

After BREXIT: Is International Commercial Litigation in London Doomed?

- Unfounded predictions of decline of the Commercial Court
- Common law rules on jurisdiction and enforcement should be extended to cover all cases and Brussels I Regulation Recast should not be replicated in English law
- Hague Conference must be joined and the Convention on Choice of Court Agreements ratified
- Rome I Regulation on choice of law should be replicated in English law

1. Background

Following BREXIT will English jurisdiction agreements and English choice of law clauses be less effective? Continental commentators have suggested the demise of the English commercial court as international commercial litigation will move to Europe. In the short term, the UK Government has to decide whether to replicate the existing private international law instruments in English law. In the longer run, it will have to decide whether to negotiate with the EU for common rules on the jurisdiction and enforcement of judgments.

I do not believe many of the concerns are well founded. True, the UK will become a third State once it leaves the EU and that has unwelcome consequences in the way Member States apply the Brussels I Regulation Recast (BIRR). The repeal of the European Communities Act 1972 may or may not reverse and re-enact all the primary and secondary UK legislation deriving from that Act, depending upon the manner of repeal and the content of the repealing Act. I here caution the UK Government against an immediate straightforward re-enactment of the law in the BIRR. Also, the Hague Convention on Choice of Court Agreements must be ratified as soon as possible after BREXIT.

2. Future of the Brussels I Regulation Recast

a. Why litigate in London?

A BIICL survey indicated that commercial parties choose the English courts for their neutrality, commercial experience (of judges and lawyers), reasonable speed and the easy enforcement of English judgments against assets in the UK. A considerable proportion of the cases before the Commercial Court is between parties from third States. These things are unchanged by BREXIT. It is not currently apparent that being able to enforce an English judgment in a Member State is an important factor in choice of the English courts either by parties from Member States or from third States. In any event, after BREXIT, English judgments will remain enforceable in Member State courts. Enforcement will not be automatic but dependent on the rules in the Member State

concerned for the enforcement of a third State's judgment. It may be slightly more cumbersome but it is unlikely to make substantive (rather than enforcement) proceedings so much more attractive in a Member State rather than England.

b. Replicate the BIRR in English legislation?

Following BREXIT the UK Government could re-enact the BIRR as if it were UK law, either just for parties from the UK and the Member States, or replacing the common law rules entirely. The latter would throw out well-accepted rules which have operated effectively for the large proportion of cases involving non EU parties for many years. There is no justification for two sets of rules (one for defendants domiciled in EU Member States and one for everyone else) without some advantage to the UK. Alternatively, the common law rules could revive for all parties, whether from Member States or not. That is the better solution for the immediate post BREXIT period.

The BIRR provides reciprocal gains and disadvantages which are finely balanced while the UK is a member of the EU. Once the UK has left the EU the gains under the BIRR regime are lost. One might question whether the rules on jurisdiction (including the manner of allocation of jurisdiction, on parallel proceedings, and on jurisdiction agreements) and on recognition and enforcement of judgments are worthy of enactment by themselves. Without automatic enforcement of English judgments in Member States, without automatic stays of proceedings in other Member States, without protection for defendants domiciled in England, would the rules in the BIRR be the ones to choose?

It makes no sense at all for the BIRR rules to be adopted in their entirety as English law. Most importantly, the unilateral application of the rules which were designed to provide reciprocal arrangements on jurisdiction and enforcement of judgments is illogical. The English courts would be taking jurisdiction over defendants domiciled in England, but with no power to take jurisdiction over a defendant domiciled in a Member State unless one of the special grounds of jurisdiction applied (Art 5). However, Member State's courts will be able to use possibly exorbitant rules of jurisdiction under their national law against defendants domiciled in England. Proceedings in a Member State's courts once commenced on the same subject matter would prevent the English courts from taking jurisdiction (Art 29). However, Member State's courts would only take account of proceedings commenced first in England as a matter of discretion (Arts 33 and 34). English courts would have no power to determine matters defined by Art 24 to be within the exclusive jurisdiction of Member State's courts. Member State's courts would not necessarily be so constrained.

In the longer term, were a new convention on jurisdiction and enforcement of judgments not be negotiated, continuing with the BIRR rules as replicated in English law becomes even less attractive. Questions of interpretation could not be referred to the CJEU. It is possible that the replicating legislation would permit the English courts to take account of the judgments of the CJEU in the future but that is somewhat incompatible with the political imperative. If such account is not taken, the UK version of the BIRR will become more and more stultified and remote from the reality of the version applying in Member States. There would be no uniformity. Any argument based on clarity of keeping the existing Regulation will therefore disappear over time.

c. Advantages of the Civil Procedure Rules

The common law rules found in Part 6 of the Civil Procedure Rules (CPR) are not outdated, nor are they marginal. On the contrary, currently those rules operate to determine the jurisdiction of the English courts in the many cases in which the BIRR does not apply. The common law rules are well-developed, well known, and eminently suitable for this type of litigation. They are not anti-European. The rules broadly permit the English court to hear any case in which it is the "forum conveniens" (ie the most appropriate forum). Therefore defendants domiciled in Member States will be subject to English jurisdiction only if England is the appropriate forum for the dispute.

The common law rules give effect to jurisdiction agreements either those in favour of England or a Member State or a Third State. Commercial contracts usually contain a jurisdiction agreement in favour of the English courts. These agreements could be exclusive (ie choosing English courts solely and excluding other courts) or non-exclusive (ie permitting English courts to hear the case but not excluding other courts, either specified or not, from doing so). Either type of jurisdiction agreement makes the English court the forum conveniens and is given effect to by the English court hearing the case. After BREXIT the English courts will remain able to take jurisdiction on the basis of English jurisdiction agreements under the common law rules. English jurisdiction clauses will still have useful effect. Jurisdiction agreements in favour of Member State's courts will also generally be respected under the common law rules. Such agreements make a Member State the forum conveniens and, if exclusive, the English court will generally decline to hear the case.

There are advantages in being free of the BIRR. Where parallel proceedings are continuing in a Member State the English court will be able to hear the dispute in appropriate cases, unlike at present when they must stay proceedings. There has been evidence that parties are using the parallel proceedings rules to frustrate litigation in a chosen forum (eg *Starlight Shipping Co* [2013] UKSC 70 [2015] 2 All ER (Comm) 747). The rules on staying proceedings under the common law rules are more flexible and nuanced than the strict rules operating in the BIRR. Nonetheless, the existence of proceedings in Member States is a ground for staying English proceedings. On leaving the EU the English courts will no longer be required to stay proceedings if a case is already going ahead in a Member State's court. Neither will a Member State's court be required to stay proceedings if a case has already been commenced in England. Parallel proceedings may lead to competing judgments. That is less than ideal in theory. In practice, proceedings can be commenced quickly in England and can be concluded reasonably expeditiously. Also, enforcement proceedings in England are quick and extensive as financial assets are often available in the UK against which to enforce an English judgment. If the common law rules revive both the pre-judgment and the post-judgment anti-suit injunction would be possible to discourage proceedings in Member States, particularly those brought in breach of an English jurisdiction agreement. If the rules in the BIRR are replicated in English legislation it would be quite unclear whether anti-suit injunctions will be available.

d. Recognition and Enforcement of Judgments

The common law rules on recognition and the enforcement of judgments are currently widely used for judgments from third States. The rules are well known by practitioners and clients. There is no reason why they should not be used to recognise and enforce Member State's judgments until reciprocal arrangements are negotiated.

3. Choice of Law for Contracts

The Rome I Regulation is unlike the BIRR. Reciprocation is not important. All Member States are bound by the Rome I Regulation to give effect to choice of law agreements whether the law chosen is one of a Member State or a third State. Therefore English choice of law clauses will be upheld in Member States. The rules of this Regulation are very similar to the pre-existing common law position. Although there are a few improvements that could be made, the Rome I Regulation should be replicated by English legislation after BREXIT.

4. Hague Choice of Court Convention

Once the UK has left the EU it can rejoin the Hague Conference as a Contracting State. It should immediately on BREXIT do so and accede to and ratify the Hague Convention on Choice of Court Agreements. This does not require the consent of the EU. Member States are bound by the Convention. Proceedings in other Member State's courts brought in breach of an exclusive jurisdiction agreement in favour of the English court are prevented by that Convention and judgments in breach of such agreements are not enforceable (with exceptions similar to those in relation to arbitration). That will protect exclusive jurisdiction agreements in favour of the English courts.

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