The Lugano Clock Has Stalled: What Now For Dispute Resolution Clauses?

By Richard Breen and Gail Nohilly

Since 1 January 2021, Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Recast) and the 2007 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention) no longer apply to the UK.

There is no mechanism allowing the UK to accede to Brussels Recast in its own right. Under the Lugano Convention however, the UK is entitled to apply for accession following certain conditions specified in Article 72. Although the UK applied for accession in April 2020, it has not yet been "invited" to accede. This is because, article 72(3) limits accession to the unanimous agreement of the contracting parties, namely Iceland, Norway, Switzerland, Denmark and the European Union (EU). Iceland, Norway and Switzerland have consented to the UK's accession application. The European Commission however, recently notified the Swiss Federal Council (as Depositary of the Lugano Convention) that, representing the EU, it does not consent to the UK's accession. Whether this is the final decision from the EU, or whether the European Council will vote on the issue, remains to be seen.

In the absence of unanimous consent of all contracting parties coupled with the enforcement gap of several months even if accession to the Lugano Convention is permitted, Irish (or indeed EU or EFTA) contracting parties with UK entities should continue to give careful consideration to their dispute resolutions clauses.

Why would accession to the Lugano Convention be significant?

UK accession to the Lugano Convention would be significant in restoring some balance and confidence to the post-Brexit setting for cross border disputes resolution. The Lugano Convention governs jurisdiction, recognition and enforcement of judgments in civil and commercial matters between EU member states and certain EFTA members, who cannot accede to Brussels Recast. It became the topic of much recent commentary because EU regulations that harmonised the rules of enforceability of choice of court clauses, and the recognition of judgments, no longer apply to the UK since it left the EU.

Now, where disputes arise between Irish and UK parties involving a UK choice of court clause, or the recognition or enforcement of UK judgments, they fall to be considered either under (i) the Hague Convention of 30 June 2005 on Choice of Court Agreements (Hague) or (ii) the common law rules of private international law.

The UK is a member of Hague, an international Convention, in its own right since 1 January 2021, but Hague has its limitations:

1. Hague only applies where the parties have chosen exclusive jurisdiction clauses,

2. It is unclear whether Hague applies to choice of court clauses entered into between the date of its original application in the UK under its EU membership (1 October 2015), and its entry into force in the UK as a party in its own right (1 January 2021).

Where to from here?

If parties want to achieve conclusiveness in terms of dispute resolution provisions in contracts, they can consider options such as:

- The appropriateness of exclusive jurisdiction clauses

The benefit of the exclusive jurisdiction clause is that it falls within the scope of Hague. It is commonly understood that asymmetric or non-exclusive jurisdiction clauses fall outside Hague. However following the UK Court of Appeal's aside comments in *Etihad Airways PJSC v Flother* [2020] EWCA Civ 1707 that Hague "should probably" be interpreted as not applying to asymmetric clauses, the UK position

on this point is not settled.

- The use of international arbitration

International arbitration as the preferred dispute resolution process remains attractive because the recognition and enforcement of arbitral awards under the New York Convention 1958 on Recognition and Enforcement of Foreign Arbitral Awards is unaffected by Brexit.

- Unilateral option clauses on the dispute resolution forum

Unilateral option clauses can take the form of either (i) asymmetric arbitration clauses or (ii) asymmetric litigation clauses. These clauses purport to give one party to the contract the option of choosing either litigation or arbitration to resolve any dispute arising between the parties after the dispute has arisen. Such clauses have not formed the subject of an Irish judgment to-date.

These types of unilateral option clauses have been the subject of judicial attention in the UK, where they have been found to be valid and enforceable in the particular circumstances of the case. *NB Three Shipping Ltd v Harebell Shipping Ltd* [2004] EWHC 2001, concerned an agreement with an express provision allowing both parties to bring proceedings in the English courts, but a separate provision giving one party only the right to go to arbitration. Morison J found no contradiction in giving one party "better" rights than the other. Harebell was cited in *Law Debenture Trust Corp plc v Elektrim Finance BV and others* [2005] 2 All ER (Comm) 476, where an agreement allowing the parties to go to arbitration, but with a provision giving the defendants the unilateral option to bring proceedings before the UK courts, was upheld.

The court described the provision as a "dual dispute resolution regime". The UK High Court in *Deutsche Bank Ag v Tongkah Harbour Public Company Ltd* [2011] EWHC 225, commented that a jurisdiction clause that gives one party only the option to arbitrate is perfectly valid.

Parties need to exercise caution in drafting a unilateral option clause to ensure that it does not undermine an otherwise valid and binding arbitration clause.

Conclusion

Whilst it is disappointing that UK accession to the Lugano Convention remains in abeyance, practical dispute resolution clause alternatives are available to parties involved in cross border transactions with UK counterparties. However, the parties need to give careful consideration to the appropriateness of any particular dispute resolution process in conjunction with legal advice, weighing the benefits against the risks involved under each proposed option.

To access further resources, please see our "smart, hyperlinked" 'Cross Border Disputes Navigator 2021: The New Europe and Beyond' to assist in navigating issues around choice of law, jurisdiction, and the recognition and enforcement of EU and non-EU judgments. You can also access ourBrexit Hub: Litigation - Top 5 Issues here.

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