



International Distribution Institute

EU COMPANIES DEALING WITH UK COUNTERPARTS AFTER BREXIT

Choice of law and jurisdiction strategies

June 17, 2021

Panel discussion

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INTRODUCTION

- Short presentation of the speakers.
- In order to provide a practical approach based on specific situations, we have divided the issue regarding post-Brexit strategies in two parts: first, the position of EU companies dealing with UK counterparts, and second, the opposite situation of UK companies towards EU counterparts.
- However, since the legal framework is the same for both situations we will briefly summarize some basic aspects.

CHOICE OF LAW

- Regarding the strategies on **choice of law**, Brexit does not imply a substantial change. Before Brexit, the UK was bound to the rules of the Rome I Regulation (593/2008).
- After Brexit the UK will continue to apply the contents of the same Rome I Regulation as “retained EU law”. The Rome Convention, as amended by the “Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019» will continue to apply to agreements signed before the entry into force of the Rome I Regulation.
- This means that in case of dispute the rules applied by an English Court or by an EU Court will be the same.

CHOICE OF JURISDICTION AND ENFORCEMENT OF JUDGMENTS

- Before Brexit, the validity and effectiveness of jurisdiction clauses was regulated by EU Regulation 1215/2012. Now this issues will be governed :
 - by the domestic laws of the respective states;
 - by possible bilateral conventions on jurisdiction and recognition of judgments;
 - by the 2005 Hague Convention on Choice of Courts Agreements, if applicable;
 - by the Lugano Convention, if and when the re-accession by the UK to such Convention will be accepted by the other signatories.
- The Hague Convention, under which choice of court clauses are recognized in the contracting states, applies only to **exclusive** jurisdiction agreements; it is almost certain that it does not apply to **asymmetric jurisdiction** agreements.
- Recognition and enforcement of judgments from UK to EU and vice-versa is as well governed by domestic rules, bilateral conventions (if existing) and the 2005 Hague Convention, if applicable.

CASE 1/1

Supplying selective distributors (retailers) in the UK

An Italian company manufacturing luxury goods (Supplier) is selling to multi-brand retailers in the UK under selective distribution agreements which specify a number of obligations of the retailer (Distributor), and include the supplier's general conditions of sale. The selective distribution agreement and the general conditions of sale are subject to Italian law and to jurisdiction in Italy, according to the following choice of forum clause:

For all disputes arising out of or connected with this selective distribution agreement and the sales agreements made under this agreement the Courts of Torino (Italy) will have exclusive jurisdiction. The Supplier retains the right to bring claims against the distributor before any other competent court.

The supplier would like to know whether the present solution is still appropriate and effective after Brexit, with respect to the following questions:

- Is the choice of Italian law fully effective?
- Will the jurisdiction clause prevent distributor to bring a claim before a UK court?
- Will the Italian judgment be enforceable in the UK?

CASE 1/1

FIRST ISSUE: CHOICE OF LAW

- No substantial change after Brexit.
- In the UK the contents of Regulation Rome I are no more EU rules (subject to the interpretation of the Court of justice) but **domestic law**.

CASE 1/1

SECOND ISSUE: EFFECTIVENESS OF THE CHOICE OF COURT CLAUSE

THE APPLICABLE RULES

- **Lugano Convention.**
Communication from the EU Commission of 4 May 2021: the Convention should be available only for countries which have a particularly close regulatory integration with the EU
- **1964 Italy – UK Convention**
No rules on choice of law clauses
- **2005 Hague Convention**
Not applicable to asymmetric jurisdiction clauses
- **English domestic rules** on effectiveness of jurisdiction clauses

CASE 1/1

SECOND ISSUE: EFFECTIVENESS OF THE CHOICE OF COURT CLAUSE

DOMESTIC RULES

- **Differences between England, Wales and Scotland?**
- **Validity of asymmetric clauses.**
English case law is in favour of validity
- **Effectiveness of choice of jurisdiction clauses in favour of foreign courts.**
Does the English judge have a discretionary power to retain jurisdiction notwithstanding the clause?

If this is the case, in which cases the court might disregard the jurisdiction clause?

CASE 1/1

THIRD ISSUE: ENFORCEABILITY OF JUDGMENTS

Enforceability of the English judgment in Italy

Italian courts will refuse recognition and enforcement if the English Court disregarded the choice of jurisdiction agreement in favour of Italian Courts

Enforceability of the Italian judgment in the UK

- Under the 1964 Italy-UK Convention (if applicable)
- Under domestic rules of the UK

CASE 1/2

Appointing a commercial agent in the UK

A Dutch company (Principal) appoints an exclusive agent for the territory of the UK. The standard contract of agency entered into provides Dutch law as the governing law and the jurisdiction of the courts of Amsterdam, as specified in the following clause:

This contract is governed by the laws of the Netherlands. The Courts of Amsterdam (the Netherlands) shall have jurisdiction in proceedings under this contract.

The Principal would like to know whether the present solution is still appropriate and effective after Brexit, with respect to the following questions:

- Is the choice of Dutch agency law fully effective?
- Will the jurisdiction clause prevent the Agent to bring a claim before UK courts?
- Will the Dutch judgment be enforceable in the UK?

CASE 1/2

The answers under the Hague Convention

Applicable law

No problem. Freedom of choice under the rules of the Rome I Regulation (now UK domestic law)

Effectiveness of the choice of court clause

Fully effective under the 2005 Hague Convention which applies, since the exclusivity clause conforms to Article 3.

Enforceability of a Dutch judgment in the UK

See Chapter III of the 2005 Hague Convention

CONCLUSIONS

Recommended strategies

- With respect to agreements containing an asymmetric jurisdiction clause
 - Replacing asymmetric clauses with exclusive ones ?
 - Updating existing contracts or only future agreements?
 - Opting for arbitration ?
- With respect to agreements containing an exclusive jurisdiction clause



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THANK YOU FOR YOUR ATTENTION

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