The nuts and bolts of maritime contracts: BREXIT and choice of law and choice of court agreements

Andrew Tettenborn. Professor of Commercial Law, Swansea University

Como es bien sabido, en el sector marítimo la gran mayoría de los contratos contienen cláusulas de sumisión a una jurisdicción determinada, siendo con mucho la más común la de Reino Unido. Si bien, en este momento, varias normas de la Unión Europea y convenios internacionales garantizan la validez jurídica de estas cláusulas y la ejecución de posibles sentencias dentro de la UE, esta situación podría cambiar sensiblemente por efecto de la salida del Reino Unido de la UE (Brexit).

Dada la actualidad de este asunto y su amplia aplicación en el ámbito marítimo, nos ha parecido interesante publicar un artículo sobre la futura validez las cláusulas de sumisión a la jurisdicción de Reino Unido y la ejecución de las sentencias de sus tribunales. El autor pone claramente de manifiesto que la situación al final del proceso del Brexit dependerá, en muy gran medida, de los eventuales acuerdos a los que lleguen Reino Unido y la UE. Por ello, y dada la incertidumbre existente sobre muchos aspectos, no pretende dar una posible solución única o más probable a la cuestión planteada, sino que analiza tres posibles "escenarios", según el grado de separación al que se llegue.

Publicamos este artículo en inglés, por primera vez en nuestra Tribuna Profesional porque, dado el alto grado de especialización del asunto, su traducción del mismo no necesariamente supondría un valor añadido y podría, por el contrario, hacer perder algunos matices.

I. Introduction – maritime jurisdiction agreements under the present EU law

Nearly all contracts connected with shipping law contain jurisdiction clauses, most often but certainly always involving the jurisdiction of the English courts. This is true of charters, whether bareboat, time, voyage or slot; carriage contracts ranging from umbrella contracts of affreightment, through bills of lading and sea waybills, to ferry consignment notes; building, repair, management and sale contracts; loan and mortgage documentation; insurance contracts and P&I club rules; and many others. Furthermore, such clauses are vital in practice. Whatever the technical merits of a dispute, a lawyer will frequently and correctly advise in the light of the economic and judicial realities that the ability to litigate in a given jurisdiction gives a knock-out advantage to one or other party.

The EU since 1968 has promoted unification of the law on court jurisdiction, including the effect of jurisdiction agreements (under the general name of *"prorogation of jurisdiction"*). Since 2015 the rule throughout the EU, including the UK, has been as follows. All jurisdiction agreements in writing or other commercially-accepted form are given effect in EU courts by Art.25 of the Brussels I Recast Regulation of 2012 (except Denmark, where a special treaty with the EU essentially incorporates the same provisions). As regards the EEA States of Norway, Iceland and Switzerland they are given effect by the less contemporary Art.23 of the Lugano II Convention of 2007, but only if at least one party is domiciled in the EEA. As regards other third States, however, the EU rules do not apply, and the law of the forum does (Brussels I Recast, Art.6).

Where Brussels I or Lugano II enforces a jurisdiction clause it not only permits but requires the court to hear the case: the defendant cannot plead *forum non conveniens* (that is, that the case would be better heard elsewhere). If the clause is exclusive, all other courts must decline jurisdiction. It is probable, though unclear, that an EU court may also decline jurisdiction when faced with a jurisdiction agreement referring to an extra-EU court. Under Lugano II, though not under Brussels I Recast, a defendant may also require the court, even where there it is the chosen court, to dismiss the proceedings on the basis that there are existing proceedings in another EU jurisdiction. However, any further intervention by the courts of the chosen jurisdiction, for example by anti-suit injunction (an order peculiar to common law courts prohibiting a party from proceeding in a foreign court on pain of punishment), is barred as inconsistent with the principle of *effet utile* of EU law.

Some mention must also be made here of the Hague Convention 2005 dealing with exclusive choice of court agreements, signed in 2015 by the EU on behalf

of all member States except Denmark. This applies to agreements to submit to the jurisdiction of the courts of Mexico and significantly in the maritime context – Singapore. Much narrower than Brussels I Recast, it is limited in its effect to exclusive jurisdiction clauses in writing. Like Brussels I it allows and compels the chosen court to hear the case, and forbids any other Convention court to hear it. It does however permit anti-suit injunctions, at least for courts outside the EEA.

The above principles, including those on jurisdiction agreements, apply equally to maritime cases, including cases where the claimant proceeds under a civil law *embargo preventivo* or under a common law action in rem. The result is that when such a clause appears in a bill of lading, charterparty, insurance or P&I club contract, a contracts to build, repair or sell a ship, or whatever, clauses in favour of EU or EEA courts are enforced almost without question, provided they are effective under the law of the chosen jurisdiction. Because, as mentioned above, a jurisdiction agreement need merely be in a form common to the parties or usual in the trade, EU law allows enforcement of a small-print jurisdiction clause, even against transferees of a bill of lading embodying it who cannot be said specifically to have agreed to it.

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In the case of insurance contracts, a special regime applies. On principle exclusive jurisdiction clauses are prohibited in respect of insurers' liabilities, which can be asserted in a multiplicity of courts: but this is not very significant in the maritime context, since marine policies and P&I risks are specifically excluded from the ban. However, one limit is now clear. It was made clear earlier this year by the CJEU that an exclusive jurisdiction clause in P&I Club rules cannot oust the right of a third-party claimant in the EU to to make use of a local direct-action statute and sue the Club personally in the jurisdiction where the damage occurred.

By contrast, the effect of the Hague Convention 2005 on maritime cases is more limited. It does not apply to the carriage of passengers and goods, thus excluding not only bills of lading but also voyage charters; nor does it apply to limitation, general average, or emergency towage and salvage. Nevertheless it could be relevant to time and bareboat charters, ship sale, building and management contracts and marine insurance.

II. Maritime jurisdiction clauses post-Brexit

From what we have just said, it is obvious that the potential for upheaval from Brexit is big. Brussels I and Lugano II are both EU-based instruments; as from withdrawal both will cease to apply *ex proprio vigore* in the UK at all, and in the EU to agreements in favour of UK courts. As for the Hague Convention of 2005, this is not an EU instrument, but its applicability to and in the UK will it seems also lapse as from Brexit. This is because the UK is only party to it through the agency of the EU, which signed on behalf of the Member States; when the UK ceases to be a member State its EU-sponsored membership will also disappear.

What can be done? On one level, there is no difficulty of principle about jurisdiction agreements. Quite apart from Art.25 of Brussels I Recast, UK domestic law has always given effect to them, both positively, by holding that they give domestic courts jurisdiction they would otherwise not have, and negatively, by allowing a case to be dismissed where the court would have jurisdiction but there is an exclusive agreement in favour of another court. This is also true of most EU domestic jurisdictions, but there there may be qualifications (for example, in Spain there are important limitations in Art. 468 of the *Ley 14/2014 de la Navegación Marítima*).

But this under-estimates the complexity of the issue. There are important issues where there is no general agreement. They include such matters as these: the right of a chosen court to refuse to take a case, for example because of forum non conveniens; the treatment of *lis alibi pendens* where proceedings are brought both in the chosen jurisdiction and elsewhere; how far courts in a non-chosen jurisdiction must decline jurisdiction in favour of the chosen court; and the powers of the chosen court to exercise exorbitant jurisdiction in order to prevent abusive proceedings being brought in other jurisdictions. Moreover, there is also a vital issue of reciprocity. Ideally, whatever solution is chosen ought to create, to a greater or lesser extent, a mirrored regime between the UK and the EU27 so that, as far as was appropriate, courts on each side would equally respect each other's proceedings and enforce the exclusivity of submissions to each other's jurisdiction.

What will happen with respect to jurisdiction clauses depends very much on what, if anything, is eventually agreed between the UK and the EU27 as representing the future relations between them. The agreement in principle of 8 December between the EU and UK is unhelpful here: Article 91 merely refers to the existence of *"agreement to provide legal certainty as to the circumstances under which Union law on jurisdiction, recognition and enforcement of judgements will continue to apply."* But three possibilities are worth discussing.

Possibility 1: continuation of the *status quo* by agreement

There is nothing to prevent the UK and the EU27 concluding an ad hoc agreement as from Brexit on similar terms to Brussels I Recast. Parallel to this, the UK could become a signatory to Lugano II in its own right as regards EEA States. This solution has the support of committees in both UK Houses of Parliament and of the UK legal profession, but requires the agreement of the EU27 (not guaranteed). Its most obvious advantage is continuity: the position stated above would remain, and the existing CJEU and English decisions would still be authoritative. Another advantage is substantive. Especially since the introduction of the new Art 31(2) of Brussels I Recast, exclusive jurisdiction agreements are very well protected, with EU courts clearly bound to stay their own proceedings to make way for the chosen forum and no ability to defeat the agreement by beginning proceedings elsewhere and then relying on *lis alibi pendens*. And there are other collateral advantages. All English judgments, whether or not based on contractually agreed juris-

diction, would be guaranteed seamless enforcement throughout the EU, where many charterers, forwarding agents and commodity dealers are domiciled. Conversely very many marine insurers, shipowners, ship managers, offshore contractors and other maritime businesses have assets in London, and EU27 businesses would welcome ready enforceability of EU judgments against them.

Were a Brussels I Recast solution adopted, the UK would almost certainly also sign up in its own name to the 2005 Hague Convention on Exclusive Jurisdiction Agreements (to which, pre-Brexit, it is already a party through the EU). But, for reasons given above, this is of fairly limited significance, save possibly for the convenience of being assured of co-operation from Singapore.

Some features may lessen the attraction of the Brussels I Recast scheme for the UK. Some are related to exclusive jurisdiction agreements (for example, its prohibition on anti-suit injunctions); some are more general (for example, the rigid – by UK standards – rules of jurisdiction generally). But it is simpler to deal with these below, in discussing the Hague-only option (Possibility 3).

Possibility 2: The Lugano II / Hague solution

The Brussels I Recast solution may be unacceptable to the EU27, either because the UK will not accept the jurisdiction of the CJEU within the UK, or because the EU27 do not wish to give the full benefits of the Brussels Recast regime to a non-member State. An alternative would be for the UK to join the EFTA members of the EEA (i.e. Switzerland, Iceland and Norway) in signing Lugano II and the Hague Convention 2005.

Lugano II is closely related to Brussels I Recast, being derived from its predecessor, the 2000 Brussels Regulation of 2000. Its Art.23 is almost word-for-word the same as Art.25 of the Brussels instrument: hence, as with Brussels I Recast, the court chosen under a jurisdiction agreement may, and if its jurisdiction is invoked must, hear the case. But for other reasons Lugano II is less good from the point of view of lawyers having to deal with maritime jurisdiction clauses.

Brussels I Recast
Reglamento (UE) No 1215/2012, de 12 de diciembre de 2012 relativo a la competencia judicial, el reconocimiento y la ejecución de resoluciones judiciales en materia civil y mercantil.

Lugano II Convention 2007
Convenio de Lugano de 30 de octubre de 2007 relativo a la competencia judicial, el reconocimiento y la ejecución de resoluciones judiciales en materia civil y mercantil.

Hague Convention 2005
Convenio de La Haya de 30 de junio de 2005 sobre acuerdos de elección de foro.

For one thing, Lugano II has a separate rule for exclusive jurisdiction agreements where no party is EEA-domiciled. This is very common in shipping cases, with English jurisdiction frequently agreed by parties with nothing whatever to do with Europe. Like Brussels I Recast, Lugano II prevents other EEA courts from hearing the case, but it does not actually require the chosen court to accept jurisdiction; whether it has to is a matter of relevant domestic law. The result can be bizarre. Imagine Brazilian sellers ship a cargo of soya beans to Europe on a Korean ship under a bill of lading containing an English jurisdiction clause; the cargo is lost. If the sellers sue the carriers in England, the question whether the English court has to accept jurisdiction depends on English domestic law; but if a German buyer of the cargo sues, Lugano II applies.

Secondly, Lugano II allows a party to an exclusive jurisdiction agreement to frustrate it by bringing proceedings in another EEA jurisdiction and then pleading lis alibi pendens (a tactic ometimes known as the Italian Torpedo, which is outlawed under Brussels I Recast).

One final thing should be added. Were the UK to join Lugano, it would almost certainly also sign up in its own name to the 2005 Hague Convention referred to above.

Possibility 3: life outside Brussels I and and Lugano II

In practice there is much advantage, certainly for the UK, in a solution based on Brussels I Recast or Lugano II. But the arguments are not all one way. It is therefore worth considering the possibility of a non-EU / EEA solution, based on the UK adhering solely to the Hague Convention and abandoning the Brussels / Lugano model altogether.

Such a solution would attract a number of actors in the UK. Non-UK EU jurists often forget that, unlike the rules on recognition and enforcement, the strict EU jurisdiction rules have never been popular with UK lawyers. Many still prefer the much more flexible and open rules of jurisdiction which the UK still applies to non-EU cases, claiming jurisdiction on a wide basis but then constraining it by the discretionary exception of forum non conveniens. The domicile rule in Art.4 of Brussels I Recast also causes problems by cutting across the nature of the English action in rem, which otherwise guarantees jurisdiction in any case where a vessel has been arrested or security given against arrest. Conversely, the inability of UK courts to apply the rules of forum non conveniens to any proceeding against a UK domiciliary, even where the action would clearly be better heard in a court outside the EU altogether, is found equally irksome in London, and is only partially palliated by the limited *lis alibi pendens* provisions of Arts.33 and 34 of Brussels I Recast.

Furthermore, abandonment by the UK of the EU / EEA regimes is not as unthinkable as it looks. As regards enforcement of London judgments abroad, the UK retains very workable pre-existing mutual enforcement conventions with Austria, Belgium, France, Germany, Italy and the Netherlands; all are still technically in force, and would revive were the Brussels I Recast regime to be dropped. Moreover, since the overwhelming majority of international commercial cases reaching the English courts do so by virtue of exclusive jurisdiction agreements it should be remembered that judgments in a number of them (for instance those arising out of arising out of P&I claims, marine insurance, time or bareboat charters and ship sale and management contracts) would also be guaranteed EU-wide enforcement by virtue of the Hague Convention.

Indeed, one can go further. Looking specifically at exclusive jurisdiction agreements in the world of ship-

ping law, UK shipping lawyers would see at least three very tangible advantages from not being subject to the EU / EEA regimes.

First, there remains some question whether the Brussels I Recast scheme permits EU courts to decline jurisdiction against a domiciliary under Art.4 where there is an exclusive jurisdiction agreement in favour of a third (non-EU, non-EEA) state court. The uncertainty is itself unsettling. And if the answer is No, the result would be bad for the UK, which would end up with a reputation for hearing disputes that were none of its business. To take a plausible example, assume a time-charter be-tween shipowner X, based in Korea, and a charterer Y, containing an exclusive jurisdiction agreement in favour of Korea. Now assume Y issues a bill of lading to Z, an English-domiciled cargo owner, incorporating the charter terms, including the jurisdiction agreement. To forestall a possible cargo claim by Z, Y sues in London for a declaration of non-liability. To say that the English court should be bound to hear the case in the teeth of the clause would be, to say the least, diplomatically unfortunate.

Secondly, if freed from the EU / EEA full faith and credit framework English courts would regain the ability to issue anti-suit injunctions against proceedings in EU and EEA courts – something of great importance in the shipping sector where national boundaries mean little. Carriers and P&I clubs in particular are at risk from claims all over the globe: damage can be suffered almost anywhere, and the same goes for the discharge of allegedly damaged or short-delivered cargo. Furthermore, local laws vary greatly in their friendliness to such claims, and in such matters as direct action statutes affecting liability insurers. It is a matter of great importance that such defendants be able to concentrate litigation in England using exclusive jurisdiction agreements: hence the fact that large numbers of anti-suit injunctions are obtained, for example, by carriers in order to prevent judgments being given against them in breach of exclusive jurisdiction provisions in far-away jurisdictions where courts can be trusted to be more cargo-friendly than those in England. Within the EEA, it is true that both Lugano and Brussels I Recast theoretically make this require other courts to respect UK exclusive jurisdiction. But this is not a complete answer. Sometimes such courts have not been as willing as they should have been to do this; and persuading them to decline jurisdiction in any case takes time and money; and. The ability of the UK courts to take their own steps to deal with the problems of parties who ignore jurisdiction agreements is a valuable one.

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Thirdly, a recent CJEU decision (the *Assens Port* case of July 13, 2017) on the special jurisdiction against insurers under the Brussels I Recast regime shows the problems caused by it to P&I clubs and marine liability underwriters. These organisations, very many UK-based, keep costs down and efficiency up by stipulating for English jurisdiction in all claims against them, whether the claim be by their assured or by a third party. They thus avoid, except in a few carefully-delineated cases such as pollution, the large potential expense of having to litigate in a jurisdiction other than their own.

English law, which regards any claim against a P&I Club by a third party as based on the contract between club and assured, allows this: no claimant can take the benefit of (say) a P&I contract without respecting the exclusive jurisdiction agreement contained in its rules. Unfortunately, the EU / EEA regimes take a different view. In common with the assured himself, victims are permitted, where the local (EEA member State) law allows direct actions against insurers, to sue in any of a number of courts, including the *lex loci damni*. And in the *Assens Port* case of July 13, 2017 the CJEU decided that this right was unaffected by any terms in the policy, even if otherwise valid. The result is that P&I clubs are now potentially bound, courtesy of the EU / EEA jurisdiction scheme, to litigate anywhere in the EEA despite any agreement to the contrary in the cover they provide. Were the UK to adopt the minimalist "Hague only" position, this would cease to be the case – or, more accurately, any judgment thus obtained would be one the English court would have the power to ignore.

Conclusion

What formal connection finally eventuates between the UK and the EU as regards choice of law and choice of court remains a matter for speculation. As regards jurisdiction and choice of court agreements, the betting seems narrowly in favour of an agreement being reached in due course on similar lines to that between Denmark and the rest of the EU, if only to allow the UK keep the benefits of reciprocal enforcement without the direct involvement of the European Court. On balance, this is also the best solution for shipping lawyers in the UK, since if no agreement is reached and the UK is thrown back on simply signing the Hague Convention a great many choice-of-court agreements – notably all those connected with carriage, such as those in bills of lading or multimodal transport documents, voyage charters and contracts of affreightment – will be left with no pan-EU method of protection or enforcement or recognition of judgments. But the pure Hague Convention method cannot be ruled out, given the freedom from control it would give English courts in matters such as anti-suit injunctions.

Nevertheless, if this brief excursus through the subject of Brexit and choice of law and jurisdiction is anything to go by, it must be emphasised that we cannot rule anything out. As the agreement of 8 December between the UK and the EU presciently said in Art.5, *"nothing is agreed until everything is agreed."*