Same as it ever was: English Court disputes in 2021

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Introduction

“Same as it ever was...”

(*Once in a Lifetime* by Talking Heads)

For England, the world moves on, but slowly. Many aspects of 2021 felt markedly similar to 2020. The COVID-19 pandemic still generated daily headlines, and the word ‘Omicron’ became part of our everyday language. Nevertheless, throughout last year, the vaccination programme has largely been considered the UK government’s one clear success, albeit that its leadership role in that programme is a subject of debate. Moreover, the government’s direction of travel is now towards the end of everyday restrictions on its public’s everyday lives. In early December 2021, the government announced a £2 billion purchase of over 100 million extra vaccine doses, no doubt in the expectation, or hope, that if the vaccination programme continued to succeed, restrictions on individuals and businesses could be lifted. That has now come to pass. In a number of announcements throughout January 2022, the government has decided that the public need no longer work from home and that face coverings are no longer obligatory.

A return to normality, or some form of it, may therefore be in sight. But the government continues to encounter serious challenges, some related to Brexit and some not. It faces uncertain economic growth and unsustainable levels of inflation. Borrowing in the financial year ending in March 2021 was at the highest level since the end of World War II. Relations with the EU have not improved, and political relations with France are considered to be at their worst since Waterloo. A migrant crisis rages across the Channel. And, whether or not as a consequence of Brexit, supplier issues led to large-scale panic buying of fuel in September 2021, followed by extraordinary gas price rises in October 2021 and the collapse of various energy firms. The recent spectre of international conflict in Ukraine has only exacerbated those pricing concerns.

And what of the English courts? The extraordinary levels of global uncertainty should, tradition suggests, encourage disputes. That is certainly the case in England. Moreover, there are reasons for optimism in terms of the English courts maintaining their long-standing reputation for excellence and as the premier forum for the resolution of commercial disputes.

First, The Chancellor of The Exchequer’s *Autumn Budget and Spending Review 2021* afforded significant funding increases for the justice system, arguably the largest increases in over a decade. Whilst the government’s focus here has plainly been upon funding to reduce court backlogs in the criminal justice system, the settlement includes the allocation of a further £324 million, over the next three years, to the civil and family courts and tribunals.

Second, the Commercial Court in London has found little difficulty in embracing technology and remote hearings throughout the pandemic. The technical expertise of many Commercial Court judges has often been more advanced than that of the lawyers appearing before them. Third, the popularity of the Commercial Court has not dimmed. In 2021, the number of judgments handed down by the courts was at its highest level in six years. It remains a popular venue for dispute resolution – in particular for litigants from Russia and Ukraine – and litigation involving U.S. parties turning on contractual disputes has also increased.

Fourth, and finally, the English courts have not shied away from robust and high-profile judgments. By way of example:

(i) In July 2021, in a long-running and bitter dispute between three Ukrainian businessmen, the Court of Appeal made plain that legal or equitable principles – in this instance, the concept of unjust enrichment – would rarely be able to avoid or circumvent plain contractual terms, as committed in writing by the parties. The decision provides a stark warning that parties seeking to conclude certain terms of an agreement orally and outside the written terms of a binding agreement may then struggle to enforce that oral agreement.

(ii) In November 2021, the Supreme Court ruled in favour of Google, thereby preventing a representative class action on behalf of around four million iPhone users relating to Google’s alleged breaches of data protection law. The decision has, however, been commonly perceived to lower the procedural thresholds for representative actions, and, in the eyes of some, potentially increased the prospect of consumer or other class actions in this jurisdiction.

(iii) Only last month, the Commercial Court made findings of fraud against Dr Mike Lynch and Mr Sushovan Hussain, the founders of Autonomy Corporation Limited, which was purchased for approximately $11.1 billion by Hewlett Packard in early 2012. The case, which turned upon Hewlett Packard’s central and successful claim that Dr Lynch and Mr Suhovan had made dishonest statements and omissions that induced Hewlett Packard to purchase the Autonomy business, was one of the largest English court disputes of recent times, with a 93-day trial.

Fifth, and finally, the English court has made recent reforms to two of the most critical exercises in the English litigation process: disclosure and trial witness evidence. The central ambition of these reforms has been clear: in the case of disclosure, to streamline the process in a proportionate manner, and for trial witness evidence, to ensure it is fit for purpose. But, as discussed in this newsletter, whilst these reforms were no doubt initiated with the noblest of intentions, there is a real question as to whether their impact will be universally helpful.

Given that England remains a popular choice of forum for a vast number of foreign parties, but where the predicaments and challenges of English litigation will not be known to many of them, we consider a number of issues in this newsletter that should, we hope, give these parties a better understanding of the forum and, perhaps more importantly, whether England is, or remains, the most appropriate forum for resolution of their commercial disputes.

This newsletter comprises articles on the following topics:

(i) An analysis of the recent procedural reforms to the disclosure and trial witness evidence rules in English Court disputes.

(ii) A summary of the various statutory reforms, particularly as found in the Corporate Insolvency and Governance Act 2020, where the government has sought to provide support and breathing space to UK companies impacted by the pandemic. That breathing space will not, however, last forever.

(iii) Our views of the Court of Appeal’s decision of last year, in *Convoy Collateral Ltd v Broad International Ltd*, in which the court modified the fundamental principles on which it will grant injunctions generally and, in particular, whether the court will grant such orders in aid of foreign proceedings or against third parties. Given that it is common, in our experience, for foreign parties often to be peripherally involved in major commercial transactions, those parties face greater risk of being embroiled in any disputes that subsequently arise from those transactions and subject to any injunctions then ordered by the court.

(iv) Our current views on the impact of Brexit on commercial litigation in England. After all, no analysis of the litigation landscape is complete without considering Brexit.

We hope you find this of interest, and if you have any questions, please do not hesitate to follow up with the authors directly.

Disclosure and witness evidence reforms: a change for the better?

The last two or three years have seen significant reforms to two of the central exercises in the English litigation process: disclosure and trial witness evidence. The objects of the reforms have been clear: in the context of disclosure, to reduce costs and make the process more efficient and proportionate while promoting a more collaborative approach between parties; and for trial witness evidence, to ensure it is fit for purpose and not just a vehicle to be hijacked by parties to advance legal argument or narrative.

But what is it they say about the best-laid plans? The response in the legal community to these changes has either been lukewarm, or marked by trepidation as to how this new procedural landscape is to be navigated.

The Disclosure Pilot Scheme

The reforms to disclosure have now been in operation for some time, having been introduced in the form of the Disclosure Pilot Scheme on 1 January 2019. The aims behind the Pilot were admirably lofty: to bring about a culture change within the legal profession, and to combat – some might say belatedly – the costs and time increasingly associated with the disclosure process caused by the huge increase in the volume of electronic data created as a result of modern business. The reforms also, perhaps optimistically, sought to promote a more collaborative approach between opposing lawyers.

The central premise behind the Pilot is that better planning at the case management stage, when the court decides how a claim should proceed to trial, could eliminate unnecessary costs when parties undertake the costly exercise of searching for and reviewing thousands of electronic documents. For this reason, the Pilot includes a complex mechanism, under which parties are to prepare a Disclosure Review Document in which they identify and agree 'issues for disclosure' and match them to the most suitable of one of five available disclosure models. This exercise typically must be concluded by the Case Management Conference in each action, which is the first substantive court hearing in any English High Court proceedings. The parties must therefore determine the specifics of disclosure, before the process has been commenced in any meaningful way. The Pilot rules also include extensive obligations on parties and their lawyers in relation to the preservation of data and an increased focus on the use of technology and costs budgeting.

How has this all been received by the profession? There are plainly concerns across the legal community. There is a view amongst many practitioners that a focus on the parties seeking to agree, at the outset, the level of disclosure required against each and every 'issue for disclosure' has only increased negotiation and correspondence between the parties' lawyers and, consequently, their legal costs. It has also often forced litigants to address these issues in the abstract, and often before they have a clear sense of what volume of documentation will be available, against each 'issue for disclosure'. It has also led to an increased use in court time.

That is not all. One unexpected and unwelcome by-product of these changes is the potential for satellite litigation connected to these new disclosure rules, which is exactly the type of adversarial distraction the Pilot was intended to eliminate. Certain parties have all too quickly used the opportunity presented by these more onerous requirements to criticise and complain about their counterpart's approach in front of a court, presumably in an effort to discredit their opponent in the context of the proceedings as a whole. For instance, the process of preparing the Disclosure Review Document has become yet another battleground in already hard-fought litigation.

The aims of the Pilot are hard to disagree with. Who can sensibly argue with the idea of streamlining a disclosure process which can often become disproportionate to the actual substantive dispute? However, for better or worse, the Pilot – with its reworking of requirements which already existed under the pre-existing rules, convoluted Disclosure Review Document and potential for satellite litigation – does not appear to be perceived as the answer, at least not yet.

For the time being, however, parties will have no choice but to live with these rules. The Pilot has recently been extended until 31 December 2022 and, despite the mixed response, it is likely to continue in one form or another beyond that with no fundamental alterations.

All that said, those responsible for the Pilot do appear to be listening to the criticism that has come their way. Changes have been made, to take account of this negative feedback, and some of the ambiguities in the rules as they first appeared in 2019 have now been resolved. More flexibility has now been introduced into the process. For complex multi-party disputes, parties can now propose a bespoke timetable and procedure for disclosure which may be more appropriate to the type of litigation involved. It is to be hoped that further feedback will lead to further improvements. The courts have also made plain their displeasure at parties seeking to exploit the rules for tactical advantage, so there is some hope that litigants with this mindset will be suitably discouraged by sensible and pragmatic judges who will be determined to make the Pilot work.

After a rocky start to life, there is nevertheless perhaps now some reason to hope the Pilot, if it continues to evolve in response to ongoing feedback from the profession, may therefore yet offer the best and most realistic chance of a long-term solution to the issues connected with the disclosure process.

Trial witness evidence

As with the Pilot, the changes to trial witness evidence introduced in April 2021 have sought to codify best practice lawyers and their clients should follow, in this case through a supplement to the rules as they already exist.

This 'supplement' does, though, radically alter parties' approaches to witness evidence. In commercial disputes, since written witness statements became commonplace, parties have typically approached witness evidence as an opportunity for parties and their lawyers to deploy fact-based narratives in support of a legal case, in addition to the witness's recollection of events. Thus key witnesses have become storytellers for the whole case, rather than concentrating on simply their own recollection. While technically that is not the purpose for which written statements were originally introduced, it is still a practice prevalent in High Court disputes. It has proved to be a popular building block in litigation, as parties look ahead to articulating their case in its fullest form at trial.

However, the aims of these reforms to the rules on trial witness statements are, in broad terms, to eliminate this practice in terms of commentary and argument, and to improve the quality of evidence, by seeking to prevent the pollution of witness recollection. It is, arguably, we suggest, an attempt to restore the witness statement exercise to what it was originally intended to be. Witness statements should now, instead, deal only with a witness's personal knowledge on important and disputed facts. There are new obligations on the witness to explain how well they recollect the matter at hand and whether, when and how they have refreshed their memory by reference to documents. Significantly, the documents used to refresh memory at the interview stage must be recorded in a list attached to the statement. There are also important changes to the preparation of the statements themselves. These include an expectation that the preparation of the statement should involve as few drafts as possible and rules on how lawyers assist witnesses with their statements; these are measures plainly designed to limit the influence of lawyers on the substance of the evidence. Witnesses and legal teams are also both now required to sign certificates of compliance to demonstrate that they have abided by the rules.

The sanctions for infringements of these rules can in theory be severe, including a court-ordered redraft of the evidence, refusal by the court to rely on the evidence, adverse costs orders, and ordering the witness to give oral evidence in chief. The courts, though, have also been clear that parties should not seek to weaponise these new rules in pursuit of an advantage, and that the more extreme sanctions will be reserved for the most serious cases. That being said, it is clear, in our experience, that the court will scrutinise witness evidence far more acutely than before, and witness evidence that adopts a more traditional, and fulsome, approach will suffer consequences. At the very least, witness statements that are inconsistent with these new reforms will impact the judge's view of the credibility of that particular witness.

Compliance with this new regime will not always be easy. We expect that attempts by litigants to expand and, often, bolster their case by providing factual evidence as a regurgitation of contemporaneous documents, and/or to be read in conjunction with a pleaded case, will be poorly received. As a starting point, we would suggest that each trial witness, in preparing his or her statement, begins with a 'less is more' philosophy.

To put it another way, adopting a proper and sensible approach to compliance with these new rules, in circumstances where your opponent does not, could result in a real advantage to be had in persuading a court as to the credibility of your evidence, by contrast to your opponent. Assuming the narrative element of a party's case can be clearly stated elsewhere, there should be no reason why powerful factual evidence cannot still be adduced following these changes if parties adapt to the reforms, and keep one eye on how the courts are applying the rules.

Corporate insolvency in the COVID-19 world – the winding journey of winding-up petitions

Introduction

The Corporate Insolvency and Governance Act 2020 (CIGA) came into force in June 2020. Since its introduction, it has been widely acknowledged as being one of the most significant reforms to the UK's corporate insolvency regime, and a broadly welcome one.

The UK government's aim with CIGA was to provide support to companies in the circumstances created by COVID-19 and to allow them to cope with the challenges the pandemic has presented. CIGA introduced corporate restructuring tools and temporary easements to give distressed businesses "the breathing space they need[ed] to get advice and seek a rescue".[1]

The majority of the changes introduced by CIGA have permanent effect; however there were additional temporary provisions, which have since been phased out by the government as the nature and scope of the pandemic, and the consequent economic landscape, evolved.

Permanent reforms have been introduced in three key areas:

(i) A moratorium, whereby companies could, in certain circumstances, seek breathing space to explore restructuring or rescue options and prevent creditors taking certain action against them for a specified period

(ii) A ban on the operation of termination (or *ipso facto*) provisions

(iii) A (new) pre-insolvency rescue and reorganisation process

The key temporary measures introduced were in the area of statutory demands and winding-up petitions, with such demands and petitions being suspended where the financial difficulties of debtors were attributable to COVID-19.

At the time of writing, these specific temporary measures have ceased to apply.

This article will consider the temporary measures in respect of winding-up petitions. Specifically, it will consider the regime as it was at the time of the introduction of CIGA in June 2020, the initial extension of the measures to September 2020, and the current status of the regime, before commenting briefly on what this means for creditors.

Winding-up petitions – the start of a winding journey

Temporary restrictions on the presenting of winding-up petitions were initially introduced for the period from 1 March 2020 to 30 September 2020, and so at the height of the national crisis caused by the pandemic.

The restrictions meant that, during that period, creditors could not present winding-up petitions in respect of unpaid statutory demands or unsatisfied judgment debts unless they had reasonable grounds to believe that:

(i) COVID-19 had not had a financial effect on the debtor company; or

(ii) the grounds for presenting the winding-up petition would have arisen even if COVID-19 had not had a financial effect on the company.

The restrictions on presenting winding-up petitions applied retrospectively. In particular, where winding-up petitions were presented on or after 27 April 2020 but before CIGA came into force, the court nevertheless applied the above test. There are instances where, in exercising its discretion, the court dismissed petitions which failed the above test in anticipation of CIGA coming into force.

In our view, the above test imposed a high evidential threshold on creditors, for the simple reason that a corporate debtor was most likely able to evidence the impact suffered by its business due to COVID-19, but it was likely to have been difficult for the creditor to contend that it had "reasonable grounds" to believe that the pandemic had no such impact since the creditor did not have the same level of insight into the nature and status of the debtor's business. As a result, the temporary restrictions largely imposed a universal moratorium on winding-up petitions against UK corporate debtors for the majority of 2020.

Moreover, while these measures were expected to come to an end in September 2020, given how COVID-19 had taken hold of the UK economy, the measures were extended until the end of September 2021.

Winding-up petitions – on the home straight

In September 2021, it was announced that the restrictions on the ability of creditors to present winding-up petitions would be relaxed from 1 October 2021. However, this only affects petitions presented on or after 1 October 2021.

This change was focussed on gradually dismantling the protections afforded to debtors under the above temporary regime, and signified a return to normalcy in line with what was seen to be the decreasing impact of the pandemic on UK businesses.

As of 1 October 2021, a winding-up petition may only be presented by a creditor if a company is unable to pay its debts and the following four conditions are met:

(i) (for a liquidated sum or non-business rent) the debt owed by the debtor: (a) is a liquidated amount that has fallen due for payment and (b) does not relate to non-payment of rent under a business tenancy;

(ii) the creditor has made a formal request to the company seeking proposals for the payment of the debt;

(iii) the company has not made a proposal that is to the creditor's satisfaction within 21 days of the formal request; and

(iv) the debt (or the total of the relevant debts) amounts to at least £10,000.

These revised restrictions are meant to be in place until 31 March 2022.

The new regime applies to all businesses in the UK, whatever their size. The changes are significant and have, in our experience, already led to the release of pent-up creditor demands to pursue their claims and, where necessary, seek a winding-up petition, either as a last resort or as a means to create serious leverage for the debtor company to pay what is owed.

The new regime nevertheless tries to strike a balance between the interests of UK companies, many of which are still impacted on an everyday basis by the pandemic, and the rights of creditors to be paid what they are due. That is not an easy balance. The new regime only permits the presentation of a winding up-petition if the relevant debt is £10,000 or more, meaning that debtors need not lose sleep if they owe a relatively insignificant sum. Nor does the regime apply when the debtor owes rent. The regime is also, in our view, designed to encourage the prospects of settlement between creditors and debtors, not least because a petition cannot be presented unless and until requests have been made for repayment, and a period of 21 days has then passed. This element of the regime does not change the fact, however, that if a debtor does not then make adequate proposals, to the satisfaction of the creditor, the creditor need not then hesitate in seeking the winding up of the debtor.

Therefore, whilst a number of competing interests are clearly recognised and addressed under the new regime, creditors can now reasonably consider recouping their potentially long overdue debts where these are for a significant amount and are not subject to a genuine dispute. In simple terms, the consequences of the pandemic for the UK corporate insolvency arena are diminishing.

1 https://www.gov.uk/government/news/major-changes-to-insolvency-law-come-into-force

Convoy Collateral Ltd v. Broad Idea International & Anor – a new test for granting freezing injunctions?

Freezing injunctions are an enormously effective tool available from the English courts to claimants who are concerned that the defendants they are pursuing may attempt to render themselves 'judgment proof' by putting their assets beyond the claimants' reach. Given the potentially extraordinary consequences of such an injunction, there is, unsurprisingly, an enormous amount of case law in relation to this remedy.

Two features of the English law in this area, which are especially important in the context of complex international litigation, have recently been considered by the courts. They are: (i) the availability of freezing injunctions against "non-cause of action defendants" (i.e., parties against whom the claimant has no substantive cause of action) but who hold assets which are controlled by the defendant in the underlying proceedings, and (ii) the availability of freezing injunctions in support of foreign proceedings, even where there are no substantive proceedings before the English courts.

The majority judgment in *Convoy Collateral Ltd v. Broad Idea International & Anor* is significant in relation to both points, while also highlighting some of the advantages of the English law in this area as compared to certain other common law jurisdictions.

The facts

Convoy Collateral Ltd brought proceedings in Hong Kong claiming damages against Dr Cho, who was resident in Hong Kong. In support of those proceedings, Convoy Collateral applied for freezing injunctions in the BVI against Dr Cho and against a company he controlled called Broad Idea International Ltd. Broad Idea was located in the BVI.

Convoy Collateral's application against Dr Cho was unsuccessful at first instance and on appeal to the BVI Court of Appeal. Its application against Broad Idea was granted at first instance, but this decision was overturned by the BVI Court of Appeal. Convoy Collateral appealed both decisions to the Privy Council.

The law

The Privy Council was asked to decide two questions of law:

1) Whether the BVI courts have the power to grant a freezing injunction in support of foreign proceedings where the respondent is resident overseas (the Jurisdiction Issue).

2) Whether the BVI courts have the power to grant a freezing injunction in support of foreign proceedings against a "non-cause of action defendant" located within the jurisdiction of the BVI courts (the Power Issue).

The Privy Council decision

The Power Issue

The Privy Council held that on the proper interpretation of the East Caribbean Supreme Court Civil Procedure Rules (the EC CPR), the BVI courts could not grant a freezing injunction against a respondent resident overseas, where the freezing injunction was the only form of relief sought before the BVI courts. On this basis, no freezing injunction could be granted against Dr Cho since he was resident in Hong Kong and there were no substantive proceedings against him in the BVI.

The Jurisdiction Issue

On the Jurisdiction Issue the majority in the Privy Council found that the BVI courts did have the power to grant a freezing injunction in support of foreign proceedings against a non-cause of action defendant located within the courts' jurisdiction. In reaching this conclusion, the majority set out a new formulation of the requirements that must be satisfied for a freezing injunction to be granted against a respondent that is within the courts' jurisdiction:

1) The applicant has already been granted or has a good arguable case for being granted a judgment or order for the payment of a sum of money that is or will be enforceable through the BVI courts.

2) The respondent holds assets (or is liable to take steps other than in the ordinary course of business which will reduce the value of assets) against which such a judgment could be enforced.

3) There is a real risk that, unless the injunction is granted, the respondent will deal with such assets (or take steps which make them less valuable) other than in the ordinary course of business with the result that the availability or value of the assets is impaired and the judgment is left unsatisfied.

Comment

The Jurisdiction Issue

The Privy Council's decision on the Jurisdiction Issue is of relatively limited wider significance since its decision was based on the specific wording of the EC CPR. The position is very different under the English rules and legislation, which expressly provide that the English courts may grant interim relief in support of foreign proceedings, even where there are no substantive proceedings before the English courts. This is an aspect of the English law which is especially helpful in the context of international litigation.

The Power Issue

The majority's judgment on the Power Issue is of potentially far reaching significance. First, the decision confirms that the English courts may grant freezing injunctions, irrespective of where the substantive proceedings are taking place, provided there is a sufficient likelihood that the substantive proceedings will result in a judgment that may be enforced through the English courts against the respondent's assets.

Second, and perhaps more importantly, the majority's reformulation of the test for the granting of freezing injunctions, and in particular the first limb of this new test, casts doubt on what had commonly been thought to be one of the overriding requirements for a freezing injunction – that the applicant must have an **existing** cause of action entitling him to substantive relief. It is unclear precisely what will be required to satisfy this new requirement of a "good arguable case for being granted a judgment", but it appears to increase the scope for the courts to grant injunctions in circumstances where the applicant has no existing cause of action, but can prove that one is likely to arise in the future.

More generally, the judgment suggests a shift in focus by the courts towards the second and third limbs of the test – that the respondent must hold assets against which a judgment may be enforced, and that there is a risk that these assets will be dissipated if an injunction is not granted.

The full effect of the majority's judgment will not become clear until it has been considered in subsequent judgments of the English courts. Nevertheless, the decision is a further illustration of the breadth and flexibility of the English courts' powers to grant freezing injunctions, and in particular their ability to do so in support of foreign proceedings. Those powers are, in our experience, in contrast to those of other common law jurisdictions, and it is another factor that arguably enhances the reputation of the English courts as the leading global forum for the determination of commercial disputes.

One year later: the impact of Brexit on English court litigation

At the end of 2020, the UK left the European Union without the benefit of an agreement on future civil justice cooperation. Some commentators feared, understandably, that the consequent loss of certainty regarding jurisdiction and enforcement would cause an exodus of litigants from the English courts.

One year later, those predictions of doom have proven unfounded. Litigation volumes in the Commercial Court remain robust, if not unprecedented.

We expect this trend to continue. In our experience of 2021, the difficulties caused by Brexit are likely to be more significant theoretically, than in practice.

Context is important here. Any uncertainty surrounding jurisdiction or enforcement will not be the sole factor considered by parties in deciding upon the forum for any commercial disputes. For many litigants, particularly those outside the EU, it is likely that the advantages of English law and the English court system will continue to outweigh a loss of access to the uniform EU jurisdictional framework. There is no point swapping a marginal uncertainty with a greater one elsewhere.

Nevertheless, during 2021, the English courts have taken proactive steps to remain attractive to international litigants. This includes, for example, the relaxation of certain procedural rules so that a party with the benefit of an English law jurisdiction clause will not require permission before it can issue a claim against a litigant based outside the jurisdiction. Critically, this applies to any foreign jurisdiction. It arguably makes access to the English courts easier for non-EU litigants post Brexit.

Are these causes for concerns in relation to the enforcement of English court judgments in a post-Brexit world?

Transitional provisions mean that the pre-Brexit enforcement regime will continue to apply to proceedings issued prior to 1 January 2021. It may therefore be some time before we see the full impact of Brexit on the enforcement of judgments within the EU.

That being said, our view is that the loss of frictionless enforcement is likely to be a marginal issue for litigants involved in higher-value commercial disputes. Most EU jurisdictions will still enforce English judgments under their national laws, as has long been the case.

Moreover, the UK's accession to the 2005 Hague Choice of Court Convention at the beginning of 2021 has further mitigated the impact of Brexit on enforcement. This convention, of which the EU and UK are key signatories, provides for the reciprocal enforcement within the EU of English judgments obtained pursuant to exclusive jurisdiction agreements in favour of the English courts entered into after 1 January 2021. Many, if not most, future commercial contracts allocating jurisdiction to the English courts will fall within the scope of the Convention, and parties would be well advised to ensure that that is the case.

And what of multi-court disputes?

Another perceived post Brexit concern was the increased risk in parallel proceedings between the English and EU Courts when there was no longer a universal EU regime to guard against that prospect. The market fear has focussed, in particular, on the resurrection of the 'Italian torpedo', which was a tactic commonly deployed by EU litigants approximately a decade ago and in the aftermath of the Lehman collapse. The tactic would typically involve a litigant proactively issuing a claim in the courts of a jurisdiction that was not identified in any commercial contract between the parties and that may move at a pace slower than other courts, thereby adding delay and complexity to the dispute as multiple courts are then forced to address and resolve various jurisdictional issues.

That tactic was largely prevented by the EU regime, in 2015. But now that the regime no longer applies in relation to English litigation, is the risk of parallel proceedings now more than theoretical? In our view, in practice, that risk has not materialised during 2021. A possible explanation is that post-Brexit, litigants in the English courts can now take advantage of anti-suit injunctions to restrain parallel proceedings brought in EU courts. An injunction is a powerful remedy, and it may be that the deterrent effect of this has been sufficient. In 2021, only one anti-suit injunction relating to proceedings in an EU state reached a reported hearing in the Commercial Court.

What of the future?

As at the end of 2021, it remains the intention of the UK to replicate much of the previous European jurisdictional framework by joining the Lugano Convention as a 'third state'. However, in June 2021, the EU Commission recommended the refusal of the UK's accession application on the basis that Lugano is intended for those countries with a closer economic integration with the EU. Whilst the final decision rests with the EU Council, approval seems unlikely given the somewhat frosty nature of current relations between the EU and the UK.

A more likely route for future cooperation is the 2019 Hague Judgments Convention. This international Convention provides for broad mutual recognition between signatory states of judgments in civil and commercial matters. Unlike the 2005 Convention, it is not dependent on the existence of an exclusive choice of court agreement. In December 2021, the European Council agreed to the EU's accession to this 2019 Convention, subject to EU parliamentary approval. If the UK follows suit in the future, this may further mitigate the effects of Brexit on enforcement, albeit that this Convention would only apply to proceedings brought after a lengthy ratification process.

In any event, the concerns of a year ago have not materialised, as many predicted, largely due to the courts' reliance on long-established, but perhaps forgotten, legal rules and principles. For now, it appears that many litigants in the English courts are managing the uncertainty of the post-Brexit world, and more certainly may follow if both the UK and EU accede to the 2019 Convention.

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