

A M E R E L L E R

Client Alert: Choice of English Law and Jurisdiction in International Contracts: A Perspective from the Middle East before and after Brexit

The current transition period in UK-EU relations under the 2020 Withdrawal Agreement will end on 31 December 2020. This client alert discusses the impact that Brexit will have on the choice of English law and jurisdiction from the perspective of the Middle East.

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No Immediate Impact on Choice of Law

Many commercial agreements in the Middle East are governed by English law, in particular financing transactions.

Brexit will have no immediate impact on choice of law clauses which provide for English law as the proper law of the contract. The choice of English law will remain largely unaffected by Brexit. Existing EU rules on choice of law (the Rome Regulations I and II) were incorporated into UK legislation as part of the European Union Withdrawal Act 2018 (EUWA). Accordingly, English courts will continue to apply the current regime. The Rome I Regulation gives effect to choice of law clauses irrespective of whether the law is from inside or outside the EU.

How Brexit will affect the popularity of English law as choice of law is difficult to predict. From a Middle Eastern perspective, however, it is notable that many Middle Eastern banks have moved their European headquarters away from London, mostly to Paris (and Asian banks to Frankfurt). This may also have an effect, in the medium term, on the law governing financing transactions.

Reciprocity Issues regarding Jurisdiction Clauses and Enforcement of Judgments

When it comes to jurisdiction clauses and the enforcement of judgments, matters are more complex.

The choice of English courts has also been popular for a variety of reasons, including the enforceability of judgments across the EU.

The effect of jurisdiction clauses and the enforcement of judgments is governed by the Brussels Regime, mainly comprised of EU Regulation 1215/2012 and the 2007 Lugano Convention (EFTA Member States). These rules stipulate that EU (and EFTA) Member State courts must uphold jurisdiction clauses that confer jurisdiction on the courts of Member States and allow for automatic enforcement of judgments in other Member States. However, unlike the Rome Regulations, these rules are reciprocal and cannot be retained so easily: the UK cannot regulate the recognition and enforcement of English judgments in the other states through unilateral, national legislation. That said, the UK Government is seeking similar arrangements. While these arrangements may successfully give effect to jurisdiction clauses, the question of mutual recognition and enforcement of judgements between England and the EU member states remains to be examined on a case-by-case basis.

On 28 February 2020, the UK applied to accede to the Lugano Convention in its own right after the transition period. Accession to the Convention, though, requires either EU or EFTA membership. The latter would include freedom of movement, a major reason for the UK's decision to end the former EU membership. For the UK to accede outside these provisions, EFTA states, and the EU as a whole, would have to consent, which they have not, leaving this issue up to current negotiations.

Without agreement on future judicial cooperation, however, these issues could be governed by another international framework, the Hague Convention on Choice of Court Agreements (HCCCA). Ratified mainly by EU Member States, the HCCCA as such remains largely untested due to the existing Brussels Regime. While it would give effect to jurisdiction clauses and enforcement of any resulting judgment and thus offers a way in which English judgments can be enforced within the EU, several issues arise: its scope is limited to exclusive jurisdiction agreements and does not extend to agreements that only bind one party to a jurisdiction (asymmetric clauses). Provisional protection measures and orders are also generally not included, limiting effectiveness. Furthermore, it is uncertain whether for the UK – currently a signatory via its EU membership and only post-Brexit a party in its own right – the HCCCA came into force on 1 October 2015 or will do so only on 1 January 2021. With the EU currently insisting on the latter, HCCCA rules might only apply to contracts entered into on or after 1 January 2021. In the last analysis, while it offers some protection, the HCCCA is clearly not a substitute for the existing framework.

Conclusion

From the perspective of Middle Eastern contracting parties, Brexit will have no immediate effect on jurisdiction and choice of law clauses providing for the jurisdiction of the English courts and English law as the proper law of the contract. The enforcement of English court decisions across the EU, however, needs to be re-examined on a case-by-case basis. Finally, how English commercial law will develop, and whether its popularity as the jurisdiction of choice in financing transactions will survive, remains to be seen.

If you would like more information about this topic, please contact us.

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