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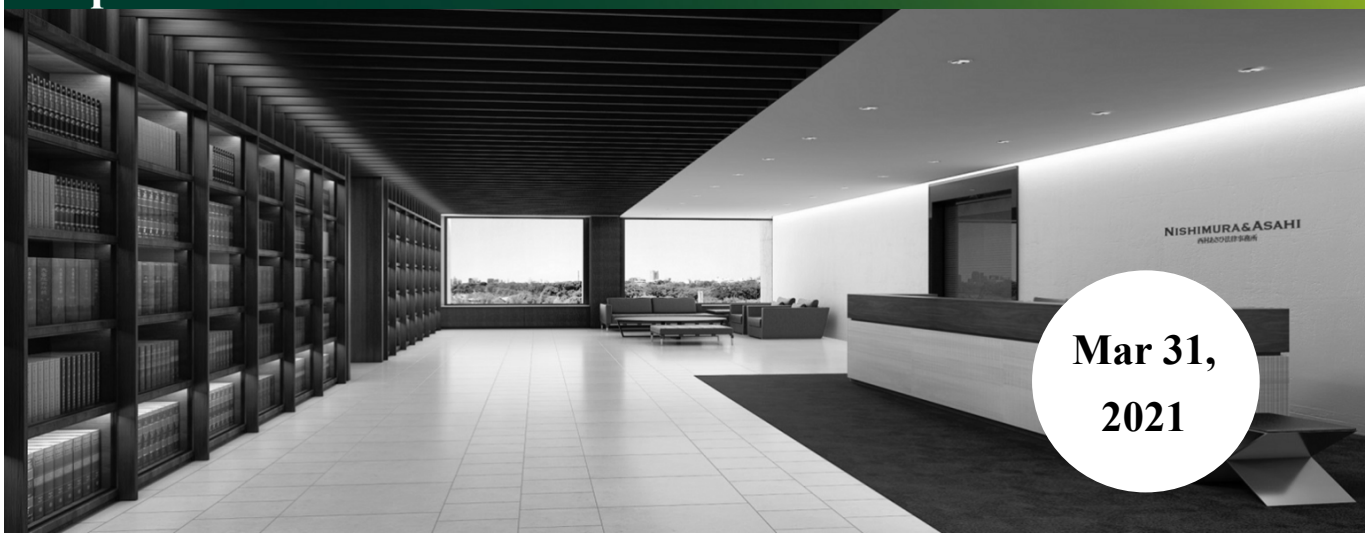

A hard Brexit for European cross-border dispute resolution? – What companies outside the EU and the UK should know (Part II)

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* This newsletter was drafted based upon the information available as of 20 March 2021.

A. INTRODUCTION

In our previous newsletter "A hard Brexit for European cross-border dispute resolution? – What companies outside the EU and the UK should know (Part I)", we provided an introduction into two key issues parties involved in a cross-border dispute should be aware of after the United Kingdom's ("**UK**") withdrawal from the European Union ("**EU**") (so-called "**Brexit**"): jurisdiction and service of process. In this Part II, we provide insight into questions surrounding the governing law, choice of law, taking of evidence and recognition and enforcement of judgments.

In doing so, we revisit the hypothetical case we already discussed/presented in Part I:

> A Japanese company operates in Europe through a subsidiary with its office in Duesseldorf, Germany ("**JP Corp.**"). In January 2021, JP Corp. contracts with a London based company ("**GB Corp.**", jointly with JP Corp., the "**Parties**"). In February 2021, a serious dispute arises between the Parties, making a respective claim by either Party imminent.

B. GOVERNING LAW AND CHOICE OF LAW

The question of the governing law is important for disputing parties as it shapes their rights and obligations. How has Brexit impacted this issue? In the EU, the determination of the law applicable to contractual and non-contractual

obligations, including the validity of contractual choice of law clauses, is governed by the **Rome-I Regulation**[1] and **Rome-II Regulation**[2]. The Rome-I and Rome-II Regulations were incorporated into the laws applicable in the UK prior to Brexit and continue to apply post-Brexit. Thus, EU Member State and UK courts are currently bound to follow the same choice of law approaches. Unless the UK amends or revises its conflict of laws rules, Brexit will not have an immediate or significant impact on cross-border issues of choice of law. However, a closer look is warranted:

In business relations, it is quite common for parties to agree on the governing law of a contract, and thus the governing law of any dispute arising in connection with such contract, in advance. If JP Corp. and GB Corp. included a choice of law clause in their contract, regardless of a dispute's timing (pre-/post- Brexit) or location (in an EU Member State or UK court), under the Rome-I Regulation (or the incorporated domestic law equivalent) such choice of law will essentially be accepted and enforced. Even if the Parties agree on a law not related to the place of business of any of the Parties involved, for example Japanese law, such a choice of law clause is generally considered to be valid. It is unlikely that this will change post-Brexit because the parties' freedom to choose the law applicable to a contract is a well recognized principle in numerous legal systems.

Absent the Parties' choice of law, the conflict of laws rules contained in the Rome-I and Rome-II Regulations and mirrored in the laws applicable in the UK will be applied by courts in the EU Member States and the UK. By way of example, imagine that the Parties enter a 2021 franchise agreement with JP Corp. being the franchisee. A dispute arises and GB Corp. brings an action in a London court post-Brexit. The English court will resort to the domestic conflict of laws rules which have incorporated the Rome-I and Rome-II Regulations. Absent a parties' choice of law clause and any special circumstances, the court accordingly will apply the law of the country where the franchisee has its habitual residence. In the example this would be the law of the country of JP Corp.'s habitual residence, i.e. German law.

Does that mean that as long as the laws applicable in the UK are not changed, Brexit essentially has no effect on the question of governing law and choice of law? One thing needs to be kept in mind: with Brexit, UK courts are no longer bound by decisions of the European Court of Justice. It is therefore possible that, over time, EU and UK courts develop differing interpretations of essentially the "same rules" – with the consequence that a uniform interpretation of conflict of laws rules throughout the EU and the UK is no longer guaranteed. In the example above, while the Rome-I Regulation states that the law where the franchisee has its habitual residence is to be applied, what is to be understood as "habitual residence" is a matter of interpretation. Any court in a conflict of laws analysis has to consider various factors and interpret the corresponding conflict of laws rules. Even the question of a whether a clause in a contract amounts to a choice of law clause is ultimately open to interpretation.

Absent a guiding uniform interpretation by the European Court of Justice, this "openness" can lead to situations where the applicable substantive law depends not only on the facts of the dispute, but, due to different interpretations of the "same rules", also on the court where the dispute is litigated. This situation somewhat contravenes the idea of unified conflict of laws rules and entails legal uncertainty for companies, while also opening the door for forum shopping. Thus, what needs to be kept in mind in a post-Brexit scenario is that it can become important – also from a governing law perspective – which court will be the competent court to hear a cross-border dispute.[3]

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1 Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I), online at https://eur-lex.europa.eu/eli/reg/2008/593/2008-07-24.

2 Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II), online at https://eur-lex.europa.eu/eli/reg/2007/864/oj.

3 See for the question of Jurisdiction in part I of our newsletter, online at https://www.nishimura.com/en/newsletters/corporate_210226.html.

C. TAKING OF EVIDENCE

During the course of cross-border litigation, the question of taking of evidence often becomes relevant. Within the EU, this issue is governed by the **EU Evidence Regulation**[4], which contains rules on judicial cooperation between Member States and Member States' courts in this regard. The EU Evidence Regulation aims at removing barriers to judicial cooperation, by allowing courts of Member States to directly interact with and assist each other, without resort to diplomatic or consular channels. This is supplemented by standardized forms for improving universal recognition of intra-EU cross-jurisdictional requests.

Imagine that the Parties in our hypothetical case have decided to resolve their dispute in a Duesseldorf court and an important witness to be interviewed in the case lives in London. Before Brexit, under article 1 of the EU Evidence Regulation, a Duesseldorf court was able to request a London court to examine the witness and send the transcripts from the examination to Germany for the Duesseldorf court to use as evidence in its proceeding. Alternatively, under article 17, the Duesseldorf court could examine the witness remotely, with the witness being physically present in the London court.

With Brexit, the EU Evidence Regulation has ceased to apply to the UK from 1 January 2021. This means that a court in a proceeding pending in the UK looking for assistance from an EU Member State court or *vice versa* has to resort to otherwise applicable international rules. The most well-known international convention for the taking of evidence is the **Hague Evidence Convention**[5].

Under the Hague Evidence Convention, the Duesseldorf court cannot conduct an examination; it can only ask the court in London to conduct an interview with the witness. Another important difference is the absence of a time limit for the request under Hague Evidence Convention. The EU Evidence Regulation states that such a request has to be executed without delay and within a maximum of 90 days. Also, requests under the Hague Evidence Convention have to be made to a centralized body and cannot be made directly from one court to the other. This means higher administrative burden, less efficiency and likely more costs for the parties involved.

The above scenario is of course only applicable in cases where both involved courts are located in countries which are signatories to the Hague Evidence Convention. Ireland, Austria and Belgium are three EU Member States not party to the Hague Evidence Convention. As such, absent any different international treaties or specific domestic rules, when taking evidence in a court in Ireland, Austria or Belgium *vis-à-vis* a court in the UK, the taking of evidence will have to be conducted by the more complicated way of sending formal letters of request to the national courts via diplomatic channels.

Thus, Brexit has made judicial cooperation in evidence taking matters more difficult.

D. RECOGNITION AND ENFORCEMENT OF JUDGMENTS

While the question of recognition and enforcement of judgments often only comes to mind after a court has issued a judgment, parties are well advised to consider this issue in advance. After all, an unenforceable judgment might not be worth the paper it is printed on. The applicable framework for the recognition and enforcement of judgments is closely

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4 Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, online at https://eur-lex.europa.eu/eli/reg/2001/1206/2008-12-04.

5 Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, online at https://www.hcch.net/en/instruments/conventions/full-text/?cid=82.

related to the framework applicable to the question of jurisdiction,[6] as most rules govern collectively matters of jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Between EU Member States, in the case of a judgment rendered by one Member State court and sought to be recognized and enforced in another Member State, the **Brussels I Regulation (recast)**[7] is applicable. In case of a pre-Brexit dispute between JP Corp. and GB Corp. in a Duesseldorf court, a judgment from the court could simply be enforced in any given court of another EU Member State (which included the UK) in accordance with article 36(1) of the Brussel I Regulation (recast). Under this provision there is no need for a separate proceeding by the "local" court in which enforcement is sought.

After Brexit, the Brussels I Regulation (recast) has ceased to apply in the UK. However, Art. 67 of the EU-UK Withdrawal Agreement[8] clarifies that the Brussels I Regulation (recast) still applies to judgments rendered before Brexit, i.e. before 1 January 2021, as well as to all judgments to be rendered after Brexit, as long as the proceedings commenced before Brexit. That means that as long as JP Corp. and GB Corp. initiated their proceeding before or on 31 December 2020, the ensuing judgment would still be enforceable under the Brussels I Regulation (recast).

In addition to this EU-internal enforcement mechanism, to which the UK is no longer a party after Brexit, the EU also has concluded an agreement with non-EU states. The **Lugano Convention**[9] governs jurisdiction and the recognition and enforcement of judgments in civil and commercial matters between the EU and a handful of non-EU states. As reported in Part I of our newsletter, in April 2020 the UK applied to join the Lugano Convention post-Brexit. However, to date, the EU has not signaled any willingness to approve the UK's application – which means the UK's application remains pending for the time being, as all contracting parties to the Lugano Convention have to approve a new applicant.

The recognition and enforcement of judgments is also subject to several multilateral treaties between the UK and EU Member States. Should one expect a fallback to the **1968 Brussels Convention**[10] or the **1971 Luxembourg Protocol**[11]? The same question also arises when looking at older bilateral agreements between the UK and EU Member States. For example, Germany and the UK in 1960 entered into a Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters. While one might consider whether after Brexit the courts will revert to applying the older conventions and bilateral agreements, this is put in doubt by the *lex posterior derogat (legi) priori* principle, which states that previous agreements are overridden by newer ones addressing the same subject matter. In the case of the bilateral UK-Germany agreement of 1960, Article 55 of the 1968 Brussels Convention explicitly repeals the UK-Germany agreement as well as several other bilateral agreements between EU Member States and the UK.[12] In a similar vein, the argument can be made that the Brussels I Regulation (recast) overrode the 1968 Brussels Convention and the 1971 Luxembourg Protocol. Therefore, parties to such a dispute should carefully consider, on a case by case basis,

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6 See, for some of the jurisdictional rules in Part I to this newsletter, online at https://www.nishimura.com/en/newsletters/corporate_210226.html.

7 Regulation (EU) No 1215/2012 of the European Parliament and Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), online at https://eur-lex.europa.eu/eli/reg/2012/1215/2015-02-26.

8 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community2019/C 384 I/01, online at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12019W/TXT(02).

9 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007 in Lugano, online at https://eur-lex.europa.eu/eli/convention/2007/712/oj.

10 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.

11 Protocol concerning the interpretation by the Court of Justice of the convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters - signed in Luxembourg on 3 June 1971.

12 Even though the 1968 Brussels Convention itself was replaced by the Brussels I Regulation (recast), one should not expect that this reinstates any explicitly repealed bilateral agreements.

whether they can still rely on older international agreements. It is likely that numerous disputes and a significant amount of time will be required before these issues have been settled by EU Member State and UK courts – with no guarantee of a uniform approach.

This somewhat bleak situation looks better where the parties have entered into an exclusive choice of jurisdiction agreement. As explained in Part I of this newsletter, after Brexit the **Hague Convention on Choice of Court Agreements**[13] will apply between the UK and EU Member States. The Hague Convention on Choice of Court Agreements does not only provide a framework under which disputing parties' exclusive choice of jurisdiction agreements are recognized, but also provides for the enforceability of judgments rendered on this basis. While it remains uncertain whether this convention will be applicable to UK matters concluded in the pre-Brexit period,[14] it certainly will apply after Brexit. Thus, for these type of cases, which will probably form the majority in professionally drafted business contracts, Brexit will have less of an impact as it first might seem.

This leaves the post-Brexit scenario in which parties have contracted without an exclusive choice of jurisdiction agreement. In order to enforce a judgment rendered by a UK or EU Member State court in the respective other jurisdiction, the party seeking enforcement would have to initiate an enforcement proceeding in the jurisdiction where it wants to enforce the judgment. The disadvantages are obvious: not only will it require additional time and costs, the applicable domestic rules of civil procedure addressing the enforcement of foreign judgments will also vary between different EU Member States and the UK, making the enforcement more complex and less predictable. After Brexit, contracting parties are therefore well advised to consider this issue when contracting, and to agree on an exclusive choice of jurisdiction clause in their contracts.

E. CONCLUSION

After having addressed questions of jurisdiction and service of process in part I of this newsletter, this part analyzed additional issues of governing law and choice of law, taking of evidence, and recognition and enforcement of judgments. The results do not warrant a different assessment. Brexit in the context of judicial cooperation in civil and commercial matters can be appropriately described as a "*hard Brexit*", i.e. a separation between the UK and the EU Member States without a sufficient regulatory continuum.

Overall, companies conducting their business between the UK and an EU Member State will have to be aware of the altered procedural landscape after Brexit.[15] Without the benefit of the largely unified EU framework, EU-UK cross-border disputes have become distinctly less comfortable for the parties involved. Nevertheless, it is unlikely that the current situation will deter companies from outside the UK and the EU from conducting their business in Europe – and it should not. That being said, the "hard Brexit" in civil and commercial matters should be a reminder for companies to carefully review existing and future contracts, and to make the necessary adjustments so that EU-UK cross-border business can continue undisturbed under the post-Brexit framework.

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13 Convention of 30 June 2005 on Choice of Court Agreements, online at https://www.hcch.net/en/instruments/conventions/full-text/?cid=98.

14 See for this problem in detail discussed under the question of jurisdiction in Part I to this newsletter, online at https://www.nishimura.com/en/newsletters/corporate_210226.html.

15 In this connection, it is noteworthy that the alternative of international arbitration has not been affected by Brexit; companies will therefore increasingly (have to) consider whether this alternative dispute resolution mechanism can be appropriate for settling issues in their contractual relationships.

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