

Current legislative position¹

The EU Withdrawal Act 2018, as amended by the European Union (Withdrawal Agreement) Act 2020, (the "Act") repealed the European Communities Act 1972 (the "ECA") on Exit Day (31 January 2020). However, the Act provides for the ECA to continue to have effect until the end of the implementation period, currently 31 December 2020 (defined as "IP Completion Day"). The Act was necessary to give effect to the Withdrawal Agreement between the EU27 and the UK dated 29 January 2020 (the "Withdrawal Agreement²").

The Act also revises the date on which the bulk of the statutory instruments drafted in contemplation of a No-Deal Brexit would come into force (assuming no future deal in those areas is agreed) from Exit Day to IP Completion Day. For the most part, there will therefore be little or no change to the current position during the implementation period (also known as the transition period). This note addresses the current position, the transitional arrangements provided for in the Withdrawal Agreement, and the key issues to be aware of following IP Completion Day.

Choice of Law

Parties' choice of governing law will be essentially unaffected by Brexit (either with a future deal after IP Completion Day or not). On the UK side, the relevant EU Regulations (Rome I³ and Rome II⁴) are being copied into UK law with minor modifications⁵. On the EU side, the Regulations are based on a principle of 'universal application'⁶ and apply whether or not the law chosen is that of an EU Member State.

The rules of applicable law in the absence of choice (and in relation to non-contractual matters) will also substantially remain those in Rome I and Rome II.

Choice of Jurisdiction

Parties' choice of English⁷ courts, however, will be affected in the event no future deal is agreed after IP Completion Day. The key legislation ("Brussels Recast⁸") only supports jurisdiction agreements in favour of courts of an EU Member State. On repeal of this legislation on IP Completion Day⁹, neither the Brussels Recast nor the Lugano Convention (similar to the Brussels Recast but operating between the EU, Norway, Iceland and Switzerland), will be copied back into UK law¹⁰. In some circumstances, therefore, courts in an EU Member State may ignore the parties' choice of jurisdiction and accept jurisdiction on the basis, for example, that the defendant is domiciled there (Art 4 of the Brussels Recast and similar provisions in the Lugano Convention).

To mitigate the effect of this change, the Withdrawal Agreement provides that in both the UK¹¹ and EU Member State courts:

For proceedings commenced but not concluded prior to IP Completion Day, current jurisdictional rules will apply; and

¹ For further information on the current position in relation to the negotiation of a Free Trade Agreement between the UK and the EU, refer to our client briefing "[Brexit: where do we go from here?](#)" (February 2020).

² The United Kingdom Internal Market Bill was introduced to Parliament on 9 September 2020. If passed, it would potentially override parts of the Withdrawal Agreement but would have minimal, if any, effect on the matters set out in this note.

³ EC Regulation 593/2008 on the law applicable to contractual obligations

⁴ EC Regulation 864/2007 on the law applicable to non-contractual obligations

⁵ The Law Applicable to Contractual and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019 <http://www.legislation.gov.uk/ukxi/2019/834/made> coming into force on IP Completion Day.

⁶ Article 2 of Rome I and Article 3 of Rome II

⁷ "England" and "English" are used interchangeably with "UK" in this note.

⁸ Brussels Regulation Recast EC 1215/2012

⁹ <http://www.legislation.gov.uk/ukdsi/2019/9780111176726/contents> The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations (the "**Jurisdiction SI**") coming into force on IP Completion Day repeal the entire Brussels Regime, including the Brussels Recast and the Lugano Convention.

¹⁰ Transitional provisions are included within the Jurisdiction SI for cases where the Brussels Recast or Lugano Convention would have applied and where a UK court is already seised of proceedings prior to IP Completion Day.

¹¹ In the UK, this provision is contained within the Jurisdiction SI.

For proceedings commenced but not concluded prior to IP Completion Day, current rules on enforcement will also apply.

Further, to a certain extent the disruption caused by the repeal of Brussels Recast may be mitigated by the UK's possible participation in the [Lugano Convention 2007](#)¹² and the [Hague Convention on Choice of Court Agreements 2005](#) ("**the 2005 Convention**").

The Lugano Convention

On 8 April 2020, the UK applied to join the Lugano Convention 2007 as an independent contracting state. For the UK to accede, it will require the unanimous consent of all other contracting parties, including the EU. As at the time of writing, that consent has yet to be forthcoming¹³.

The Hague Convention on Choice of Court Agreements 2005

Despite its name, the 2005 Convention covers not only jurisdiction but also the enforcement of judgments. However, it is limited in scope. It applies only to civil and commercial matters and to judgments given on the merits by the court chosen under a qualifying exclusive jurisdiction agreement. It does not apply to interim or procedural decisions so, for example, it does not cover freezing injunctions.

From when does the 2005 Convention apply?

The UK deposited a notice of accession to the 2005 Convention as an independent signatory on 28 September 2020. It will come into force on 1 January 2021¹⁴.

The UK has been a party to the 2005 Convention (by virtue of its EU membership) since 1 October 2015, and it has indicated that it considers the 2005 Convention to have been in force without interruption since that date. There is a risk, however, that other country's courts may not take the same view. The EU Commission, for example, has indicated that it considers that English jurisdiction clauses pre-dating the UK's accession as an independent state will not benefit from the 2005 Convention. Ultimately, this will be a matter for the English courts, those of other EU Member States or 2005 Convention States and the CJEU to decide. For guidance on minimising this risk, see below.

Asymmetric Jurisdiction Clauses

These clauses provide for claims by one party to be subject to the exclusive jurisdiction of (say) the English Courts but give the other party the option to bring proceedings in any court having jurisdiction. There is doubt over whether the 2005 Convention will apply to such clauses. The official documents relating to the 2005 Convention suggest it does not but there are now two decisions of the English courts which provide a contrary view¹⁵. Until the matter is decided in a case under the 2005 Convention, the position remains uncertain.

Issues to be aware of in the event of no future deal after IP Completion Day:

Jurisdictional Rules

Where neither the 2005 Convention nor the transitional provisions in the Withdrawal Agreement apply, jurisdiction decisions in England will revert to the common law rules. In essence, jurisdiction under the common law turns upon serving the claim form on the defendant either because the defendant is in the jurisdiction or because the courts have given permission for service to be effected out of the jurisdiction.

Enforcement of Judgments

Unless the transitional provisions in the Withdrawal Agreement apply (i.e. proceedings were commenced prior to the IP Completion Day), it will no longer be possible to enforce English judgments in Member States

¹² [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22007A1221\(03\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22007A1221(03)&from=EN)

¹³ <https://www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007>

¹⁴ <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1318&disp=resdn>

¹⁵ *Commerzbank AG v Pauline Shipping and Liquimar Tankers Management Inc*, 3 February 2017; and *Etihad Airways v Flöther* [2019] EWHC 3107 (Comm). Also see SH article: <https://www.shlegal.com/news/commercial-court-considers-the-scope-and-effect-of-an-asymmetric-jurisdiction-clause>

under EU rules (Brussels Recast Art 39). The 2005 Convention provides an enforcement mechanism but only of judgments given pursuant to exclusive jurisdiction agreements that fall within its scope. It may be possible to enforce an English judgment in the EU under local (national) enforcement rules, and use may even be made of old (pre-EU) reciprocal enforcement treaties between the UK and certain EU Member States¹⁶. Advice should be sought from local counsel.

International arbitration will be largely unaffected by Brexit, since arbitration agreements and awards are supported by the New York Convention 1958, which the UK participates in independently of the EU.

On a practical level:

- Under the transitional provisions in the Withdrawal Agreement, the EU's Service Regulation and Evidence Regulation will apply where the relevant document for service or request for taking of evidence was received prior to the IP Completion Day. Thereafter, in the absence of a future deal, these regulations will not apply to the UK. Roughly equivalent Hague Conventions may be used instead, but they are not so advantageous and you should check that the relevant countries are covered by them.
- As the Brussels Recast will no longer apply, parties are likely to have to obtain the permission of the court to 'serve out' more frequently than they do now.
- Because of the permission issue, it may be best to serve proceedings out of the jurisdiction before rather than after the IP Completion Day if possible.

What are the key issues arising from any changes or uncertainty, and what basic things should be done to address them?

Given future uncertainty, if it is possible to commence proceedings or enforce judgments prior to IP Completion Day, this may be advantageous.

The problem of jurisdiction agreements falling outside the temporal scope of the 2005 Convention may be addressed by agreements being re-executed once the UK is subject to the 2005 Convention in its capacity as an independent contracting state. However, this may not be a practical option in many cases.

How is the market dealing with these issues?

Some parties are choosing arbitration over litigation, and where English courts are chosen, either bolstering that choice with a 'Brexit clause'¹⁷ (which may or may not be effective) or turning it into a different type of clause.

Consideration may also be given to the most appropriate form of jurisdiction clause. For example, an exclusive instead of asymmetric clause may be chosen because it may be more likely to be supported by the 2005 Convention (depending on subject matter and date - see above). On the other hand, a non-exclusive jurisdiction clause might be chosen because it allows a dispute to be tried in an EU Member State, if appropriate, to make enforcement of the resulting judgment easier across the EU.

ISDA has published new French law and Irish law ISDA Master Agreements and related collateral documentation. These templates envisage submission to the jurisdiction of either the French or Irish courts. Clearly, there is some concern within the market in relation to the impact of Brexit and the ease with which disputes relating to intra-EU contracts can be heard and ultimately enforced. However, where contracts are with parties outside the EU (or within the jurisdiction), there appears to have been little change.

¹⁶ The White Book Commentary on Part 74 and the Foreign Judgments (Reciprocal Enforcement) Act 1933

¹⁷ A 'Brexit clause' is a contract clause triggering a change in parties' rights and obligations as a result of a defined event (related to Brexit) occurring. It attempts to govern what will happen should the legal and business environment change in the future.

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