

# CLIENT ALERT

## Post-Brexit: Jurisdiction Clauses and Governing Law Clauses

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In this alert we briefly address the impact of Brexit on jurisdiction and governing law clauses in commercial contracts.

### Governing Law Clauses

The governing law is the law which governs the contractual or non-contractual relationship between the parties that will be applicable in the event of a dispute. Prior to Brexit, the rules applicable to governing law for contractual and non-contractual obligations were set out in the Rome instruments – Rome I and Rome II.

Post Brexit, these rules have been retained by being adopted into U.K. law as “U.K. Rome I” and “U.K. Rome II”, so that the same rules will be applicable pre and post Brexit. This means that the courts in the U.K. and EU 27 will apply broadly the same rules and the parties’ express choice of governing law should be upheld and applied.

### Jurisdiction Clauses

Jurisdiction clauses can be used by parties to determine in which country’s court a dispute arising from a contract will be heard. Before Brexit, the position was set out in the Brussels and Lugano regimes which set out rules which determined which country’s courts had jurisdiction to hear a dispute. The overriding principle was that the rules respected any choice of court the parties had chosen.

However, the post-Brexit position is – regrettably – relatively unsettled for proceedings commenced after 1st January 2021 as the Brussels and Lugano regimes are no longer applicable to the U.K. There are transitional provisions for proceedings commenced before 1st January 2021.

The key post-Brexit changes are:

- Now it is no longer a member of the EU, the U.K. does not enjoy the benefit of either the recast Brussels Regulation or – for now at least – the Lugano Convention, which set out clear rules regarding which country’s courts had jurisdiction to hear disputes. The U.K. is, therefore, reliant upon its accession into the 2005 Hague Convention on Choice of Court Agreements (having rejoined it in its own right from 1 January 2021), which is applicable between the U.K. and the EU. However, this is both untested and limited as it is applicable only to exclusive jurisdiction clauses and certain categories of dispute are excluded (*e.g.* consumer claims, employment claims, IP claims and claims relating to immovable property).
- There is uncertainty to whether the EU courts will respect an exclusive jurisdiction clause entered into before 1st January 2021. The Commission’s position suggests that the Hague Convention (which guarantees the enforcement of a judgement in a contracting state in any other state that is a member of the convention) may only apply to exclusive jurisdiction clauses entered into after the U.K. rejoined the Hague Convention at the end of the transition period. This

has created a time period of uncertainty in which exclusive jurisdiction clauses may not be applied by EU courts and it will depend on the domestic law of the member states. Parties that have entered into exclusive jurisdiction clauses between 1 October 2015 – 1 Jan 2021 run some risk of those clauses not being upheld.

- Where the Hague Convention does not apply, the position is more complex and questions of jurisdiction will be decided by the national courts applying national laws. This is likely to lead to greater uncertainty and possible inconsistency of application by different national courts.

## **Enforcement of Judgments**

Prior to Brexit, the Brussels and Lugano regimes contained provisions for the reciprocal enforcement of judgments across EU member states. This provided a simplified and consistent regime for parties.

Post-Brexit, for any claims issued after 1 January 2021, the Brussels and Lugano regimes will not be applicable. This means that whilst judgements should still be enforceable, the route is less certain. The Hague Convention will apply to judgements where there was an exclusive jurisdiction clause and enforcement will be available in any other country's court that is signed up to the Convention. However, enforcement may take longer and be more expensive than previously.

Where the Hague Convention is not applicable, enforcement will be subject to national laws in the country where the enforcement is sought. As a result, if a party is seeking to enforce a judgment obtained in an EU 27 state in the U.K., the judgment creditor would need to bring a new claim in the U.K. court and cite the foreign judgment as proof of debt. This is likely to add additional layers of cost, delay and uncertainty.

## **Future Changes on the Horizon**

The U.K. applied to join the 2007 Lugano Convention on 8 April 2020. However, this requires unanimous support across the EU member states (Norway, Iceland and Switzerland are supportive). If approved, accession to the Lugano Convention would provide improved certainty for jurisdiction clauses and enforcement of judgments (albeit not as comprehensive as the Brussels regime).

The application is still pending, and a decision is expected by April 2021 but once approved, there will be a time delay of 3 months before the Lugano Convention will come into force.

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