



## Effects of Brexit on jurisdiction and choice of law clauses in contracts for carriage of goods by sea – the Danish perspective

In this newsletter, we discuss the impact of Brexit on exclusive jurisdiction agreements in favour of the English courts seen from a Danish perspective.

## 1. Introduction

The United Kingdom of Great Britain and Northern Ireland (UK) held its referendum on its membership of the European Union (EU), commonly referred to as the EU referendum or the Brexit referendum, on 23 June 2016. Just over nine months thereafter, the UK on 29 March 2017 notified the EU of the UK's intention to leave the EU and thereby initiated the official withdrawal process under article 50 of the Treaty on the European Union (TEU). The EU and the UK then negotiated and made an agreement on the withdrawal of the UK from the EU (commonly referred to as "Brexit"): Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (commonly referred to as the "Withdrawal Agreement"). Based on this, the UK left the EU with effect on 31 January 2020.

The resulting Brexit changes are fundamental and comprehensive and have effects on many different matters in and in relation to the UK, the EU and the EU member states, including Denmark.

The resulting Brexit changes also have a fundamental impact on the effect of jurisdiction and choice of law clauses in favour of the English courts and English law. This is also the case with respect to cargo claims regarding contracts for carriage of goods by sea and involving Danish carriers as well as contracts for carriage of goods by sea entered into in Denmark or involving Danish destinations.

In this newsletter, we discuss the impact of Brexit on exclusive jurisdiction agreements in favour of the English courts seen from a Danish perspective. In particular, we consider cargo claims subject to chapter 13 of the Danish Merchant Shipping Act ("DMSA") on carriage of goods by sea (see sections 2-6 below) and the removal of the legal regime governing recognition and enforcement of judgments in relation to such claims. We also briefly discuss Brexit's impact on choice of law clauses (see section 7 below).

## 2. Pre-Brexit: The Brussels (recast) Regulation and the Lugano Convention

Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), commonly referred to as the Brussels (Recast) Regulation, applies to EU member states with respect to jurisdiction, jurisdiction clauses and recognition and enforcement of judgments. Article 25 provides that if the parties, regardless of their domicile, have agreed that a court or the courts of an EU member state shall have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, then that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that member state. Such jurisdiction shall be exclusive unless the parties have

agreed otherwise.

Similar provisions are stated in the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 2007 (Lugano Convention). Article 23 provides that if the parties, one or more of whom is domiciled in a state bound by the convention, have agreed that a court or the courts of a state bound by the convention shall have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, then that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

## 3. Danish Merchant Shipping Act and its chapter 13 on carriage of goods by sea

Chapter 13 of the Danish Merchant Shipping Act ("DMSA") regulates the carriage of goods by sea, including the liability of the carrier for loss of and damage to goods etc. arising while the goods are in the custody of the carrier. See section 262 in the DMSA.

Chapter 13 also sets out specific provisions on jurisdiction for claims relating to carriage of goods. Section 310(1) states as follows:

*"Section 310*

*Subsection 1. Any prior agreement which restricts the plaintiff's right to have disputes regarding carriage of goods pursuant to this part decided by civil legal proceedings shall be void to the extent that it restricts the plaintiff's right, at his option, to institute an action with a court at one of the following places:*

- 1) the principal place of business, or in the absence thereof, the habitual residence of the defendant, or*
- 2) the place where the contract was made, provided that the defendant there has a place of business, branch or agency through which the contract was made, or*
- 3) the port of loading agreed in the contract of carriage, or*
- 4) the agreed or actual port of discharge pursuant to the contract of carriage."*

This limitation of the validity of choice of court clauses under section 310, subsection 1, however, does not apply to the extent that the application of the provisions of section 310, subsection 1, would be contrary to the Brussels (Recast) Regulation or the Lugano Convention. See section 310, subsection 5 of the DMSA.

The right to commence legal proceedings in the Danish courts for a cargo claim under section 310, subsection 1, of the DMSA thus overrides an agreed jurisdiction clause in the contract of carriage, unless the jurisdiction clause falls under the Brussels

(Recast) Regulation or the Lugano Convention. See section 310, subsection 5.

Traditionally, many Danish ship owners and other carriers who issue bills of lading for carriage of goods have inserted jurisdiction clauses favouring the English courts in their bills of lading. Based on section 310, subsection 5, of the DMSA, such exclusive jurisdiction clauses would previously have prevailed over the right for the cargo owner to commence proceedings against the carrier in the Danish courts under section 310, subsection 1.

## 4. Jurisdiction clauses and enforcement of judgments

For cargo claims subject to chapter 13 of the DMSA, the effect of the UK's withdrawal from the EU on exclusive jurisdiction clauses in favour of the English courts generally depends on whether legal proceedings were instituted before the transition period (see part 4.1 below) or after the transition period (see part 4.2 below).

### 4.1. THE TRANSITION PERIOD AND THE WITHDRAWAL AGREEMENT

As mentioned above, the EU and the UK negotiated and made an agreement on the withdrawal of the UK from the EU (commonly referred to as "Brexit"): Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (commonly referred to as the "Withdrawal Agreement"). Based on this, the UK left the EU with effect on 31 January 2020.

The Withdrawal Agreement was in force during the so-called transition period which was from 31 January 2020 to 31 December 2020.

Under article 67, see article 69(2), of the Withdrawal Agreement, the EU rules on jurisdiction (including the Brussels (Recast) Regulation) shall continue to apply in and for the UK, if the legal

proceedings concerned were commenced in a court in the UK before the end of the transition period, which was on 31 December 2020.

The Withdrawal Agreement thus ensures that EU law on international jurisdiction in cross-border civil disputes, including the Brussels (Recast) Regulation and the Lugano Convention, will continue to apply to legal proceedings instituted before 31 December 2020, and that relevant EU law on recognition and enforcement of judgments will continue to apply with respect to judgments in such proceedings.

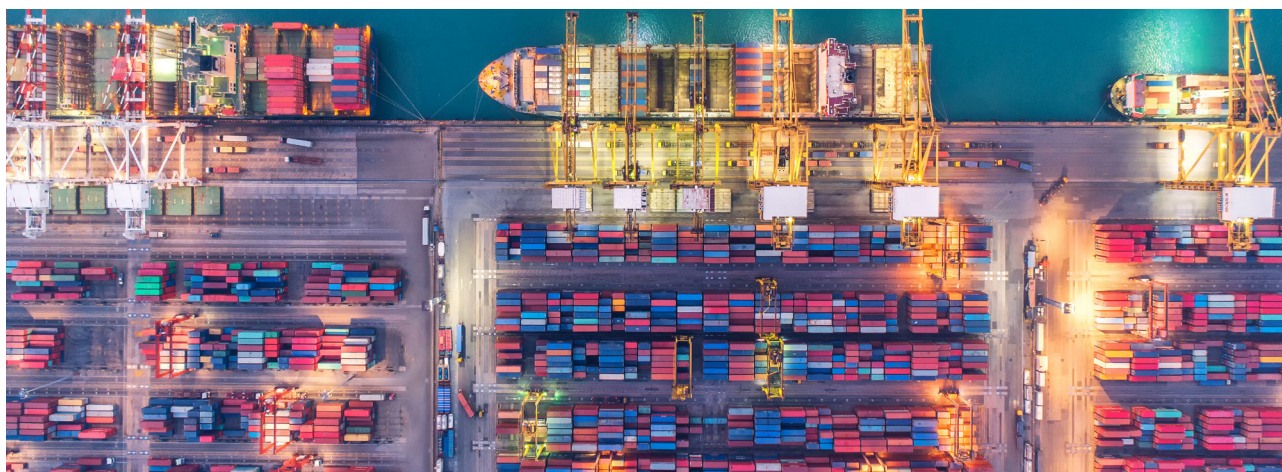
A valid jurisdiction clause referring disputes between contractual parties to the courts of the England will therefore override any of the grounds for establishing jurisdiction in Denmark under section 310, subsection 1, of the DMSA, if the legal proceedings were filed before the end of the transition period; that is, no later than 31 December 2020.

### 4.2. PROCEEDINGS COMMENCED AFTER THE TRANSITION PERIOD

However, after the expiry of the transition period, the fundamental consequences of Brexit came into effect for claims subject to chapter 13 of the DMSA and arising out of contracts of carriage containing a jurisdiction clause favouring the English courts. Such jurisdiction clauses will no longer prevail over the grounds for establishing jurisdiction in Denmark as set out in section 310, subsection 1 of DMSA. The reason for this is two-fold:

*(1) The Lugano Convention only applies between the EU member states and Iceland, Norway, and Switzerland and no longer the UK*

As the UK has not currently joined the Lugano Convention as a non-EU member state, the Lugano Convention does not apply between the UK and EU member states, including Denmark. Therefore, the provisions of the Lugano Convention conferring exclusive jurisdiction on the English courts for disputes arising out of contracts containing an English jurisdiction clause no



longer applies, and the exception in section 310, subsection 5, will no longer be triggered. This leaves it open for either party to the dispute to invoke the grounds for establishing jurisdiction in section 310, subsection 1, and file legal proceedings against the other party with the Danish courts. This will effectively set aside any jurisdiction clause seeking to have the contrary effect.

*(2) The Withdrawal Agreement and the Brussels (Recast) Regulation do not apply in and for the UK if the legal proceedings were commenced after the expiry of the transitional period*

The transitional period ended on 31 December 2020. This means that any legal proceedings filed with a UK court after the said date are not subject to the Withdrawal Agreement and thereby also not to subject to the Brussels (Recast) Regulation. This follows from article 67 and article 69(2), of the Withdrawal Agreement. Therefore, under a dispute subject to chapter 13 of the DMSA, a Danish court will generally consider a jurisdiction clause in favour of the English court to be void or without legal effects.

After the end of the transition period on 31 December 2020, a new legal reality has materialised for cargo claims subject to chapter 13 of the DMSA for which legal proceedings have yet to be filed.

From a Danish perspective, in a dispute resolution context the legal regime for recognition of jurisdiction clauses in favour of the English courts has therefore switched away from the Brussels (Recast) Regulation to the Hague Convention. However, the Hague Convention does not apply to carriage of cargo and passengers, as discussed below. This means that claims in relation to carriage of cargo and passengers are only governed by the Danish national general statutory rules on jurisdiction and jurisdiction clauses.

Further and importantly, after the expiry of the transition period there is now no convention or bilateral agreement in place between Denmark and the UK governing recognition and enforcement of judgments in relation to cargo and passenger claims. Legal proceedings for such claims can be filed with the courts of one of these countries, regardless of whether legal proceedings for the same claim has already been filed in the courts of the other country (provided, of course, that the courts of both countries find that they have jurisdiction to consider the claim). A judgment passed by the courts of one of the countries will generally not be enforced by the courts of the other country.

## 5. The new legal regime: the Hague Convention

For now, the fall-back position currently applicable to the UK after the expiry of the transition period is to be found in the Hague Convention on Choice of Court Agreements of 30 June 2005 (the Hague Convention). This convention has entered into

force both in the UK and Denmark.

The Hague Convention provides that exclusive jurisdiction clauses must be respected. The Hague Convention applies between the courts of the participating states and jurisdictions. Currently they are the EU, Mexico, Montenegro, Singapore and the UK. The Hague Convention applies with respect to contracts entered into after the convention came into force in the state of the chosen court.

However, the Hague Convention does not apply to the carriage of passengers and goods. See article 2(f). Further, the Hague Convention does not trigger the exception in section 310, subsection 5, of the DMSA to the jurisdiction rules and the grounds for establishing jurisdiction in section 310, subsection 1. The provisions of the Hague Convention therefore does not change the position stated above. This means that section 310, subsection 1, will prevail over jurisdiction clauses in favour of the English courts. This grants jurisdiction to the Danish courts with respect to cargo claims involving Danish carriers as well as contracts of carriage entered into in Denmark or involving Danish destinations.

## 6. Further change ahead: When will the UK join the Lugano Convention?

Once the UK joins the Lugano Convention, the position set out above will revert to the familiar regime whereby jurisdiction clauses in favour of the English courts will prevail for cargo claims subject to chapter 13 of the DMSA.

The UK applied to join the Lugano Convention in April 2020. However, the consent of all the existing parties (including each EU member state) is required for the UK to join the convention. There are currently no indications that such consent from the EU member states will be granted anytime soon. So far, only the non-EU parties Iceland, Norway and Switzerland have supported the UK's application. Once consent is received from all parties, there is a three-month objection period before the Lugano Convention enters into force. The new legal regime is therefore expected to apply at least for a substantial part of 2021.

## 7. English choice of law clauses after Brexit

Where legal proceedings regarding a cargo claim subject to chapter 13 of the DMSA are filed with a Danish court, the court will determine the law applicable to the claim according to Danish choice of law rules.

First, section 252 of the DMSA provides that chapter 13 of the DMSA shall apply to all cargo claims as set out in the provisions of section 252:

*"Subsection 1. The provisions of this part shall apply to all contracts on domestic carriage by sea in Denmark and trade between Denmark, Norway, Finland and Sweden. The law of the country in*

which the carriage takes place shall apply for domestic carriage in Norway, Finland and Sweden.

*Subsection 2. For other trade, the provisions shall also apply to contracts of carriage by sea for trade between two different states, if*

*1) the port of loading as provided in the contract of carriage by sea is located in a State Party, or*

*2) the port of discharge as provided in the contract of carriage by sea is located in Denmark, Norway, Finland or Sweden, or*

*3) several ports of discharge are provided in the contract of carriage by sea and one of these is the actual port of discharge and such port is located in Norway, Denmark, Finland or Sweden,*

*4) the transport document is issued in a State Party, or*

*5) the transport document provides that the provisions of the Convention or the legislation of any State Party giving effect to them are to apply.*

*Subsection 3. If neither the agreed port of loading nor the agreed or actual port of discharge are located in Denmark, Norway, Finland or Sweden, it may, however, be agreed that the contract of carriage by sea shall be governed by the legislation of a State Party."*

The term "State Party" refers to a Hague-Visby Convention State. Section 252, subsections 1 and 2, therefore applies, on a mandatory basis, the provisions of chapter 13 of the DMSA to cargo claims arising under a wide range of contracts of carriage. They include contracts of carriage where the port of loading and/or port of discharge are/is in a Hague-Visby Convention State or the issuing of the transport document for the carriage has taken place in a Hague-Visby Convention State.

However, section 252, subsection 3, provides that a choice of law clause agreed to by the parties to a contract of carriage shall prevail over section 252, subsections 1 and 2, unless the agreed port of loading or the agreed or actual port of discharge are located in Denmark, Norway, Finland or Sweden. Whether the choice of law clause has been validly agreed will be a matter for the courts to determine under applicable Danish law. There is substantial case law on this point, including with respect to choice of law clauses stated in standard terms printed on the reverse side of bills of lading or made available in electronic booking systems.

England is a Hague-Visby Convention State. Therefore, an English choice of law clause agreed to by the parties to a contract of carriage will have the effect that a cargo claim before the Danish courts arising under the contract of carriage shall be subject to English law to the exclusion of Danish law. However, this does not apply if the port of loading or the port of discharge was situated in one of the four Scandinavian countries, as mentioned above, that is Denmark, Norway, Sweden or Finland.

If the Danish courts apply English law to the cargo claim, then this would likely require that the claimant files as evidence in the legal proceedings an expert report on the applicable English law relevant for the claim.

Where the port of loading or discharge under a contract of carriage is situated in one of the four Scandinavian countries – or where no choice of law clause has been included in the contract or validly agreed to by both parties – chapter 13 of the DMSA will apply to the cargo claim. The contents and details of Danish law on cargo claims lie beyond the scope of this newsletter, but there are some differences compared with English law on cargo claims. The provisions of Chapter 13 of the DMSA are based on and implement the Hague-Visby Rules; however, Chapter 13 also contains other supplementary provisions based on and similar to the Hamburg Rules, as well as some national Danish provisions that are not based on international conventions.

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