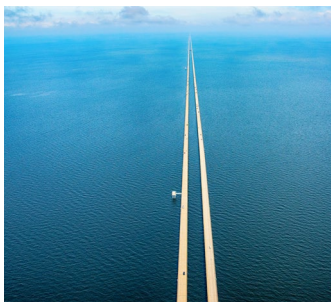
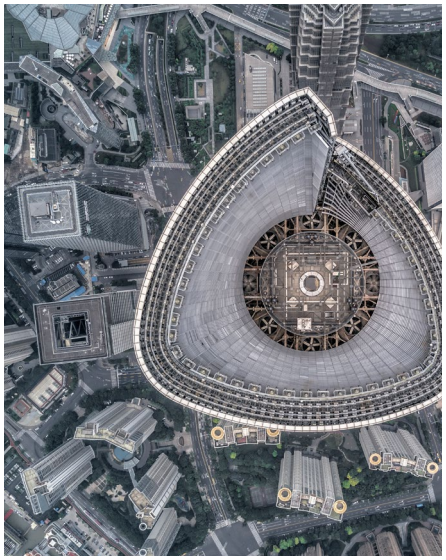
HERBERT SMITH FREEHILLS

CROSS-BORDER LITIGATION UPDATE

In this issue





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Welcome

Welcome to the latest issue of Cross-Border Litigation, a periodic publication spotlighting legal and practical issues specific to litigation with an international aspect.

Why the focus on cross-border litigation? The increasing globalisation of business has resulted in a dramatic increase in the number of litigated disputes where the parties are based in different jurisdictions or there is some other international aspect.

Such disputes raise particular legal issues, many of which fall within what is traditionally known as "private international law" - jurisdiction, choice of law and enforcement of foreign judgments key among them. Those areas of law are continuing to evolve apace, both within national legal systems and through multi-jurisdictional arrangements. For commercial parties dealing internationally, an awareness of developments in these areas of law is a key part of dispute risk management - not only when a dispute arises but also at the deal-making and contract drafting stages.

Further, beyond matters of substantive law, cross-border litigation typically gives rise to practical challenges that do not arise to the same extent in domestic disputes. Relatively straightforward procedures can become complicated where they span borders, and it is important to be aware of these additional hurdles and how best to navigate them.

We hope that you enjoy reading this issue and welcome your feedback.

To read previous issues, click here.

To discuss any of the topics covered or other cross-border litigation issues, do not hesitate to get in touch with one of our regional key contacts listed at the end of this publication, or your usual Herbert Smith Freehills contact.

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In Brief

Steady business for the English Commercial Courts

At a time when some are warning of a risk of decline in the international status of the English courts, against a backdrop of Brexit and competition from other jurisdictions, the latest court statistics suggest it is business as usual.

According to minutes of the November 2019 Meeting of the Commercial Court Users Group, 830 claim forms were issued in that court in the year 2018-19, compared with 864 in the previous year. 178 judgments were handed down, up from 165, and there were 58 trials, down from 62, with the settlement rate remaining steady at around 60%. There was, however, a slight drop in the number of hearings, with 1450 hearings compared to 1788 the previous year, and other available statistics suggest a slight fall in claims issued the Business List of the Chancery Division (approx 13%) for the year up to and including Q3 2019.

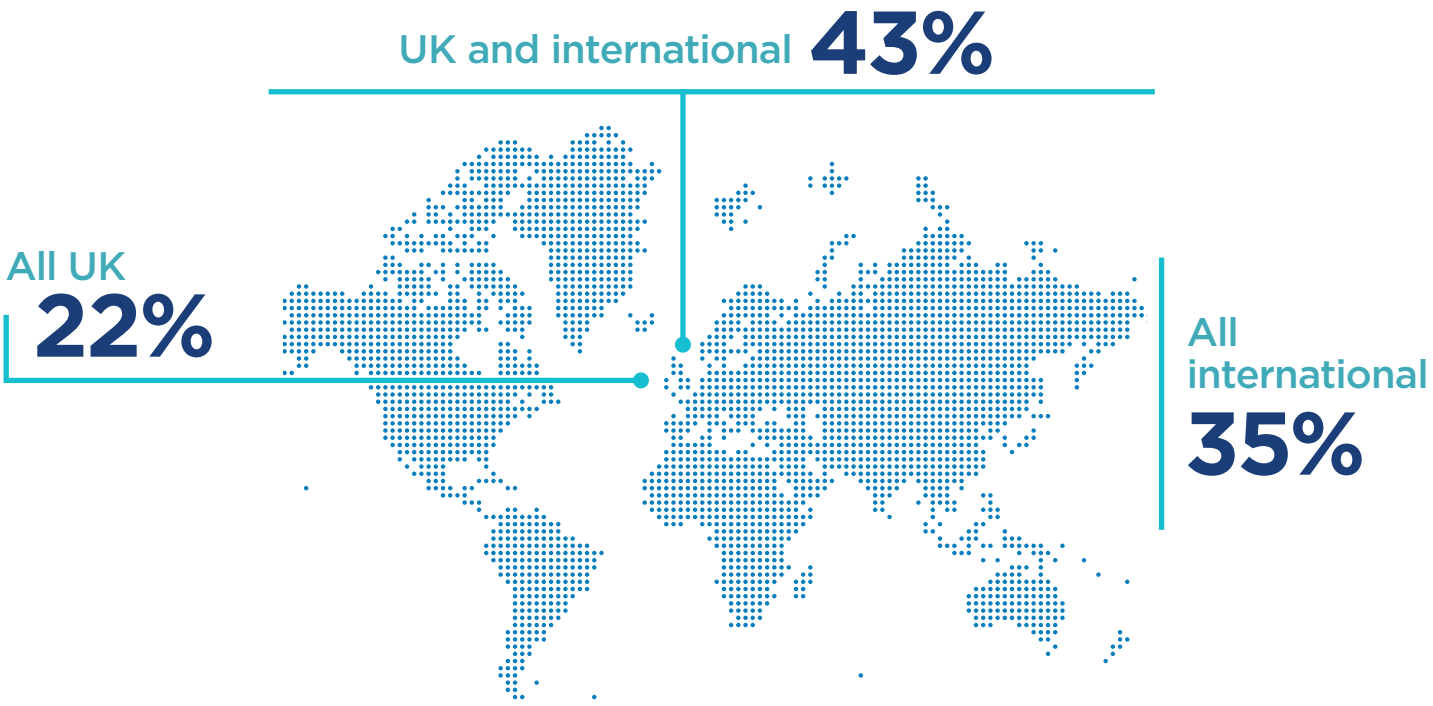
The Commercial Court minutes refer to the breadth of work and number of international parties in the Commercial Court which "continue to impress those from other jurisdictions". That is demonstrated by the statistics linked above, which show that, for Commercial Court claims issued in the first three quarters of 2019, approx 22% had all parties UK registered, 43% a mix of UK and international and 35% all international.

But with growing competition ...

The Commercial Court minutes note that the court has hosted various international delegations eager to replicate its success, including in the past year delegations from China, the US, Singapore, Africa, Europe and the former USSR.

That eagerness is reflected in the number of jurisdictions which have, in recent years, announced the launch of an English-speaking commercial court (see details in our report in our May 2018 issue).

Of particular note is the new China International Commercial Court. As we observed in our May 2018 report on the growing "internationalisation" of China's courts, the fact that Chinese law does not permit the recruitment of international judges to sit on the court could limit its ability to establish itself on the same level as other internationally recognised commercial courts. However, the speed at which the court has progressed from its 2017 announcement through to its opening (see the English website) and recently delivering its first ruling indicates that the success of the new court is a priority for the Chinese government. China's Belt and Road initiative will no doubt continue to be a key driver for this.



No-deal Brexit: Implications for disputes

On 31 January 2020 , at 11pm GMT, the UK left the EU under the terms of a withdrawal agreement concluded between the UK and the EU on 19 October 2019.

In a recent post on our Litigation Notes blog, we look at the implications for commercial litigation involving the English courts, including practical issues for commercial parties to consider. The summary considers:

- applicable law
- jurisdiction and enforcement of judgments (including jurisdiction agreements and the impact of the Hague Convention on Choice of Court Agreements 2005)
- methods of service
- taking of evidence
- references to the CJEU
- interpretation of retained EU law

Read the post here.

Court of Appeal clarifies approach to competing jurisdiction clauses

BNP Paribas S.A. v Trattamento Rifiuti Metropolitani S.P.A. [2019] EWCA Civ 768

In a decision in May 2019, the Court of Appeal set out useful guidance on how to interpret apparently competing jurisdiction clauses in related contracts.

It particular, it provides further assurance that jurisdiction clauses within standard form ISDA documentation will not readily be displaced by different jurisdiction clauses in related contracts.

The Court of Appeal gave effect to an English jurisdiction clause in an ISDA Master Agreement over an apparently competing Italian jurisdiction clause in a related financing agreement, despite a provision in the Schedule to the ISDA Master Agreement stating that, in the event of conflict, the financing agreement would prevail.

Key to the decision was the court's conclusion that there was no conflict between the two jurisdiction clauses, which were found to govern different legal relationships and were therefore complementary, rather than conflicting. The court emphasised that factual overlap between potential claims under the ISDA Master Agreement and the wider financing agreement did not alter the legal reality that claims under the two agreements related to separate legal relationships.

The court endorsed an approach to construction of jurisdiction clauses that is broad, purposive and commercially minded - interpreting such clauses in the context of the overall scheme of the agreements between the parties. The decision has been welcomed as further evidence of the English court's emphasis on construing commercial contracts in a manner that achieves market certainty and predictability.

For more, read this post on our Banking Litigation Notes blog. The Supreme Court refused permission to appeal against this decision on 9 January 2020.

Lord Briggs: "International Commerce: Mapping the Law in a Borderless World"

A recent lecture delivered by Lord Briggs, Justice of the UK Supreme Court, provides an interesting discussion of the current landscape of cross-border dispute resolution and enforcement systems available to international commercial parties. The discussion addressed the forces that drive parties' choices as to substantive law, tribunal and procedures, and the pros and cons of the most popular systems. The role of online courts and the potential for artificial intelligence in dispute resolution were also touched upon.

Of particular note are Lord Briggs' comments adding his voice to a somewhat controversial debate regarding the impact of commercial arbitration on the wider dispute resolution landscape – an issue brought to prominence in recent years by Lord Thomas, then Lord Chief Justice of England and Wales, in a 2016 lecture.

Although recognising the "powerful advantages" arbitration offers, Lord Briggs noted:

> "There is .. a real risk that the rise to pre-eminence of arbitration over court proceedings may involve a substantial price to be paid by the international commercial community generally. I have mentioned how the privacy of arbitration prevents the reasoning of the often distinguished tribunals from adding richness to the international legal models which are used mainly there, rather than in court. But if arbitration approaches a monopoly of international commercial dispute resolution generally, the same problem will also detract from the richness and development of the common law in its application to the same field."

While acknowledging that there has been some academic challenge to Lord Thomas's use of statistics, Lord Briggs concluded that "the general thrust of his concern must surely be well-placed, looking in the long term".

Lord Briggs also noted the potential of the recently agreed 2019 Hague Judgments Convention (if ratified widely) "to redress the junior partner status to which national judgments have been reduced, compared with arbitration awards, when it comes to enforcement abroad".

Guidance on the test for deciding factual issues in jurisdiction disputes: a "good arguable case"

In January 2019, the Court of Appeal considered how the test for establishing English jurisdiction should be applied where there is a dispute over the facts relevant to jurisdiction: *Kaefer Aislamentos SA de CV v AMS Mexico SA de CV* [2019] EWCA Civ 10.

Where a claimant needs permission to serve proceedings out of the jurisdiction, it has to establish that a relevant jurisdiction gateway applies, eg that the defendant has committed a breach of contract within the jurisdiction. The same is true where the claimant asserts an entitlement to serve out of the jurisdiction without the court's permission under an article of the recast Brussels Regulation or Lugano Convention, eg on the basis of a jurisdiction clause in favour of the English courts.

The test has in the past been expressed as the need to establish a "good arguable case" as to the application of the relevant gateway/article. This test was intended to be straightforward, but has become, in the Court of Appeal's words, "befuddled by 'glosses', glosses upon glosses, 'explications' and 'reformulations'."

The Supreme Court sought to clarify the test in two cases in 2018 (*Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192 and *Goldman Sachs v Novo Banco SA* [2018] UKSC 34). However, how it applies in practice has not been entirely clear. The Court of Appeal in the present case sought to interpret each limb of the test. It has, in particular, given its view that a court must consider the relative merits of the parties' arguments, rather than merely requiring the claimant to surmount a set evidential threshold. There remains, however, plenty of scope for further debate on the Supreme Court's formulation and how it applies in any particular case.

For more on the decision, read our blog post.

The new Hague Judgments Convention: A potential gamechanger (eventually)

On 2 July 2019, the Hague Conference on Private International Law finalised a new treaty on enforcement of judgments: the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, or the 2019 Hague Judgments Convention.

The new Convention has been a long time in the making. Its origins go back to 1992, when work began on a general convention dealing with jurisdiction and enforcement of judgments. Political consensus could not be reached, initially, and so the Hague Conference decided to focus on the area where consensus was possible – jurisdiction and enforcement of judgments where the relevant court was chosen under an exclusive jurisdiction clause. That resulted in the 2005 Hague Choice of Court Convention.

The new Convention goes much further than the 2005 Convention, in that it is not limited to judgments based on exclusive jurisdiction clauses. And, in contrast to the 2005 Convention, employment and consumer contracts are within scope.

The Hague Conference press release describes the 2019 Convention as "a gamechanger in international dispute resolution", saying it will be a single global framework, enabling the free circulation of judgments in civil or commercial matters, which will provide "better, more effective, and cheaper justice for individuals and businesses alike".

> "...a single global framework, enabling the free circulation of judgments in civil or commercial matters..."

Timing

The 2019 Convention is certainly welcome, but it will of course only apply between those countries that ratify it and bring it into force. The EU Commission has announced that it is starting the process of preparing EU accession to the Convention, although the timescale is uncertain. The UK will also be looking closely at accession in its own right in a post-Brexit scenario, subject to any transitional arrangements that may be agreed with the EU.

But it is worth noting that the Convention won't come into force for any state until (approximately) 12 months after ratification and, even then, it will only apply where the proceedings that led to a judgment were instituted at a time when the Convention was in force for both the state where the judgment originated and the state where it is to be enforced. This means that there will be some considerable time before the Convention applies to any judgment, even if the EU and the UK (and other countries) take early steps to accede to it.

A post-Brexit alternative to Brussels/Lugano?

Some may hope that the 2019 Convention will provide an alternative route to the easy enforcement of English judgments after the end of the Brexit transition period, when the dynamics for enforcement will become significantly more complex as the recast Brussels Regulation and the Lugano Convention will no longer apply to the UK (subject to the transitional provisions under the withdrawal agreement, and the prospect of some further arrangement on jurisdiction and enforcement being agreed).

But the 2019 Convention should not be seen as a complete answer. Apart from the likely delay before its impact is felt, its operation will be more limited than the Brussels/Lugano regime. For example, recognition and enforcement can be refused on broader grounds (more akin to those in the New York Convention in respect of arbitral awards). And of course the new Convention deals only with enforcement of judgments rather than the allocation of jurisdiction (apparently work is underway on a further Hague instrument addressing jurisdiction).

So while it is certainly a positive step, it is still hoped that the UK and EU will be able to agree other arrangements more closely replicating the current regime, including an agreement for the UK to join the Lugano Convention. In that regard, it is noteworthy that the UK has received statements of support from EFTA countries Iceland, Norway and Switzerland for its intention to accede to the Lugano Convention. However, agreement is still needed from the EU and Denmark (which has an "opt-out" of justice and home affairs matters under relevant EU treaties).

For a summary of the position regarding the post-Brexit enforcement of English judgments in the EU27, see our decision tree on page 10

Obtaining evidence from US-connected entities: US court widens the scope

A recent US court decision has potentially increased the scope for parties in non-US legal proceedings to use the US courts to access evidence held by US-connected entities, even if that evidence is located outside the US.

The decision (*Re Application of Antonio Del Valle Ruiz 18-3226 (L)*) concerns the US process known as a "section 1782 application" (under section 1782 of Title 28 of the United States Code – see boxed text). Broadly, that provision enables a litigant or other interested party in a non-US legal proceeding to ask a US District Court to order an individual or entity who "resides or is found" in the relevant federal district to provide testimony or disclosure of documents for use in that foreign proceeding. Caselaw has confirmed that the foreign proceeding can include quasi-judicial administrative proceedings and regulatory proceedings.

The provision provides a powerful evidence-gathering procedure, particularly in jurisdictions where disclosure of documents is not available or, even where it is, to overcome technical limitations on the scope or timing of disclosure (although this is not a precondition to its use).

The scope of section 1782 has been the subject of much conflicting authority amongst different US federal district courts. Probably the most controversial of the unsettled issues is whether the procedure can be used in aid of commercial arbitrations (see our update here for the latest position on this issue). However, there has also been much uncertainty concerning the extent to which the provision operates extraterritorially.

Extraterritorial operation

In particular, it has been unsettled as to: (i) what degree of connection with the US district is needed to satisfy the statute's requirement that the target of the order "resides or is found" there; and (ii) whether the provision extends to documents located outside the US.

This latest decision, from the US Court of Appeals for the Second Circuit addresses both those issues.

Who can be the subject of a section 1782 order?
The court held that, in addition to cases where a US court has general jurisdiction over an entity based on residence, a section 1782 order can be made whenever a court has specific jurisdiction over an entity arising from the entity's contact with the district (rejecting an argument that it is limited to cases where an individual has been personally served within the district).

Going on to apply the general principle that specific jurisdiction is based on "in-state activity that gave rise to the episode-in-suit", the court held that, for the purposes of a section 1782 application, jurisdiction will exist where the entity's contacts with the US district were "the primary or proximate reason" that the requested evidence existed:

> "..(T)he respondent's having purposefully availed itself of the forum must be the primary or proximate reason that the evidence sought is available at all. On the other hand, where the respondent's contacts are broader and more significant, a petitioner need demonstrate only that the evidence sought would not be available but for the respondent's forum contacts."

In the present case, the court held that the respondent did not have the necessary contacts with the forum because its contacts all occurred after the financial transaction that gave rise to the claim and the discovery sought.

Documents located outside the US
The court held that there is no per se bar to section 1782 being used to obtain disclosure of documents located outside the US. The general US presumption against extraterritorial operation of statutes does not apply here given that section 1782 is a purely jurisdictional mechanism, rather than one giving rise to substantive liability. This ruling concurs with a 2016 finding to the same effect by the Eleventh Circuit, although that was in a less fully reasoned judgment.

Aside from the commercial importance of the Second Circuit as a jurisdiction (encompassing New York), the decision is likely to be particularly influential because, as the court noted, most of the decisions in other districts that have refused to apply section 1782 to documents outside the US have done so on the basis of earlier Second Circuit authority to that effect. The precedent value of those decisions is now arguably weakened, leaving the door open for other federal districts to follow suit in ordering disclosure of documents located outside the US.

This issue is important as such a global geographical reach potentially allows documents held anywhere in the world by a non-US company to be accessed under section 1782 on the basis that the company was a foreign subsidiary or other affiliate of a US-based company, provided it could be established that the relationship was sufficiently close that the US company had the requisite degree of control over the documents (the test for control is that that applies to domestic US discovery under the Federal Rules of Civil Procedure, which is broadly similar to the test under English law).

The issue is also important as the task of identifying the physical location of electronically held data becomes more complicated with advances in data storage technology. Recognition that the statute is not limited to US-based documents removes the potential for recipients of section 1782 orders to resist production of electronic documents on the grounds that they are stored on foreign servers or in cloud-based platforms.

The US court's discretion

Of course, the fact that a US court could grant a section 1782 application in a particular case does not mean that it necessarily will. Even where the statutory requirements are met, a

court has a wide discretion as to whether to make such an order and to what extent.

The range of factors it can take into account include whether the request is unduly intrusive; whether there were other ways of obtaining the information (including within the foreign proceeding itself); the likelihood that the foreign court/tribunal in question would reject the evidence obtained; and whether the application can be seen as an attempt to circumvent or undermine the foreign country's processes and policies.

These discretionary factors may be applied differently in different US federal districts. It is therefore important, when considering whether to make (or resist) such an application, to take local advice in the relevant US district - both as to how the statutory provision will be interpreted and how the discretionary factors might be applied in the particular case.

It will also be necessary to take local advice in the country where the foreign proceedings are based, to assess the foreign court's likely attitude to the section 1782 process and to the particular evidence sought to be obtained.

The English courts' attitude

The English courts' attitude to the use of section 1782 in support of English proceedings can be broadly categorised as supportive. The leading authority is *South Carolina Co v Assurantie NV* [1987] 1 AC 24, in which the House of Lords rejected a Court of Appeal finding that use of the procedure was inherently objectionable and abusive because it interfered with the court's control of its own procedure. Accordingly, as a general principle, it is open to a litigant in English proceedings (including regulatory and administrative proceedings) to choose to make use of the procedure if it is able to do so.

The US courts have themselves noted the *South Carolina* decision as an example of the kind of authoritative guidance to which US courts may have regard when assessing whether evidence sought under section 1782 would be likely to be rejected by a foreign court.

The handful of occasions where the English courts have baulked at the use of section 1782 have tended to be not because the court objected to the procedure per se but because the application was pursued in a manner considered disruptive to the conduct of the English proceedings, to the point of being abusive or oppressive (for example, *Bankers Trust v PT Dharmala Sakti Sejahtera* [1996] CLC 252, where the section 1782 orders had been sought and obtained ex parte during the period while the English court's final judgment was reserved).

Click here to read our New York office's report on the recent decision.

For more on section 1782 applications, see the article from our March 2017 issue: "Section 1782 – A surprisingly underused tool in cross-border litigation".

Section 1782 of Title 28 of the United States Code

"Assistance to foreign and international tribunals and to litigants before such tribunals

- The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.

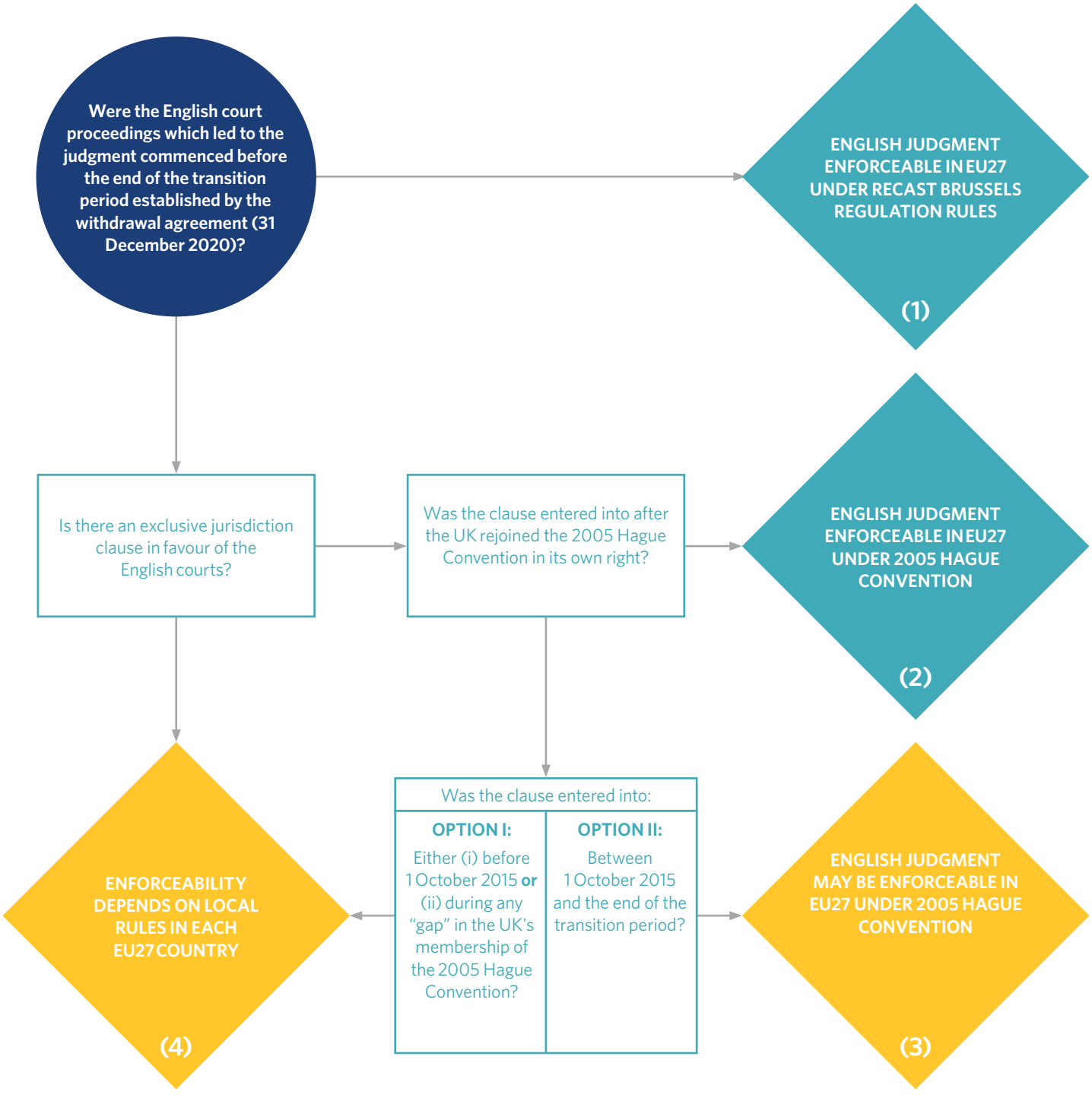
  The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing.

  To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

  A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

- This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him."

Will an English judgment be enforceable in the EU27 post-Brexit?



This decision tree has been prepared as a quick reference guide to help determine whether an English court judgment will be enforced in EU27 countries post-Brexit.

It is necessarily a simplification of complex issues and should be read with reference to the notes set out below.

1 English judgment enforceable in EU27 under Recast Brussels Regulation rules

The withdrawal agreement between the UK and the EU dated 19 October 2019 provides (at article 67) that the rules on both jurisdiction and enforcement of judgments under the recast Brussels Regulation (Regulation 1215/2012) will apply where proceedings are commenced before the end of the transition period established by the agreement (31 December 2020).

Accordingly, if the English court proceedings which led to the judgment were commenced before the end of the transition period, then the judgment will be enforceable in the EU27 under the recast Brussels Regulation (subject to limited exceptions).

2 English judgment enforceable in EU27 under Hague

The UK was a party to the 2005 Hague Convention on Choice of Court Agreements by virtue of its EU membership. That came to an end when the UK left the EU on 31 January 2020. In the event of a no-deal Brexit, the UK would have re-joined the Convention in its own right as soon as possible following its exit from the EU. The UK deposited its instrument of accession to the Convention in December 2018 with the intention that it would re-join with effect from 1 April 2019 (the Convention comes into force on the first day of the month following three months from deposit of the relevant instrument).

In light of the various extensions to the Article 50 period, the UK submitted declarations to the Hague depositary to the effect that its accession to the Convention was suspended until (ultimately) 1 February 2020. However, the UK withdrew its instrument of accession on 31 January 2020 as, under the withdrawal agreement, EU law, including the Convention, continues to apply to and in the UK during the transition period. (That is reflected at article 129 of the withdrawal agreement, which provides that during the transition period the UK continues to be bound by obligations stemming from international agreements concluded by the EU.)

The UK intends to re-join Hague in its own right from the end of the transition period, and will deposit a new instrument of accession for that purpose. (It may during the transition period also agree other arrangements with the EU in relation to jurisdiction and enforcement. These may include for example that the UK will participate in the Lugano Convention, in which case English judgments will be enforceable in the EU27 - as well as Iceland, Norway and Switzerland - in similar circumstances to the present.)

Hague applies only where there is an exclusive jurisdiction agreement in favour of a contracting state's courts, and only where that clause was entered into after the Convention came into force for the chosen state. It also does not apply to consumer or employment contracts or to certain other matters for example relating to land or certain intellectual property rights. Where Hague applies, a judgment will be enforceable (subject to limited exceptions) in the other contracting states, which includes all EU27 states.

Accordingly, if the UK re-joins Hague following the end of the transition period, and the English court's judgment was given pursuant to an exclusive English jurisdiction clause that was entered into on or after the UK has re-joined Hague, then the judgment will be enforceable in the EU27 under that Convention.

3 English judgment may be enforceable in EU27 under Hague

As noted above, the 2005 Hague Convention on Choice of Court Agreements applies only where there is an exclusive jurisdiction agreement in favour of a contracting state's courts which was entered into after the Convention came into force for the chosen state.

Hague came into force for the UK as an EU member state on 1 October 2015. However, as noted above, that came to an end on Brexit, though the UK will be treated as an EU member state for the purposes of the Convention until the end of the transition period. In these circumstances, there is some uncertainty over whether other contracting states will apply Hague rules where an exclusive English jurisdiction clause was agreed before the UK re-joined Hague in its own right, even if the clause was agreed when the UK was party to Hague by virtue of EU membership (ie between 1 October 2015 and exit day). The position would seem to be equally uncertain where the clause was agreed during the transition period, as the UK is not technically a member of Hague during that period.

4 Enforceability depends on local rules in each EU27 country

If there is no applicable agreement or convention on enforcement of judgments, then each EU27 country will apply its own domestic rules to questions of jurisdiction and enforcement.

There are old bilateral treaties between the UK and a number of EU27 countries but, as these were expressly superseded by the Brussels Convention and the original and recast Brussels Regulations, it is not at all clear whether they apply post-Brexit. In any event most (but not necessarily all) EU countries will enforce foreign judgments even without a specific reciprocal regime, although the type of judgment enforced may be more limited and the procedures involved more time consuming and costly.

The new Singapore Convention on mediated settlements: Some practical issues to consider now

The Singapore Convention has received widespread attention since it was signed with much fanfare on 7 August 2019. Not only did its tally of 46 first-day signatories break the record for any United Nations trade convention, it included the world's two largest economies, China and the US.

Given the enthusiastic initial response, it is feasible that the Convention could come into force as early as 2020. Once it does, it will apply to mediations conducted anywhere in the world, not just within jurisdictions that have ratified it. It will therefore be advisable for all mediating parties, regardless of whether their home state ever ratifies the Convention, to factor into their mediation procedures the potential to rely on the new regime should enforcement become necessary.

We highlight below a number of practical issues that mediating parties should be turning their minds to now to put themselves in the best position to take advantage of the Convention in the future should the need arise.

More formally known as the United Nations Convention on International Settlement Agreements Resulting from Mediation, the new Convention essentially establishes a regime under which contracting states will be obliged (except in limited circumstances) to recognise international settlement agreements that result from commercial mediations, either to enforce the agreement or allow it to be invoked as a defence to a claim.

A settlement agreement will be "international" if either: (i) at least two parties have their place of business in different countries; or (ii) the country where the settlement agreement is to be performed, or the country with which the agreement is most closely connected, is different to the parties' place of business.

The Convention will enter into force six months after ratification by at least three signatory states.

In practice, failure to honour settlements reached through mediation is in fact relatively uncommon, at least compared to court judgments and arbitral awards. However, where that does occur and cross-border enforcement is necessary, it can be time-consuming and costly. Given that there will soon be an enforcement regime in place, parties would be well advised to give thought to how they can best position themselves to take advantage of it should the need arise.

Some of the issues raised below do not lend themselves to clear answers at this stage, and may need to be judicially clarified, but should be borne in mind when arranging and conducting mediations and, most importantly, documenting any resulting settlement.

Don't assume it won't apply to your mediation

The UK and other EU states have not yet signed the Convention. The UK government has recently consulted on whether it should do so and the EU is apparently deliberating whether it may sign as a regional entity or whether member states need to join individually.

Some readers based in the UK and elsewhere in Europe may have therefore postponed engaging with the Convention on an assumption that it will not have any relevance for them unless and until their own jurisdiction signs and ratifies it. But that is not the case.

A key point that is not widely appreciated is the fact that the Convention does not operate on the basis of reciprocity between member states. Unlike most other multilateral enforcement regimes such as the New York Convention, the Hague Choice of Court Convention 2005 and the Brussels regime, it is not limited to enforcement between member states. Unlike court judgments and arbitral awards, settlement agreements under the new regime do not have any "nationality". As long as a settlement is international and results from mediation, then (unless it falls within an excluded category) it will qualify for enforcement in any Convention state, regardless of where the mediation took place or the settlement agreement was signed.

Accordingly, even if the UK never signs and ratifies the Convention, international settlement agreements resulting from UK mediations will be able to be enforced under the Convention (or relied on as a defence) in any state that has ratified it.

This could prove very significant for cross-border dispute resolution – bearing in mind that the Singapore Convention signatories include four of the top six foreign nationalities who used the English commercial courts in 2018 (the US, Kazakhstan, India and Ukraine). In particular, given that the US still shows no signs of ratifying the 2005 Hague Convention on Choice of Court Agreements (despite having signed it in 2009), if it ratifies the Singapore Convention this will mean that a party who successfully mediates with a US opponent is likely to be better placed to enforce in the US than it would be with an English or other EU court judgment.

The same of course applies to the majority of the other 46 signatories, who are also not Hague Convention states (including China, which has also signed but not yet ratified Hague).

> "As long as a settlement is international and results from mediation, then .. it will qualify for enforcement in any Convention state, regardless of where the mediation took place or the settlement agreement was signed."

Should you expressly opt in to the new regime?

The default position under the Singapore Convention is that, where it applies, it will do so automatically, without the need for the parties to "opt in" to it. However, it does include (in Article 8(1)(a)) a reservation provision, which allows member states to declare that they will apply the Convention only to the extent that the parties to the relevant settlement agreement have agreed that the Convention will apply. (For more on this reservation, see this earlier blog post).

There are no provisions specifying how or when the parties must have indicated such agreement to the Convention applying, and this would be determined by the court where enforcement is sought. However, it seems likely that the best form of such agreement would be an express statement to that effect within the settlement agreement itself.

Of the initial signatories, one (Iran) has so far indicated an intention to exercise the reservation. However, any of the other states may do so when they ratify it, or indeed at any time after ratification.

Mediating parties will therefore want to avoid the (albeit small) risk of finding themselves in a position where a state in which they ultimately need to enforce a settlement has exercised this reservation and they are unable to prove the necessary opt in to the Convention.

Given that enforcement location will not always be clear at the time a settlement is reached, there would seem to be merit in routinely seeking to include in all mediated settlement agreements a statement confirming that the parties agree to the application of the Convention. Even if that agreement is not ultimately required, there would appear to be no downside in including it. If one of the parties was from a jurisdiction that had exercised the opt-in reservation, this may represent a compromise on its part, but it is difficult to see how an objection to such a provision could be justified in the context of parties documenting a negotiated settlement.

Further, at least for an initial period while parties are still unfamiliar with the Convention, it may be worthwhile flagging to a counterparty during the preparations for the mediation the intention to include such an agreement in any settlement, so that this issue does not hold up the drafting of the settlement agreement at the end of a long mediation day.

How will you secure the mediator's confirmation?

Article 4 of the Convention sets out the basic evidence to be provided to the enforcing court. Unsurprisingly, this includes a copy (translated if necessary) of the settlement agreement.

However, it also includes a requirement for evidence that the settlement agreement "resulted from mediation".

The examples given of what could constitute such evidence are "the mediator's signature on the settlement agreement" or "a document signed by the mediator indicating that the mediation was carried out". If the mediation was organised through an ADR institution, the evidence may take the form of an attestation by that institution. Otherwise, "any other evidence acceptable to the [enforcing court]" may be relied on.

While it appears that such confirmation could technically be obtained from the mediator at a subsequent date, only once it became apparent that there was a need to enforce under the Convention, it is clearly preferable that it be obtained at the time the settlement agreement is signed.

This evidentiary requirement is understandable given the scope of the Convention. However, the need for the mediator to make some form of attestation, to be put before a court as proof of the facts stated, is potentially problematic. In most jurisdictions where mediation is well entrenched, the fundamental principle of mediation confidentiality is underpinned by a well-accepted principle that the parties may not call a mediator to give evidence in relation to a mediation. This is usually recorded in the mediation agreement and, in some jurisdictions (including England and Wales), is also enshrined in statute or court rules. Concerns have been expressed within the mediation community that this new evidentiary requirement could threaten that established position, if for example the counterparty or even the enforcing court itself

sought to call the mediator to confirm or expand on their written confirmation.

A mediator making an attestation of the type described in the Convention is of course not the same as providing a witness statement for use in court proceedings or otherwise agreeing to give evidence. Given the limited nature of the confirmation required, it seems unlikely to threaten the established position as to mediator confidentiality. However, as it does represent a change to current mediation practice, and that there is scope for uncertainty as to precisely what wording will satisfy the Convention's requirement, it could be expected that some mediators may have concerns in this regard.

It would seem strongly advisable that this issue be raised with the mediator during the mediation preparation period, so that any concerns can be addressed and the format of the mediator's confirmation, should the dispute settle, be agreed in advance. It may be something that should be included in the mediation agreement - perhaps as a qualification to the standard provisions confirming that the mediator will not be required to give evidence. Again, this issue has the potential to be an undesirable distraction if raised for the first time when the settlement agreement is being signed.

In addition, apart from the concerns about mediator confidentiality, the requirement to prove that a settlement resulted from mediation also highlights a more substantive issue regarding the scope of the Convention. It is very common for disputes that are not resolved on the day of a mediation to settle in the days or even weeks afterward, with or without the continued assistance of the mediator. It is not clear whether the Convention extends to such circumstances and, if so, how an enforcing court should assess whether in any particular case there was a sufficient connection between the mediation and the settlement.

Parties engaged in post-mediation negotiations should therefore bear in mind that they may be in a stronger position to rely on the Convention, if that becomes necessary, if the mediator remains involved. In any case, the mediator's confirmation would be likely to take on particular importance in such circumstances and parties can put themselves in the best position by liaising with the mediator in advance to ensure that the necessary confirmation is obtained if that is justifiable in the particular case.

Anticipating grounds for refusal to enforce

The Convention sets out (in Article 50) a list of grounds upon which a member state can refuse to recognise and enforce a settlement agreement. Many of these are unsurprising and are broadly familiar from other enforcement regimes such as the New York Convention.

Many of the listed factors are matters that could justify a domestic court refusing to enforce an agreement, and so should already be in parties' minds when drawing up mediated settlement agreements. These include party incapacity, the agreement not being clearly final and binding, the terms not being clear and comprehensible and the matter not being one capable of being mediated under the applicable law.

However, the introduction of the Convention adds a new dimension in the sense that, if it becomes necessary to enforce the agreement abroad, the foreign court will be considering these matters directly, rather than via an application to enforce another court's judgment. Depending on the country involved, that assessment might be conducted against the backdrop of a very different legal framework to that in which the settlement agreement was drawn up, possibly underpinned by different legal norms and public policies.

This underscores the need to draft the mediation arrangements and any settlement with an eye to how a foreign court might view the provisions (ideally by reference to the particular state(s) where enforcement would be required, if that is ascertainable at the time). In particular, consider any steps that can be taken to minimise the risk of an enforcing court objecting to a settlement on the following grounds:

- **Mediator misconduct** (the mediator's serious and material breach of applicable standards or material failure to disclose conflicts). Unlike the position with arbitrators, there is no broadly accepted international code or body of judicial authority on mediator standards and conflicts. There is therefore potentially greater scope for courts in different jurisdictions to take differing views of the same conduct. This underlines the importance of the relevant provisions in the mediation agreement accurately reflecting the mediator's obligations and any conflict disclosures being fully documented.
- **Public policy of the enforcing state**. As in other enforcement regimes such as the New York Convention, this ground is intended to be applied very narrowly, only where a state's most basic and fundamental legal norms would be offended by enforcing the agreed terms. These norms obviously differ state to state but examples include rules against punitive damages, contractual penalties and unreasonable restraints of trade.

  If there is an unavoidable risk of some of your agreed terms falling foul of such rules, consider including in the agreement severability provisions, to support an argument that the offending terms should not prevent the enforcement of other terms in the agreement.

In many cases, risk minimisation may simply involve erring on the side of including fuller detail and explanation in the mediation and settlement documents and not assuming that a reader will know and apply principles that are well understood in your home jurisdiction.

(An extended version of this article first appeared as a post by Jan O'Neill, Professional Support Lawyer, on the Practical Law Dispute Resolution blog on 18 September 2019.)

"If (the US) ratifies the Convention, a party who successfully mediates with a US opponent is likely to be better placed to enforce in the US than it would be with an English or other EU court judgment."

Jurisdiction and governing law: Recent decisions

UK Supreme Court narrowly interprets Brussels regime's exclusive jurisdiction provisions regarding validity of corporate decisions

Akcil v Koza Ltd [2019] UKSC 40

The Supreme Court has held that the English courts did not have exclusive jurisdiction to hear certain claims brought by an English subsidiary company against Turkish domiciled defendants, including its parent company: The judgment overturns the decision of the Court of Appeal and narrowly interprets article 24(2) of the recast Brussels Regulation. This provides that, where proceedings have as their object the validity of a company's constitution or the decisions of its organs, the EU member state of that company's seat will have exclusive jurisdiction over the proceedings, regardless of domicile.

The Supreme Court held that a mere link between a claim that engages article 24(2) and one that does not is not sufficient to bring both claims within the scope of the provision.

It has been established for a number of years that article 24(2) only applies where the principal subject matter of the proceedings is a company law matter, so it is not sufficient that some aspect of the case might concern the validity of a decision taken by a company if that is not the principal subject matter overall.

This decision makes clear that it is not legitimate to reverse that approach and find that, by virtue of an overall evaluative judgment in relation to two separate claims – one falling with the article when taken alone and the other not – both come within article 24(2) because the principal subject matter taken together is a company law matter. That would be an illegitimate expansion of the application of article 24(2).

For more on the decision, read our blog post.

Suing employees outside their domicile: When does a claim "relate to a contract of employment"?

Bosworth and anor v Arcadia Petroleum Limited and ors [2019] CJEU C-603/17

Under the jurisdiction rules in the recast Brussels Regulation and the Lugano Convention, in "matters relating to individual contracts of employment" the default position is that an employer can only sue the employee in the state of the employee's domicile.

However, this prompts the question of what constitutes a matter "relating to" an employment contract. In particular, it is unclear whether the provision will be triggered wherever a claim is one that could be pleaded as a breach of the employment contract, even if it has not been pleaded in that way. So, for example, if an employer is alleging a conspiracy to defraud by employees, is that a matter relating to their contracts of employment on the basis that it could be pleaded as a breach of their contractual duties of good faith?

This was the situation before the English courts and then the CJEU in this case, which involved conspiracy claims against company directors.

The Court of Appeal held that the correct approach was to consider whether the reality and substance of the alleged conduct related to an individual's contract of employment. It rejected a mechanistic approach that turned simply on the question of whether the claims could be technically pleaded as a breach of contract. On the facts, it held that, while the directors' employment contracts provided the opportunity for the alleged conduct, they did no more than that, and the claims did not "relate" to the employment contracts for the purposes of the Lugano Convention provisions.

On appeal, the Supreme Court referred the matter to the CJEU for a preliminary ruling. However, hopes for clarification of the law were dashed when the CJEU found that it did not need to consider the question because of its conclusion that, on the facts here, the directors (who had acted as CEO and CFO) should not be regarded as having had individual contracts of employment.

This is clearly an important issue for employers as it has the potential to substantially restrict their choice as to where to pursue claims involving their employees. Furthermore, even if the Court of Appeal's approach is applied, how it will operate in any particular case may not always be easy to predict, given that the proper characterisation of the case will be determined by the court's view of the substance of the claim and the facts of the case.

There therefore remains considerable scope for a jurisdiction challenge where proceedings are commenced against an EU or EFTA domiciled employee in a country other than their domicile.

Read the judgment here.

Exclusive jurisdiction clauses in settlement agreements with employees

Merinson v Yukos UK BV [2019] EWCA Civ 830.

The Court of Appeal has held that an exclusive jurisdiction clause in a settlement agreement between an employer and employee was not effective to give jurisdiction to the chosen court.

The dispute related to an individual contract of employment and the jurisdiction agreement had not been entered into after the particular dispute had arisen, as there had been no prior communication between the parties concerning the issue: Article 22 of the recast Brussels Regulation provides that, in matters relating to individual contracts of employment, an employee may only be sued in the courts of their domicile. A jurisdiction clause cannot therefore be relied on by the employer, unless (under article 23(1)) it was entered into after the dispute had arisen.

In this case the Court of Appeal found that, for a jurisdiction clause to be effective under article 23(1), at the time it is concluded the parties must disagree on a specific point and proceedings between them must be imminent or contemplated. It is not enough that there is merely a potential, rather than an actual, dispute between the parties.

The decision is significant as it means that a jurisdiction clause in a settlement agreement entered into with certain categories of defendants (such as employees, consumers and insurance policy holders) will only be effective in respect of matters actively in dispute at the time the settlement is reached. It will not extend to the release of potential future disputes under wide releases in the agreement, even if those disputes are within the separate contemplation of the parties, if they are matters relating to the employment contract, or consumer contract, or insurance policy.

For more on the decision, read our blog post.

UK anchor defendants can be sued for the sole purpose of establishing jurisdiction against foreign co-defendants

JSC Commercial Bank Privatbank v Kolomoisky and Bogolyubov and others [2019] EWCA Civ 1708

The Court of Appeal has held, by a majority, that the Brussels and Lugano regimes allow a defendant to be sued in a co-defendant's domicile (rather than their own domicile) even if the sole object of bringing the proceedings against the "anchor" defendant was to bring the foreign-domiciled defendant within the jurisdiction.

Accordingly, provided a claimant has a sustainable claim against an anchor English defendant, which it intends to pursue to judgment, it will be entitled to rely on the relevant EU rules to join a foreign defendant where the court accepts that the claims are so closely connected that it is expedient to hear them together to avoid the risk of irreconcilable judgments.

The decision is also interesting for its separate ruling on the question of whether EU jurisdictional rules can be applied by analogy, or "reflexively", to circumstances falling outside the rules' scope. The court held that the Lugano Convention rules as to when a court may stay its proceedings in favour of parallel proceedings in another Convention state (lis pendens rules) could be applied by analogy where the foreign proceedings were in a non-Convention state.

The findings regarding reflexive application are of particular interest when considering the position following the end of the Brexit transition period if no arrangements to replace the Brussels and Lugano regimes are put in place. In that scenario it is uncertain whether the courts of the remaining EU states will only have a power to stay their proceedings in favour of English proceedings in the circumstances specified in articles 33/34 of the recast Brussels Regulation (ie where the English court was first seised) or whether they will have a residual discretion to do so outside those circumstances, for example where the English court was second in time but there is an English exclusive jurisdiction clause. Previous High Court authority has taken the view that, given that articles 33/34 expressly incorporate some degree of reflexive operation to non-EU states, it was not open to find that there is a discretionary power beyond those provisions (*Gulf International Bank BSC v Aldwood* [2019] EWHC 1666 – see our blog post).

While the court in this case did not directly consider that question, and the issue is ultimately a matter for the CJEU, the decision may leave open the scope for an argument that there is such a residual discretion.

For more on the decision, read our blog post.

Anti-enforcement injunctions – only available in exceptional cases

SAS Institute Inc v World Programming Ltd [2019] EWHC 2481 (Comm)

This High Court decision illustrates the English courts' reluctance to issue an anti-suit injunction to restrain a party from pursuing enforcement of a foreign judgment in the country in which it was handed down.

A US-based company was pursuing Californian enforcement procedures to enforce a US court judgment against an English company. The English company applied to the English High Court for an anti-suit injunction on the grounds that:

- the enforcement procedures would "reach in" to the English court's jurisdiction – including because they included orders for the assignment of certain payment rights under debts payable in the UK and therefore required action in the UK
- the US company had initially sought to pursue its substantive claims thorough proceedings in the English courts, which had been dismissed and
- the English courts had subsequently refused an application to enforce aspects of the US judgment in England - on the basis of both issue estoppel and public policy factors arising from conflict between the US court's findings and EU law.

Although an injunction was initially granted at a "without notice" hearing (under time pressure and without a reasoned judgment), the High Court subsequently refused to continue it.

Noting that the injunction had apparently been regarded by the US court as "a startling and unwelcome action", the court observed that it should only interfere with a foreign court's own processes to enforce a domestic judgment in an exceptional case, and generally something of the force of fraud would need to be demonstrated. The court rejected an argument that the present case was exceptional because the enforcement procedures involved an exorbitant remedy (reaching into England) or because of its apparent conflict with the English judgment to refuse enforcement. The judge considered the extent of the "reaching in" and interference insufficient to give rise to a basis for an anti-suit injunction, still less an anti-enforcement one.

The decision is a useful reminder that while an English court has power to restrain the pursuit of foreign proceedings even at the post-judgment enforcement stage, cases in which it will consider it appropriate to do so will be rare. Read the judgment here.

The rule against reflective loss does not apply to foreign law claims in English courts

KMG International NV v Chen [2019] EWHC 2389

The English law principle known as the rule against reflective loss essentially prevents a company shareholder or creditor from bringing claims where their loss merely reflects the loss suffered by the company. In this decision, the High Court has held that the rule is not a rule of procedure, so as to fall outside the Rome II Regulation, and nor is it an overriding mandatory provision of English law for the purposes of article 16 of Rome II. The rule therefore does not bar a foreign law claim brought in the English court, even if that would be its effect if the claim was governed by English law.

In determining what law will be applied to a dispute, the English court (in common with all EU courts) applies the Rome I or Rome II regulation, depending on whether it is dealing with contractual or non-contractual obligations. That will remain the case even after Brexit, as the UK government intends to incorporate Rome I and Rome II into English law post-Brexit.

Rules of procedure are excluded from both Rome I and Rome II and, in the English courts, are dealt with under English law. In addition, both Rome I and Rome II provide that any "overriding mandatory provisions" of the law of the forum must be applied, even where the substantive claim is governed by a foreign law. The present decision is of interest in confirming that the English law rule against reflective loss will not be applied by the English court where, applying Rome I or Rome II, the applicable law is a foreign law.

The decision is of particular interest as a rare example of the English court considering what amounts to an overriding mandatory provision of English law. The test is, in summary, whether respect for the provision is regarded as crucial for safeguarding a country's public interests, such as its political, social or economic organisation, irrespective of the law that otherwise applies. The court's finding that the rule against reflective loss does not meet that test may not be seen as surprising. However, it is helpful in confirming that an overriding mandatory provision goes beyond a provision that cannot be derogated from by agreement, or is mandatory in the sense of not discretionary, or is informed by considerations of policy.

For more on the decision, read our blog post.

Reference to CJEU as to whether EU-domiciled defendant has right to restrain non-EU proceedings by anti-suit injunction

Gray v Hurley [2019] EWCA Civ 2222

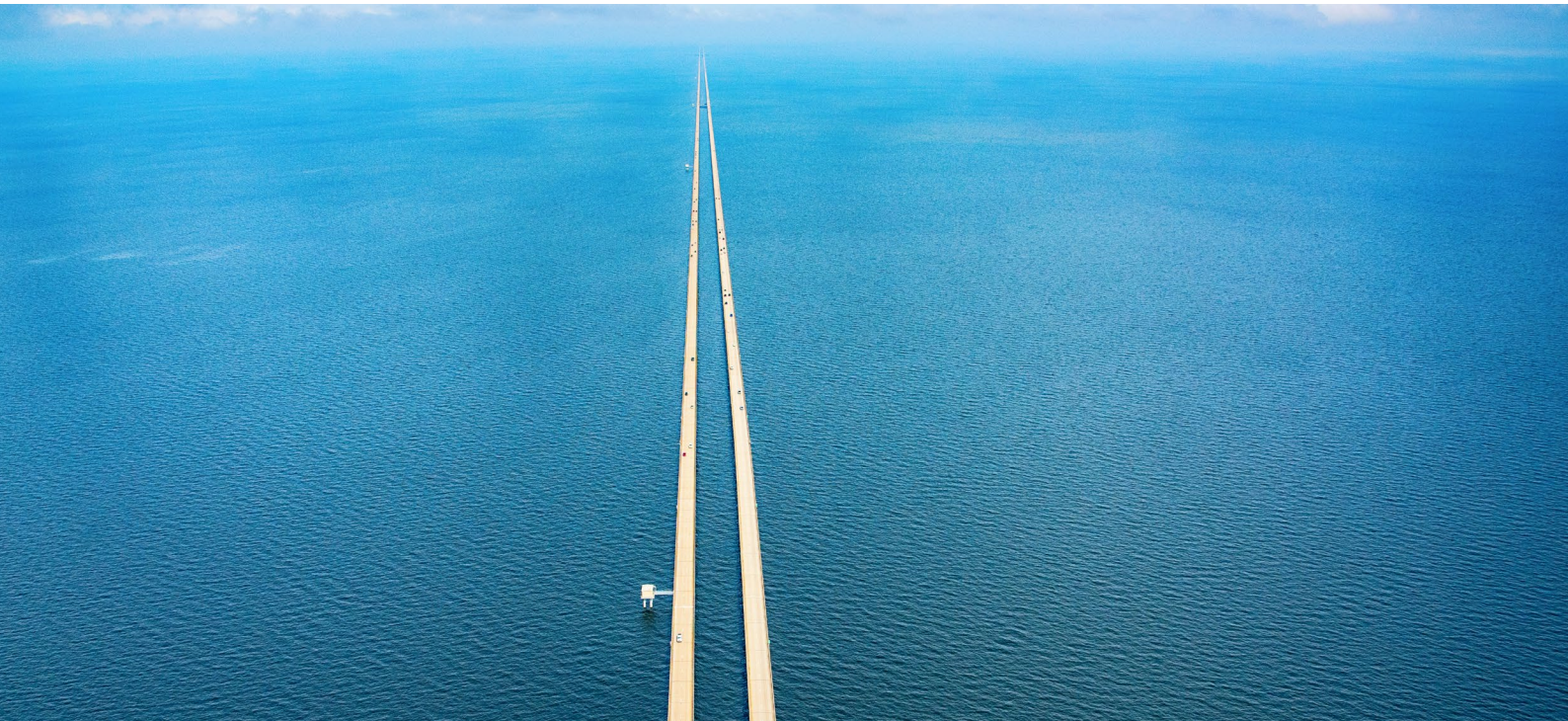
The Court of Appeal has made a reference to the CJEU, asking for a preliminary ruling as to whether a defendant domiciled in an EU member state has the right, under the recast Brussels Regulation, to be sued in that state and to obtain an anti-suit injunction restraining proceedings in a non-EU jurisdiction. It further asks whether the availability of the injunction extends to a situation where the cause of action in the non-EU court isn't available in the state of domicile.

Previous Court of Appeal decisions have held that an employee has the right to be sued in their EU domicile and to restrain proceedings in a non-EU court. The court in this case considered, however, that those decisions were restricted to employees. Applying the same reasoning in all domicile cases would lead to extreme results and injunctions would be granted in circumstances where, if the Regulation did not apply, an English court would be unlikely to grant an injunction. It concluded, however, that the position was not sufficiently clear (acte clair) and therefore a reference should be made to the CJEU.

It is unlikely that the CJEU will give judgment before the end of 2020, when the transition period following Brexit is due to come to an end (assuming no extension). However, the withdrawal agreement provides that the CJEU will continue to have jurisdiction to give preliminary rulings in cases referred by the UK courts before the end of the transition period, and that such rulings will be binding in the UK.

Although the question arose in this case in the context of an attempt to restrain non-EU proceedings against an English-domiciled defendant, the question will have obvious implications for proceedings brought in the UK courts against EU-domiciled defendants after the end of the transition period – in particular if the CJEU decides that the Regulation does confer a right on EU-domiciled defendants to be sued in their home courts, rather than a non-EU court as the English court will be post-Brexit.

For more on the decision, read our blog post.



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