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Brexit Implications for European Litigation

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European Disputes

How is Brexit likely to affect litigators in Europe after the end of the transition period on 31 December 2020, if no deal is agreed between the UK and the EU to cover their future relationship? In this alert, we consider the "run-off" period created by the Withdrawal Agreement, what is left thereafter, and the implications for drafting choice of law and jurisdiction clauses.

Current status of UK/EU negotiations

The UK has left the EU and remains in a transition period in its relationship with the EU. During the transition period, subject to some limited exceptions, EU law continues to apply to the UK. In broad terms, the EU civil justice co-operation regime continues to apply as it did previously. The purpose of the transition period is to preserve the *status quo* for a period of time to allow the UK and the EU to negotiate a wide-ranging agreement to cover their future relationship, including matters relevant to litigators. However, those negotiations have been slow and in many sectors, preparations for a "no deal" end to the transition period have ramped up.

The transition period ends on 31 December 2020. A 30 June 2020 deadline in the Withdrawal Agreement to agree a one or two year extension to the transition period has now passed without any extension being agreed. This does not mean that an extension is impossible, but the UK Government has repeatedly made clear that it will not seek (and legislated against seeking) any extension.

As such, there is a real risk of a "no deal" end to the transition period.

After the end of the transition period: the run-off period

Assuming that no deal is reached, then the provisions in the Withdrawal Agreement which set out transitional provisions will be applied after the end of the transition period. These effectively create a run-off period for the old regime:

a. The Withdrawal Agreement requires the UK to apply the Rome I and Rome II Regulations to, respectively, contracts concluded before the end of the transition period and events giving rise to damage where those events occurred before the end of the transition period. However, the UK has in fact gone further and legislated to incorporate Rome I and Rome II into domestic law, so Rome I and Rome II will continue to be

applied by UK courts generally to determine applicable law even following the end of the transition period.

b. The Brussels Recast Regulation will continue to apply as between the UK and EU in respect of jurisdiction and recognition and enforcement of judgments relating to proceedings which are commenced before the end of the transition period. Again, it therefore creates a run-off period for the current regime.

c. The following will apply beyond the transition period in certain circumstances, again creating run-off periods:

    a. The EU Service Regulation will apply to judicial and extrajudicial documents received for the purposes of service before the end of the transition period;

    b. The Taking of Evidence Regulation (1206/2001) will apply to requests received before the end of the transition period; and

    c. The Council Decision governing requests for judicial cooperation (2001/470/EC) will continue to apply to requests that were received before the end of the transition period.

d. The CJEU will continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals in the UK which were made before the end of the transition period.

After the end of the transition period: what then?

The regime that will overlap with, and over time take over from, this run-off period following the transition period is not yet known. It had been hoped that a comprehensive new agreement would be entered into, addressing matters of civil judicial co-operation, but there is an increasing risk that will not happen. Should businesses with a preference for English law and jurisdiction clauses therefore be revisiting that preference?

Choice of English law

Taking English choice of law clauses first, as noted above, the relevant EU rules are being permanently adopted in the UK, such that there is effectively no change in this regard, whether a dispute ends up being heard before the English courts or any EU national court. There is no reason therefore to change a preference for English law.

Choice of English jurisdiction

Turning to jurisdiction clauses, the Brussels Recast Regulation will fall away, along with the Lugano Convention. As such, in the absence of any other regime, the UK will fall back on bilateral treaties with some key EU jurisdictions, and general principles of international comity, which mean that respect for, and enforcement of, clear jurisdiction agreements are the norm, even where no binding commitment to do so exists. Further, the UK has taken concrete steps towards acceding to two international conventions in the field of civil judicial co-operation, that could largely plug the gap left by the Brussels Recast Regulation.

Hague Convention on Choice of Court Agreements

First, the UK intends to accede to the 2005 Hague Convention on Choice of Court Agreements. This Convention is designed to give effect to exclusive jurisdiction clauses, in particular by requiring that contracting states respect such clauses, and enforce judgments resulting from them.

The UK Government intends to provide for the ratification by the UK of the Convention and its implementation into the UK law by the end of the transition period[1]. The UK's accession is not subject to the EU's agreement.

The Convention will be extremely helpful to those with exclusive English jurisdiction clauses in their contracts. It is not, however, a "one stop shop" solution. In particular, it is limited to exclusive jurisdiction clauses and is generally understood not to apply to asymmetrical clauses. There is also a question as to its application to any exclusive jurisdiction clauses concluded between the entry into force of the Convention (on 1 October 2015) and the date the UK becomes a contracting party in its own right. The UK has passed regulations[2] which provide that the UK will apply the 2005 Hague Convention to any exclusive jurisdiction clauses concluded in that period, to close any gap. However, it is unclear if other countries will do the same (and it appears that the EU does not intend to do so).

Lugano Convention

Secondly, the UK has deposited an instrument of accession to the 2007 Lugano Convention, which governs jurisdiction and the recognition and enforcement of judgments between the EU, Norway, Iceland and Switzerland. The Lugano Convention reflects earlier iterations of the Brussels Recast Convention, and would be a more "full service" (if not perfect) solution to the issue of civil judicial co-operation with the EU than the Hague Convention.

Statements of support for the UK's accession have been issued by Norway, Iceland and Switzerland. However, the European Commission has so far not been forthcoming with its consent. Unanimous approval by all contracting parties to the 2007 Lugano Convention is required for the UK's accession, and so it is possible that a failure to reach wider agreement with the EU will prevent the EU from agreeing to this.

If the UK has not acceded to the 2007 Lugano Convention by the end of the transition period, then it will cease to apply in the UK[3].

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[1] The Private International Law (Implementation of Agreements) Bill is passing through Parliament. The Bill received broad support at its second reading in the House of Commons, and is expected to pass into law shortly. The UK deposited an instrument of accession to the 2005 Hague Convention on 28 September 2020.

[2] The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018.

[3] It appears to be the UK's intention to apply a run-off period (although it is unclear if Switzerland, Iceland and Norway will do the same).

Other options?

Thirdly, the UK Government is considering becoming a contracting party to other relevant conventions, such as the 2019 Singapore Mediation Convention, and the 2019 Hague Convention on the Recognition and Enforcement of Judgments, but none will come into effect in the UK by the end of the transition period.

Retaining a choice of English jurisdiction

For the reasons given above, if no new agreement on civil judicial co-operation is entered into, the risk profile of retaining a choice of English jurisdiction will change slightly after the end of the transition period, as the EU-wide regime by which such clauses are given almost automatic effect will fall away. That said, there are several fallback regimes that will or may apply, and failing all else, it would be unusual for an EU27 national court to disregard a clear choice of a third country's courts in a contract, such that the change is not expected to have a significant practical impact on English exclusive jurisdiction clauses. Any parties nervous about the change, or with a nervous counterparty, may wish to consider arbitration as an alternative.

Comment

Litigators involved in UK/EU-related disputes in the coming years will need to consider a number of inter-related, and in some cases overlapping, regimes: the pre-Brexit regime, the transition period regime; the run-off regime; and the post-Brexit regime.

As to the post-Brexit regime, for those considering choice of law and jurisdiction clauses for their contracts:

- English choice of law clauses will be protected, by EU and UK legislation, before EU national courts and the English court; and
- English exclusive jurisdiction clauses will be respected in England and are likely to be protected in the EU by one or more of the Hague Convention, the Lugano Convention, bilateral treaties and/or the principle of international comity. That said, the simple EU-wide regime that has protected them to date seems likely to fall away without a simple replacement being implemented (at least in the short term).

If you have any questions concerning the material discussed in this client alert, please contact the following members of our European Disputes practice:

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