

Insights: Brexit and EU Cross-Border Civil and Commercial Disputes

Summary and Overview

Most of the aspects governing cross-border litigation within the EU are governed by EU Regulation, or by international agreements applicable to the UK by virtue of EU membership. Key aspects relating to commercial litigation will be affected by the UK's exit from the EU.

An "intra-EU dispute" is one that involves an EU-domiciled defendant, or where the courts of an EU Member State otherwise have jurisdiction by agreement, or by mandatory rules (such as over immovable property), or at the enforcement stage, where the assets are located within another EU Member State.

The Withdrawal Agreement, agreed between the UK and the EU, and now implemented into domestic law, retains EU law (meaning EU Regulations, EU case law and UK implementing legislation) in the UK until the end of the Transition Period, currently 31 December 2020. No immediate changes will therefore take effect as at Exit Day, on 31 January 2020.

In relation to civil litigation matters:

- The legal framework for jurisdiction and recognition and enforcement of judgments in the EU will continue to apply unchanged for the Transition Period. The position is less clear thereafter, and will depend on further arrangements agreed between the UK and the EU and/or EFTA States. If no arrangements are agreed, jurisdiction and recognition and enforcement matters will revert to default rules under national law of the applicable court, subject to the application to the Hague Convention or other bilateral treaty.
- Similarly, the regime for the automatic recognition of insolvency proceedings will continue to be effective during the Transition Period. The position thereafter will be subject to arrangements that the UK agrees with the EU. In the absence of any further agreement, the default position will be dependent on the respective national rules on a case by case basis, subject to the application of the 1997 UNCITRAL Model Law on Cross-Border Insolvency.
- Rome I and Rome II will be implemented into UK law as at the end of the Transition Period. Therefore, the effectiveness of a party's choice as to the applicable law should remain unchanged.
- The conduct of London-seated arbitration is unaffected by EU regulation and parties would continue to enforce awards under the 1985 New York Convention where applicable.

Framework of Transition

The UK will be leaving the EU ("**Exit Day**") on 31 January 2020. Transition measures for the UK's withdrawal are agreed in the draft withdrawal agreement dated 19 October 2019 (the "**Withdrawal Agreement**").¹ From Exit

¹ [Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community dated 19 October 2019.](#)

Day, EU law will continue to apply on a transitional basis, until at least 11pm on 31 December 2020, unless extended (the "**Transition Period**").²

The key domestic implementing legislation to achieve transition are:

- The European Union (Withdrawal) Act 2018 (the "**2018 Act**")³; and
- The European Union (Withdrawal Agreement) Act 2020 (the "**2020 Act**")⁴, which received royal assent on 23 January 2020, and passed the Withdrawal Agreement into law.

The 2018 Act provides that most of EU law as at Exit Day, including EU Regulations, EU case law and UK implementing legislation, will be converted into "retained EU Law" as UK domestic legislation. Secondary statutory instruments have been drafted to implement necessary amendments to existing legislation.⁵ The 2020 Act postponed the effects of the 2018 Act until the end of the Transition Period, and took a snapshot of "retained EU law" at the end of the Transition Period, instead of on Exit Day.

Applicable Law

- Within the EU, the relevant frameworks for applicable law or governing law clauses are the Rome I Regulation (EC) No 593/2008 on the law applicable to contractual obligations since 17 December 2009 ("**Rome I**"), and the Rome II Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations since 11 January 2009 ("**Rome II**").⁶
- During the Transition Period, EU law shall continue to be applicable to and in the UK. Savings provisions in the Withdrawal Agreement provide that Rome I continue to apply following the Transition Period in respect of governing law clauses concluded before the end of the Transition Period,⁷ and that Rome II continues to apply in respect of events giving right to damage, where such events occur before the end of the Transition Period.⁸
- Rome I and Rome II have also been legislated into UK law, pursuant to the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019.⁹ The Regulation comes into force as at the end of the Transition Period.

Jurisdiction of Courts and Recognition and Enforcement of Judgments

- Jurisdiction and enforcement matters are governed by the Brussels Regulation regime, which is directly effective in all EU Member States. This provides for uniform rules for jurisdiction of national courts (including *lis pendens* rules), as well as standard rules for mutual enforcement of judgments across the EU without special procedure. The rules give effect to a party's agreed choice of jurisdiction, and once a court is

² Withdrawal Agreement, Article 126.

³ <http://www.legislation.gov.uk/ukpga/2018/16/contents/enacted>

⁴ <http://www.legislation.gov.uk/ukpga/2020/1/contents/enacted>

⁵ For example, amendments to the civil procedural rules: [Civil Procedure Rules 1998 \(Amendment\) \(EU Exit\) Regulations 2019](#).

⁶ In general, where a party specifies that a governing law will apply to the contract and any dispute arising from it, that choice will generally be upheld by any EU Member State court. In addition, the precursor to Rome I, the 1980 Rome Convention, applies to contracts entered into between 1 April 1991 and 16 December 2009.

⁷ Withdrawal Agreement, Article 66(a).

⁸ Withdrawal Agreement, Article 66(b).

⁹ <http://www.legislation.gov.uk/uksi/2019/834/contents/made>

seised, any other court seised of the same dispute must stay its proceedings until the jurisdiction of the first-seised court has been determined.

- The Brussels I Recast Regulation (EU) No. 1215/2012 ("**Brussels I Recast**") applies to proceedings instituted on or after 10 January 2015, whilst its predecessor, the Brussels I Regulation (EC) No. 44/2001 ("**Brussels I**") is still relevant to proceedings commenced before 10 January 2015. As between the EU and certain EFTA states (Iceland, Norway and Switzerland), similar jurisdictional rules and enforcement of judgments are governed by the 2007 Lugano Convention (the "**Lugano Convention**").
- In addition to the Brussels regime, the EU has ratified (on behalf of all Member States) the 2005 Hague Convention on Choice of Court Agreements ("**Hague Convention**"). Rules are agreed as to the recognition of written exclusive choice of court agreements in civil matters, as well as the enforcement of related judgments in those proceedings. Pre-Brexit, the Hague Convention is only relevant as between the UK and non-EU States. The Hague Convention rules are narrower in scope than the Brussels Regime, as they do not apply to "asymmetrical" jurisdiction agreements. In addition, the EU, Singapore, Mexico and Montenegro are the only current Contracting Parties.
- During the Transition Period, EU law shall continue to be applicable to and in the UK, which means that the Brussels Regime as to jurisdiction and enforcement will continue to be in force.
- The Withdrawal Agreement provides that the UK shall still be bound by the obligations stemming from international agreements concluded by the EU (acting for Member States) for the duration of the Transition Period.¹⁰ Therefore the 2005 Hague Convention and 2007 Lugano Convention shall continue to apply to jurisdiction and recognition and enforcement matters.
- Savings provisions in Article 67 of the Withdrawal Agreement apply to pending proceedings as at the end of the Transition Period. In particular, the Brussels Recast continues to apply (i) in respect of jurisdiction matters relating to (a) legal proceedings instituted before the end of the transition period (Article 67(1)(a)), and (b) other related legal proceedings to those that are instituted before the end of the Transition Period (Article 67(1)(a)), and (ii) to judgments given in legal proceedings instituted before the end of the Transition Period (Article 67(2)(a)).
- Thereafter, the position on the framework for jurisdiction and enforcement matters will depend on further arrangements agreed between the UK and the EU and/or the EFTA states. Given the required reciprocity the Brussels regime cannot be unilaterally legislated into law.

Recognition of Insolvency Proceedings

- Within the EU (other than Denmark, which has opted-out), insolvency and restructuring proceedings are governed by Council Regulation No 2015/848 on Insolvency Proceedings (the "**2015 Regulation**"), which applies to insolvency proceedings from 26 June 2017, and which replaced Council Regulation (EC) No 1346/2000 on Insolvency Proceedings (the "**2000 Regulation**"). Article 84 of the 2015 Regulation confirms that the 2000 Regulation shall continue to apply to insolvency proceedings commenced before 26 June 2017.
- The regime allows for office-holders to be recognised in other EU member states and enables cross-border cooperation including to take appropriate action in those jurisdictions. The 2015 Regulations in particular provide automatic uniform mechanisms to recognise main insolvency proceedings to avoid parallel proceedings across different jurisdictions.

¹⁰ Withdrawal Agreement, Article 129(1).

- During the Transition Period, EU law shall continue to be applicable to and in the UK, which means that the relevant Regulations as to insolvency proceedings will continue to be in force.
- Savings provisions in Article 67 of the Withdrawal Agreement apply to pending proceedings as at the end of the Transition Period. In particular, the 2015 Regulations shall apply to insolvency proceedings, and actions referred to in Article 6(1) of that Regulation, where the main proceedings were opened before the end of the Transition Period (Article 67(3)(c)).
- Thereafter, the position on the framework for jurisdiction and enforcement matters will depend on further arrangements agreed between the UK and the EU. The UK Government has enacted secondary legislation¹¹ to address deficiencies arising from the continued operation of the regime in the UK where there is no continued automatic recognition and reciprocity from the EU Member States.■

¹¹ [Insolvency \(Amendment\) \(EU Exit\) Regulations 2019](#)

To view our previous publication, “*Brexit Outlook: The Future Of EU Cross-Border Disputes*”, please click [here](#).

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