

Brexit: Implications for European Litigation

31 December 2020

European Disputes

On 24 December 2020, the EU and the UK reached agreement on the terms of the “EU-UK Trade and Cooperation Agreement” (the “Brexit Deal”).¹ Despite this eleventh-hour agreement, the Brexit Deal is silent on judicial cooperation in civil matters. In this alert, we consider how Brexit, and the Brexit Deal, are likely to affect litigators in Europe going forward and considerations for parties with a preference for English law and jurisdiction clauses.

Current status

The UK has left the EU, and the transition period, which has largely held the ring in terms of its relationship with the EU, ends at 11 p.m. GMT on 31 December 2020. Despite a wide-ranging agreement having been reached on other matters (including judicial cooperation in criminal matters), there is no mention of civil judicial cooperation in the Brexit Deal (either in general terms, or in relation to the UK’s request to re-accede to the Lugano Convention specifically). This means that civil litigators are effectively facing a “hard Brexit” (unless anything further is agreed in this regard in the coming weeks or months).

The transition period and the “run-off period”

The purpose of the transition period was to preserve the *status quo* for a period of time to allow the UK and the EU to negotiate an agreement to cover their future relationship.

The Withdrawal Agreement² contained transitional provisions, which will be applied after the end of the transition period, creating a run-off period for the old regime:

¹ The Brexit Deal must be signed and ratified before entry into force, but will be provisionally applied from 11 p.m. GMT on 31 December 2020.

² The “Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community”, signed on 24 January 2020, set the terms of the withdrawal of the UK from the EU and Euratom. The UK’s withdrawal from the EU took effect at 11 p.m. GMT on 31 January 2020, and at that moment the Withdrawal Agreement entered into force, until 11 p.m. GMT on 31 December 2020.

- a. The Withdrawal Agreement requires the UK to apply the Rome I³ and Rome II⁴ 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 Regulation⁵ will continue to apply as between the UK and EU in respect of jurisdiction and recognition and enforcement of judgments relating to proceedings which were 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 Regulation⁶ will apply to requests received before the end of the transition period;
 - c. The Council Decision governing requests for judicial cooperation⁷ will continue to apply to requests that were received before the end of the transition period; and
- 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.

Going forward: from 1 January 2021

It had been hoped that the Brexit Deal would address matters of civil judicial cooperation, but this has not (yet) happened. Should businesses with a preference for English law and jurisdiction clauses therefore revisit that preference?

³ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

⁴ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

⁵ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁶ Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters is an EU regulation in the field of judicial cooperation.

⁷ Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters.

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 EU regime (the Brussels Recast Regulation) will fall away, along with the Lugano Convention, which governs jurisdiction and the recognition and enforcement of judgments between the EU, Norway, Iceland and Switzerland. As such, given the absence of any new regime taking their place, the UK has taken steps towards acceding to two international conventions in the field of civil judicial cooperation, that could largely plug the gap left by the Brussels Recast Regulation. Further and in any event, 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.

Hague Convention on Choice of Court Agreements

The UK will accede as an independent contracting state 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 Parliament has legislated for the ratification of the Convention by the UK and its implementation into UK law⁸. Importantly, 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 (11 p.m. GMT on 31 December 2020). The UK has passed regulations⁹ 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).

⁸ The Private International Law (Implementation of Agreements) Act 2020 received Royal Assent and passed into law on 14 December 2020. The UK deposited an instrument of accession to the 2005 Hague Convention on 28 September 2020. Although the instrument of accession takes effect at 11 p.m. GMT on 31 December 2020, the UK considers that the 2005 Hague Convention entered into force for the UK on 1 October 2015 and that the UK is a contracting state without interruption from that date.

⁹ The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018.

Lugano Convention

The UK has deposited an instrument of accession to the 2007 Lugano Convention. 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 cooperation with the EU than the Hague Convention.

Statements of support for the UK’s accession have been issued by Norway, Iceland and Switzerland. However, as noted above, the Brexit Deal does not contain reference to the UK’s request for accession to the Lugano Convention, and 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 the EU will not agree to this.

As of the date of this alert, the UK has not acceded to the 2007 Lugano Convention, and so from 1 January 2021, it will cease to apply in the UK¹⁰.

Other options?

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 in the short-term.

Retaining a choice of English jurisdiction

For the reasons given above, as the Brexit Deal is silent on civil judicial cooperation, the risk profile of retaining a choice of English jurisdiction will change slightly from 1 January 2021, 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.

¹⁰ 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).

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 will fall away without a simple replacement being implemented (at least in the short-term).

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