



# SOUNDINGS

## Brexit: Impact on shipping contracts

The referendum decision in the UK to leave the EU sends the UK into uncharted waters and creates a period of uncertainty for those in the shipping industry. Although the exit date and precise terms of departure from the EU are not yet known, this briefing is intended to highlight some possible areas for change arising from that decision.

### **Immediate effects of the referendum decision and timeline for changes**

Although it had an immediate economic impact on general market conditions and currency exchange rates, the decision did not itself change the UK's legal relationship with the EU.

As a matter of English law current EU rules will continue to apply in full force until the UK's official exit. It is not expected that this will occur until two years after the UK invokes Article 50 of the Treaty on the European Union and no steps have yet been taken to commence this process.

Nevertheless, the timing of any changes arising from Brexit cannot, at present, be predicted with accuracy.

Even with a period of transition following the referendum decision there are good reasons to start assessing now the possible impact the UK's exit may have on shipping contracts.

That is because some of the changes in English law which may result from the UK's departure will have consequences not only for any contract or extension/renewal to an existing contract which is concluded after the official exit date but will also affect contracts which are then still in force but which were concluded or renewed/extended before this date.

In addition, even in this transitional period there is a risk of divergence between the UK and the EU. During this period, the UK may not continue to adopt national

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legislation to achieve objectives set by EU which are not otherwise directly applicable in the UK. It also remains to be seen whether all the other EU member states will follow or allow the UK's stance of "business as normal" right up until its official exit date. Some member states may well be less inclined to preserve the status quo for the entire duration of the transitional period.

#### **Potential impact on shipping contracts generally**

Although the substance of English maritime and contract law will be largely unaffected by the UK's exit, it is unlikely that shipping and related contracts and will be immune from it.

At a basic level, many such contracts either provide for, or permit trading to, certain geographical regions. If those limits are defined by reference to the EU without addressing the question of trading to the UK separately, this may give rise to disputes as whether they apply to allow trading to the UK when it is no longer a member of the EU.

It is not only trading to the UK which would be affected by its departure from the EU. Presently, the UK is required to comply with the EU imposed sanctions regimes. After its exit, the UK could implement its own sanctions regime. The introduction of yet a further sanctions regime to those imposed by the UN, US and EU would add a further layer of complexity in trading with those countries affected by the imposition of sanctions.

Possible changes in other areas of English law are also likely to have a knock-on effect on shipping contracts. The following are a few examples of where this could occur.

New UK border controls may be imposed for trade and immigration between the EU and the UK. With the possibility of the introduction of new regulations, extra documentation

requirements, import/export duties and delays at ports/terminals comes the need for contractual allocation of responsibility for these risks in shipping contracts.

Such restrictions on the movement of people coupled with possible changes to the UK employment laws (which are significantly influenced by EU rules) could also have an impact on the shipping industry which may find itself having to adapt to separate immigration and employment regimes for the UK from those which apply in the EU.

In the maritime insurance and finance sectors, there is also concern about possible changes to or loss of "passporting rights" after the UK's exit. Those rights currently allow authorised entities to carry out certain regulated services in an European Economic Area state or provide cross-border services via a UK-based office or branch. If restricted or lost, this would be likely to affect the general availability and costs of insurance and finance for the shipping industry.

#### **Potential impact on choice of law clauses**

One area of law where there will be a substantive change following the UK's exit is in the area of conflicts of laws.

In most shipping contracts, there is an express choice of law governing the contract and for the determination of any dispute arising thereunder.

Currently, English courts apply the Rome I Regulation (593/2008) in determining which law should govern a contract but that will cease to apply on the UK's exit from the EU. It remains to be seen what rules will be applied in its place. It may be that English law principles which existed immediately prior to the Rome I Regulation would apply. Alternatively, it is possible that the UK may enact legislation replicating, or closely reflecting, the Rome I Regulation, so that there would be little or no change to the law.



## As a matter of English law current EU rules will continue to apply in full force until the UK's official exit.

Irrespective of the precise route by which it is achieved, however, it seems likely that English courts will continue to uphold parties' contractual choice of law clauses.

The applicable law governing non-contractual obligations is currently determined by the Rome II Regulation (864/2007). When those rules cease to apply on the UK's exit from the EU it also remains to be seen what will replace them. If the English law rules which existed prior to the Rome II Regulation were to be applied, these would differ from the EU rules. Alternatively, again it is possible that the UK may enact legislation replicating, or closely reflecting, the Rome II Regulation so there would be little or no change to the law. It is, however, impossible at this stage to predict which of these is most likely to occur.

As regards what will happen in the courts of EU member states after the UK's exit, the position will continue to be governed by the Rome I and II Regulations. Thus they should continue to give effect to a choice of English law provision in a shipping contract.

### **Potential impact on dispute resolution clauses**

Another area which may see significant change after the UK's exit from the EU is dispute resolution.

In respect of proceedings commenced on or after 10th January, 2015 in disputes involving an EU based defendant or where there is a contractual choice of English jurisdiction, the jurisdiction of the English courts is currently governed by the Brussels I Regulation (1215/2012). That Regulation provides that the parties' choice of jurisdiction should be upheld and that judgments given by the courts of one EU member state should be enforced in all other member states. It will cease to apply when a dispute comes before the English courts after the UK's exit from the EU and it remains to be seen precisely what jurisdictional rules will be applied by English courts.

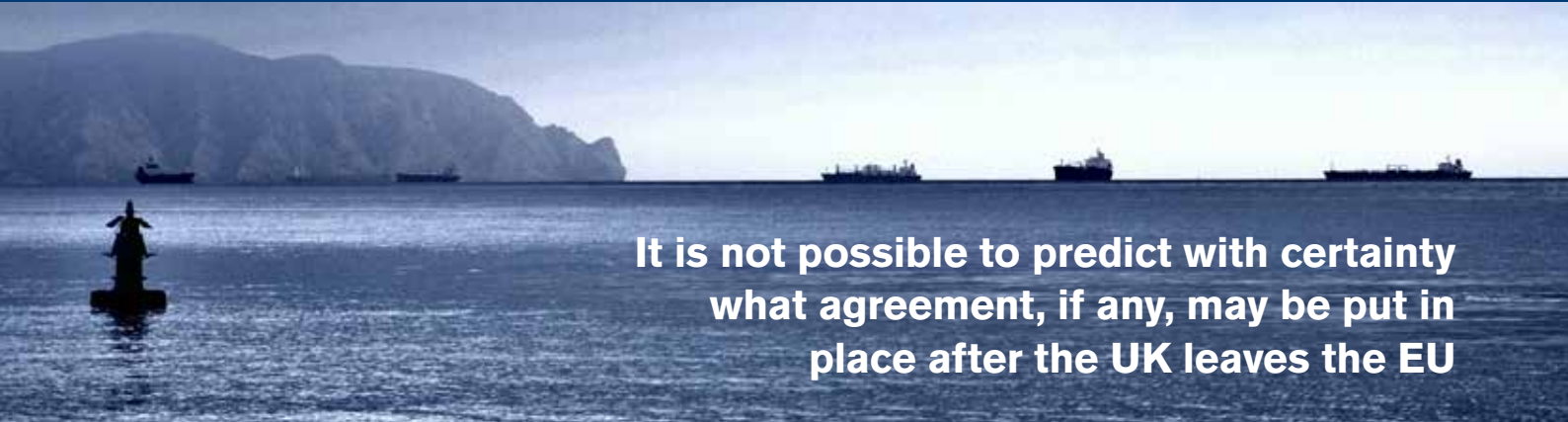
As with choice of law clauses, it is likely that whatever is put in place will continue to uphold parties' contractual choice of jurisdiction. Where there is no contractually chosen forum, however, the UK may well choose to apply different rules from the EU to determine jurisdiction.

Another consequence of the Brussels I Regulation not applying after the UK's exit is that service of English court proceedings may become more difficult. That Regulation currently permits service of proceedings without requiring the English court's permission on parties within the EU (and in Lugano Convention contracting states) and on parties outside the EU where the parties have an exclusive jurisdiction clause. Furthermore, the provisions of the EU Service Regulation (1393/2007) can be used to effect service. After the UK's departure from the EU, those provisions will no longer apply although claimants will still be able to rely upon the Hague Service Convention, which is similar to the EU Service Regulation, and all other available methods to effect service.

These potential difficulties in service can, however, be overcome by the inclusion in contracts of agreed methods of service which permit service on a process agent in England. It should also be borne in mind that none of these difficulties affect the commencement of English arbitration proceedings.

The question as to whether an EU member state would uphold an English jurisdiction clause after the UK's exit from the EU would fall to be determined pursuant to their national laws. In the event, however, that the EU member state does not do so, a party may then be able to apply to the English court to enforce the obligation by obtaining an anti-suit injunction.

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**It is not possible to predict with certainty what agreement, if any, may be put in place after the UK leaves the EU**

**Potential impact on availability of injunctive relief**

As the law currently stands (although the Brussels I Regulation has itself created uncertainty in this respect), English courts are prohibited from granting anti-suit injunctions in respect of proceedings in other EU member states because they are contrary to the principles of mutual trust between member states' courts.

After the UK exits the EU, the English courts could, conceivably, grant anti-suit injunctions in respect of proceedings in EU member states. That is a potentially important right for commercial parties, particularly where a party seeks to gain an advantage by commencing proceedings in an EU jurisdiction in contravention of the contractually agreed forum.

The ability of parties to obtain other injunctive relief from English courts, such as worldwide freezing orders, will be unaffected by the UK's exit from the EU.

However, as with any court order, the effectiveness of any form of injunctive relief depends on its ability to be enforced.

**Potential impact on enforcement of judgments**

Recognition and enforcement of court judgments in the EU is presently dealt with by the Brussels I Regulation. That Regulation provides a straightforward mechanism for enforcement of English court judgments in EU states.

There is a risk that, once the Brussels I Regulation ceases to apply, an English judgment may not be so easily enforceable in the EU as is the case now and vice versa.

Although there are a number of existing agreements to which the UK may become party to make that process easier (such as the Hague Service Convention or the Lugano Convention) it is not possible to predict with certainty what agreement, if any, may be put in place after the UK leaves the EU.

What can be said is that in the absence of any sensible agreement the process of enforcing English court judgments in the EU and vice versa is likely to become slower, more expensive and uncertain.

Consideration should therefore be given to the prompt enforcement of judgments to take the benefit of the reciprocal enforcement regime before any changes take effect.

**Potential impact on enforcement of arbitration awards**

Importantly for shipping contracts which often provide for arbitration, the UK's exit from the EU will not affect the procedure and conduct of arbitrations having their seat in England, as these are governed by domestic legislation.

Additionally, the recognition and enforcement of international arbitration awards is governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which all current EU members (including the UK) are party.

**Conclusion**

**The full extent of the upheaval in English law that will be caused by the UK's exit from the EU is presently uncertain. At this stage, it is important to recognise the possibility of change in certain areas which will have an impact on shipping contracts. The impact of those changes can, however, be effectively managed by Members by giving consideration to appropriate contractual terms and by taking advantage of the transitional periods to enforce any rights which might be lost on the UK's departure from the EU.**

**If Members have any queries, please contact your usual contact at the Managers' offices.**

**The UK Defence Club**

Thomas Miller Defence Ltd, 90 Fenchurch Street, London, EC3M 4ST  
 tel: +44 207 283 4646 fax: +44 207 204 2131  
 email: tmdefence@thomasmiller.com web: www.ukdefence.com

