

19 May 2017
London

JURISDICTION CLAUSES AND ENFORCEMENT OF COURT JUDGEMENTS POST BREXIT

Ana Stanič

English Solicitor Advocate

**Honorary Lecturer at Centre for Energy Petroleum and Mining
Law and Policy, University of Dundee**

1. *General Observations*

- Brexit no impact on the choice of law. Revert to Rome Convention but no equivalent to Art. 4(1)(h) re. applicable law for certain types of financial service contracts
- Scope of English law will over time become different to EU law
- Question of whether English and Welsh courts have jurisdiction in a civil or commercial dispute involving subject matter giving jurisdiction to an EU court or concerning a party domiciled in the EU is currently governed by the Recast Brussels Regulation (Regulation 1215/2012)
- Recast Brussels Regulation sets out a comprehensive regime on jurisdiction and seeks to avoid the risk of parallel proceedings across the courts of the EU
- Recast Brussels Regulation provides that if a court, which is not the first court involved, has jurisdiction pursuant to an exclusive jurisdiction clause, that court may continue to hear the matter – Italian torpedo

2. *Brexit Options*

1. **Great Repeal Act: Copy paste Recast Brussels Regulation into English law**

- Problem of reciprocity

2. **Danish/EU 2005 Agreement: Brussels I Regulation, notification to implement Recast**

- Obligation to make reference to CJEU + subject to infringement proceedings

3. **Tailor made agreement with no reference to CJEU**

- Possible option of English courts to “take due account” of CJEU

2. *Brexit Options*

4. Lugano II Convention

- Extends Brussels I Regulation to Iceland, Switzerland, Norway
- UK not a party in its own right so will cease to be a party upon Brexit
- Unanimous agreement of all contracting parties required for UK to join
- Protocol 2 – court to “pay due account” to decisions of the other courts
- Areas not covered
 - a. a new exception to the *lis pendens* rules for torpedo actions (Article 31(2));
 - b. the clarification of the arbitration exception (Recital 12 and Art. 1(2)(d));
 - c. changes to the rules relating to jurisdiction agreements (Article 25);
 - d. new discretion to stay proceedings where other proceedings are pending in a third state (Articles 33 and 34);

2. *Brexit Options*

e. the abolition of exequatur (Article 39).

f. Does not cover asymmetric jurisdiction clause

g. Extra grounds to refuse enforcement of judgement enforcing court in England or Wales may of its own volition refuse to recognise and thus enforce a judgment on a number of grounds including:

- public policy
- whether the debtor had sufficient time to respond to the original claim
- the judgment is irreconcilable with a judgment given in a dispute between the same parties in England and Wales, regardless of the order in which the conflicting judgments were given

2. *Brexit Options*

5. Hague Convention on Choice of Court Agreements

- currently in force between the EU, Mexico and, from October 2016, Singapore, US signed
- Hague Convention only deals with the validity and effectiveness of **exclusive** jurisdiction agreements (and enforcement of judgments made in such cases)
- 3 month gap between entry and agreements covered
- recognition and enforcement procedure (Article 14)

6. 1968 Brussels Convention

- reimmerge on Brexit
- does not cover changes introduced by Brussels I Regulation or Recast Regulation
- Article 68 of the Brussels I Recast Regulation specifies that the Regulation “supersedes” the 1968 Brussels Convention except for some territories of Member States that do not fall under the Regulation’s scope

2. *Brexit Options*

- Brussels Convention was never abrogated or formally denounced by any of its Contracting State
- MS could decide to withdraw invoking *fundamental change of circumstances that constituted an essential basis of the parties' consent to be bound* within the meaning of article 62 of the 1969 Vienna Convention on the law of treaties
- Only 14 of 27 MS are party
- The Protocol of 3 June 1971, annexed to the 1968 Brussels Convention, tasks the Court of Justice of the (former) European Community with interpreting the 1968 Brussels Convention
- Brussels I Recast Regulation, which provides for an immediate enforceability of a judgment across the EU without the need for intermediate proceedings in the enforcing State
- Under the 1968 Brussels Convention, enforcement of a judgment rendered in another contracting State is subject to an order for enforcement that must be issued in the enforcing State, which must be sought by any party with standing

3. *Anti-suit Injunctions*

- Recast Regulation: thought to allow anti-suit injunctions in case of exclusive arbitration clause
 - *Gazprom v. Lithuania* C-536/13 (anti-suit injunction issued by way of an award)
- Danish-type Agreement: not clear
- Lugano Convention: depends on whether English courts would choose to adopt a purposive approach
- Post Brexit: antisuit injunctions also in case of exclusive jurisdiction accorded to courts (no longer bound by *West Tankers* CJEU ruling)

Thank you for your attention

Ana Stanič

E&A Law Limited

anastanic@ealaw.eu