ASYMMETRIC JURISDICTION CLAUSES VIS-À-VIS DISPUTE RESOLUTION IN THE UK: WHAT IN 2022 IN THE AFTERMATH OF BREXIT?

Background

In an asymmetric jurisdiction, the parties submit to the jurisdiction of one or more designated courts, but some parties' submissions are exclusive while others are not. Therefore, provisions of an asymmetric jurisdiction clause ("AJC") might be interpreted as either granting a certain Court exclusive jurisdiction over a dispute or delegating that authority to that Court.

Currently, the freedom to choose any Court to hear the dispute by the party with more extensive jurisdiction raises a few key questions, including whether such a Court will be *stricto sensu* 'any Court' or a Court of 'competent jurisdiction' and how the capability of a Court in a transnational dispute with multiple domestic procedural rules will be determined.

The Brussels Regulation (Recast) and the 2005 Hague Convention are two of the main pieces of EU law that an AJC is based on. However, as a result of Brexit, the United Kingdom can no longer rely on the Brussels legislation after December 2020. Therefore, Parties are prevented from using the Hague Convention. In the event that the UK does not ratify the 2007 Lugano Convention, parties are attempting to establish jurisdiction and reciprocal recognition of judgments under the Hague Convention on Choice of Court Agreement.

Asymmetric clauses are most likely recognised under the Lugano Convention as exclusive choice of court agreements because the United Kingdom ("UK") has applied to accede to this Convention, which is broadly comparable to the Brussels Recast Regulation and to which the UK government has applied to accede. It is still uncertain whether or when the UK will really accede to it because all signatories must agree, and the European Union ("EU") hasn't done so yet.

Asymmetric jurisdiction provisions are acceptable under the Brussels Recast Regulation as an exclusive jurisdiction clause, according to English courts' rulings in the instances of Etihad Airways PJSC and Commerzbank Aktiengesellschaft. However, given that the Brussels Recast Regulation no longer applies in the UK as a result of Brexit, this only has immediate impact for actions that begin on or before December 31, 2020.

There are certain areas of doubt in the current system for exclusive jurisdiction clause enforcement in the UK and across the EU, but overall, it is reliable enough to be employed.

This article looks at the current position of the UK in regard to AJCs, covering the issues surrounding enforceability and examines a feasible road ahead.

The current position of the UK and the enforcement conundrum

Uncertainty surrounds the Hague Convention's applicability to jurisdiction agreements made prior to January 1, 2021. The EU and its member states have suggested that they may not, but the UK has stated that it will implement such accords as if the Hague Convention applied. Uncertainty and concurrent legal actions may result from this. Additionally, temporary remedies like an injunction will not be subject to execution under the Hague Convention. The parties may decide to restate their agreement at this time to make sure it is covered by the Hague Convention in order to prevent this confusion.

Contracting parties will no longer be able to depend on treaty-based enforcement of their English judgements throughout the EU, Switzerland, Iceland, and Norway as of January 1, 2021, without the Hague Convention, as these countries are not signatories to the Hague Convention.

In general, it is likely that decisions made in business disputes other England will be upheld in member nations, and vice versa. Since the courts could recognise and enforce each other's judgements until fairly recently, there is no reason to believe that since Brexit the various courts' rulings are any less secure. However, recognition won't happen automatically. It could be necessary to start new legal action to enforce the verdict. Before determining whether to file procedures, it will likely take considerably longer and cost more money. It may also be essential to pay for local enforcement guidance. Potential claimants may be discouraged from pursuing their claims by the uncertainty.

Possibility of Optional Arbitration Clauses

Similar to asymmetric jurisdiction agreements, optional arbitration clauses are untested in many countries, therefore it is unclear what stance the courts there will likely adopt. The courts of some jurisdictions may decline to enforce an optional arbitration clause or any judgement or award made in reliance thereon, either on the basis of public policy considerations or on the ground that it is a conditional agreement and thus in some way violates Article II of the New York Convention, even though such clauses are permissible under English law, as in the case of NB Three Shipping.

In ZAO Russian Telephone Company, a London arbitration clause with a unilateral option to litigate contained in an English law governed contract was found to be invalid by the Supreme Arbitrazh Court of Russia. Interestingly, in France, notwithstanding the Rothschild case, such optional arbitration clauses have been upheld in the case of Société Générale SA.

The Way Forward

In accordance with the Brussels Convention, the Lugano Convention, the common law, or some combination of them, English courts may stay their legal actions in favour of another nation decided upon by the parties. The ways in which that agreement is expressed and the permitted exceptions may differ slightly from the existing situation.

Likewise, EU Member States will undoubtedly continue to accept exclusive jurisdiction clauses designating the English courts, whether the UK is a Brussels Convention state, a Lugano Convention state, or simply a non-Member State within the scope of the Brussels Regulation. Instead of a global convention, this may be accomplished through their own domestic conflict of law laws.

If the UK just joins the other non-member states, it may result in more room for delay strategies. However, the UK will probably once more be allowed to deploy anti-suit injunctions if its negotiating position is outside the Brussels rules. By the Brussels Regulation, as mentioned above, this potent tool to force compliance with an exclusive jurisdiction provision was substantially taken out of the English courts' legal toolbox.

The UK may ask for a special status as a non-Member State under the Brussels Regulation system if it wants a situation that is similar to the status quo. The Lugano Convention might be a close substitute if this is not politically possible, maybe because it would necessitate acknowledging the Court of Justice of the European Union's ongoing supremacy. However, the EU might not be open to letting the UK stick with the current system or anything similar. The UK might then elect on its own to ratify the Hague Choice of Courts Convention and rely on its past participation in the Brussels Convention. This results in a system that incorporates a reasonable amount of reciprocity, particularly for agreements involving exclusive jurisdiction.

It is anticipated that the domestic legislation concerning the recognition of judgments in EU member states will be enforced if the UK is unable to establish a trustworthy reciprocal arrangement that recognises and implements AJCs. Without the Brussels Recast Convention or its equivalent, it is conceivable that many EU member states will uphold English judgments.

This is not guaranteed, and international rulings that are implemented for consistency are probably just going to be superficial.

Uncertainty over the post-Brexit strategy is also brought on by the uneven attitude taken by EU nations to date. In any case, this ambiguity highlights how crucial it is to make sure covenants to pay are added moving forwards to local law security papers. This precaution would not, however, totally eliminate the requirement to determine the terms of the principal credit arrangement under the applicable legislation, which is typically English law. Determining whether a proper default has actually happened and, if so, whether that default authorises the lenders to enforce their local law security are only two examples of such requirements.

To be clear, it should be underlined that these concerns with cross-border security enforcement will only materialise if a legal challenge to financial documents is successful and results in the cross-border enforcement of security. Under financing documents, parties are allowed to settle problems amicably and regularly, with judicial action serving as a last resort. Another situation where the lack of the Recast Brussels Regulation or any successor agreement will have no bearing is when security is frequently implemented outside of court without the necessity for any kind of legal action or procedure.

Although the use of unequal jurisdiction provisions reflects market practise, the latest Loan Market Association Guidelines and the new post-Brexit framework may make this conventional method more problematic than helpful. This problem could be solved by symmetric jurisdiction provisions because they are enforceable under the Hague Convention. The benefits of being able to employ the Hague Convention by choosing such symmetric provisions over depending on the various laws and legal systems in the 27 EU nations may outweigh the drawbacks of using symmetric jurisdiction clauses.