely to detract from the primary reasons commercial parties choose English law and the English courts, including the accessibility of the English language, English law's procedural and relative substantive certainty, and the English courts' reputation for speed, fairness, impartiality, and an independent, highly qualified and experienced judiciary.

—By Gemma Anderson, Morrison & Foerster LLP

Gemma Anderson is of counsel in Morrison & Foerster's London office.