

MOFO BREXIT BRIEFING

30 June 2016

BREXIT: JURISDICTION

IMPLICATIONS FOR CONTRACTING PARTIES AND DISPUTES

By Jonathan Wheeler, Gemma Anderson and Westley Walker

The process of Brexit will take many years, and the implications for our clients' business will unfold over time. Our MoFo Brexit Task Force is coordinating Brexit-related legal analysis across all of our offices, and working with clients on key concerns and issues, now and in the coming weeks and months. We will also be providing MoFo Brexit Briefings on a range of key issues. We are here to support you in any and every way that we can.

From a commercial contracting and disputes perspective, Brexit has the potential to impact four key areas: jurisdiction; recognition and enforcement of judgments; service; and governing law. This note focuses on the first of these areas – jurisdiction. You can find our notes on the other three areas here:

- [Brexit: Recognition and Enforcement of Judgments](#) (30 June 2016)
- [Brexit: Service - Implications for Contracting Parties and Disputes](#) (30 June 2016)
- [Brexit: Governing Law - Implications for Contracting Parties and Disputes](#) (30 June 2016)

As with other areas, it is difficult to predict what the exact impact of Brexit will be on these matters until we know what post-Brexit model the UK will choose to adopt. In the meantime, there will be an inevitable period of uncertainty. That said, there are some practical steps that parties entering into or renegotiating contracts can take now to seek to protect themselves from the impact of Brexit and the intervening uncertainty.

Will your choice of jurisdiction be upheld post-Brexit?

The current regime

Jurisdiction within the EU on civil and commercial matters is currently governed by the *Recast Brussels Regulation*. The English Courts (and the courts of other EU Member States) apply the

Recast Brussels Regulation to determine which court takes jurisdiction where a defendant is domiciled in an EU Member State *or* where an agreement confers jurisdiction on an EU Member State court regardless of the domicile of the parties *or* where the other bases of jurisdiction under the Recast Brussels Regulation apply.

Post-Brexit options

Post-Brexit, the Recast Brussels Regulation will cease to apply in the UK. Although it is theoretically possible for the UK and the EU to agree that the Recast Brussels Regulation will continue to apply, this is unlikely.

The more likely scenario under most of the potential post-exit models is that the UK accedes to the *2007 Lugano Convention* (whose signatories include the EU Member States, Iceland, Switzerland and Norway) or the *2005 Hague Convention on Choice of Court Agreements* (which came into force on 1 October 2015 in all EU Member States (except Denmark) and Mexico). Both conventions would provide a predictable framework for signatory states to determine questions of jurisdiction and are similar to the present regime under the Recast Brussels Regulation (although with some important differences). Alternatively, the UK could seek to negotiate an individual treaty (or individual treaties) incorporating elements of one or more of the existing regimes.

The Lugano Convention

If the UK chooses to adopt the *Lugano Convention*, there are two primary differences with the current regime under the Recast Brussels Regulation which may be of significance to contracting parties:

1. *First*, under the *Recast Brussels Regulation*, where a contract contains an *exclusive jurisdiction clause* in favour of an EU Member State, it is for that court to determine whether it has jurisdiction to hear a dispute arising out of the contract. Any proceedings issued in other EU Member States must be stayed until the question of jurisdiction is determined by the parties' chosen court, if proceedings have also been commenced in that court. The purpose of this is to uphold parties' choice of exclusive jurisdiction and avoid parallel proceedings being commenced in another EU Member State for tactical reasons.

In contrast, the *Lugano Convention* does *not* give precedence to an exclusive jurisdiction clause, so the question of jurisdiction is always determined by the court first seised of a dispute. If the Lugano Convention is adopted, it is therefore possible that the "*Italian torpedo*" (by which 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. *Second*, a jurisdiction agreement will only be effective under the *Lugano Convention* if one or more of the parties is domiciled in a Lugano Convention Contracting State. This is not a requirement under the *Recast Brussels Regulation* (meaning that parties outside the EU can nominate the courts of an EU Member State to have jurisdiction in the knowledge that their choice will be upheld in those courts).

The Hague Convention

Alternatively, the UK could choose to adopt the *Hague Convention*, which contains rules regarding the validity and effect of jurisdiction agreements and subsequent recognition and enforcement of judgments by designated courts. Hague Convention Contracting States' courts will give effect to *exclusive jurisdiction agreements* in favour of the courts of another Hague Convention Contracting State entered into after 1 October 2015. (This will limit the effectiveness of the Hague Convention for parties with exclusive jurisdiction agreements entered into before that date.)

The "*Italian torpedo*" risk is not, however, a concern under the Hague Convention, because any court other than the chosen court must suspend or dismiss proceedings to which an exclusive jurisdiction agreement applies (subject to very limited exceptions).

No international agreement

If the UK *decides not to enter into any international agreements*, international principles of comity will apply to determine jurisdiction. That is, 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. This would lead to considerable uncertainty and an increased risk of parallel proceedings.

What you should do now

Parties entering into jurisdiction agreements in favour of EU Member States in the short-to-medium term may want to consider taking local law advice in their chosen EU Member State and other EU Member States in which it is likely that proceedings could be commenced.

What about arbitration?

The EU rules on jurisdiction under the Recast Brussels Regulation do not extend to arbitration. In addition, if the Recast Brussels Regulation ceases to apply, parties subject to an arbitration agreement with an English seat will be able to seek an anti-suit injunction from the English courts restraining proceedings brought in an EU Member State in breach of the arbitration agreement, which is not permitted under the current EU regime.

Brexit is therefore unlikely to have any adverse impact on arbitration, which could make arbitration an attractive option for contracting parties seeking to obtain certainty, at least until the post-Brexit position becomes clearer.

Please do not hesitate to call with any question or concern that you may have. We're here to help.

Jonathan Wheeler
(+44) 20 7920 4161
jwheeler@mofocom

Gemma Anderson
(+44) 20 7920 4063
ganderson@mofocom

Westley Walker
(+44) 20 7920 4056
wwalker@mofocom

or

Brexit@mofocom

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for 12 straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.