

Current legislative position

The Brexit transition period ended on 31 December 2020. The UK-EU Trade and Cooperation Agreement¹ (currently applying on a provisional basis until ratification by the European Parliament) addresses many aspects of the future UK-EU relationship (including judicial cooperation in relation to criminal matters) but does not cover civil dispute resolution issues.

The key piece of legislation remains the EU Withdrawal Act 2018, as amended by the European Union (Withdrawal Agreement) Act 2020, (the "Act"). The Act repealed the European Communities Act 1972 (the "ECA") on Exit Day (31 January 2020) and gave effect to the Withdrawal Agreement between the EU27 and the UK dated 29 January 2020 (the "Withdrawal Agreement"). The Act also brought the bulk of the statutory instruments drafted in relation to Brexit into force on 31 December 2020 ("IP Completion Date").

This note addresses the current position, the transitional arrangements provided for in the Withdrawal Agreement, and the key issues to be aware of in the new dispute resolution landscape.

Choice of law

Parties' choice of governing law will be essentially unaffected by Brexit. On the UK side, the relevant EU Regulations (Rome I² and Rome II³) have been copied into UK law with minor modifications⁴. On the EU side, the Regulations are based on a principle of 'universal application'⁵ 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 English⁶ courts, however, will be affected. The key legislation ("Brussels Recast"⁷) only supports jurisdiction agreements in favour of courts of an EU Member State. It has now been repealed and will not be copied back into UK law.⁸ The Lugano Convention (operating between the EU, Norway, Iceland and Switzerland)⁹ has also been repealed. Though the position has not been the subject of a decision by the CJEU, some English case law¹⁰ suggested that an agreement for the jurisdiction of the court of a non-member state might not be given effect where jurisdiction existed under the Regulation, in particular where the defendant was domiciled in a member state (Art 4 of the Brussels Recast). 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 <https://www.gov.uk/government/publications/agreements-reached-between-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-european-union>

² EC Regulation 593/2008 on the law applicable to contractual obligations

³ EC Regulation 864/2007 on the law applicable to non-contractual obligations

⁴ [The Law Applicable to Contractual and Non-Contractual Obligations \(Amendment etc\) \(EU Exit\) Regulations 2019, SI 2019/834](#) which came into force on IP Completion Day.

⁵ Article 2 of Rome I and Article 3 of Rome II

⁶ "England" and "English" are used interchangeably with "UK" in this note.

⁷ Brussels Regulation Recast EC 1215/2012

⁸ 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 seized of proceedings prior to IP Completion Day.

⁹ [The Civil Jurisdiction and Judgments \(Amendment\) \(EU Exit\) Regulations 2019 SI 2019/479 \(as amended by the Civil, Criminal and Family Justice \(Amendment\) \(EU Exit\) Regulations 2020, SI 2020/1493, reg 5 and the Private International Law \(Implementation of Agreements\) Act 2020, Sch 5, Part 1, para 5\)](#) (the "**Jurisdiction SI**") which came force on IP Completion Day repealed the entire Brussels Regime, including the Brussels Recast and the Lugano Convention.

¹⁰ *Gulf International Bank BSC v Aldwood* [2019] EWHC 1666 – but see *JSC Commercial Bank Privatbank v Kolomoisky and Bogolyubov* [2019] EWCA Civ 1708 where the court (although not directly considering the question – and although the case related to the Lugano Convention) potentially may have come to a different conclusion.

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 accession to the [Hague Convention on Choice of Court Agreements 2005](#) ("the 2005 Convention") and any future possible participation in the [Lugano Convention 2007](#).¹²

The Lugano Convention

The UK has applied to join the Lugano Convention 2007 as an independent contracting state and this has been supported by Switzerland, Norway and Iceland. However, for the UK to accede, it will require the unanimous consent of 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 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 came 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 the legislation¹⁵ bringing its independent accession into force provides that it will continue to apply to the UK without interruption since that date. There is a risk, however, that EU courts (and ultimately the CJEU) 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 Convention¹⁶. 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 report relating to the 2005 Convention suggest it does not and a recent obiter comment in a decision of the Court of Appeal lends support to this view¹⁷. Until the matter is decided in a case under the 2005 Convention, however, the position remains uncertain.

Issues to be aware of post 1 January 2021

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 under the "gateways" contained in CPR 6.36.

Enforcement of judgments

Unless the transitional provisions in the Withdrawal Agreement apply (i.e. proceedings were commenced prior to 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 [Private International Law \(Implementation of Agreements\) Act 2020, Sch 5, Part 2, para 7](#)

¹⁶ https://ec.europa.eu/info/sites/info/files/file_import/civil_justice_en_0.pdf

¹⁷ [Etihad Airways PJSC v Lucas Flover \[2020\] EWCA Civ 1707](#)

under EU rules (Brussels Recast Art 39)¹⁸. 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 States¹⁹. Advice should be sought from local counsel.

The enforcement of EU judgments in England and Wales (where the 2005 Convention does not apply) may be possible either at common law or pursuant to the registration processes set out in the Foreign Judgments (Reciprocal Enforcement) Act 1933 where a pre-existing reciprocal enforcement treaty exists (currently Austria, Belgium, France, Germany, Italy, The Netherlands and Norway).²⁰

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. Where that transitional provision does not apply, these regulations no longer apply to the UK²¹. Roughly equivalent Hague Conventions²² may be used instead but they are not so advantageous and you should check that the relevant countries are covered by them.
- The Civil Procedure Rules Committee has agreed an amendment to allow service out without the court's permission where a contract contains a jurisdiction clause in favour of the English courts. As at the date of writing, this amendment is not yet in force.

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

The problem of jurisdiction agreements falling outside the temporal scope of the 2005 Convention may be addressed by agreements being re-executed now that 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.

The problem of effecting service out of the jurisdiction may be addressed by ensuring that agents for service of process are appointed in agreements.

How to deal with these issues?

Some parties are choosing arbitration over litigation. 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. It also remains to be seen whether the EU will ultimately agree to the UK re-joining Lugano.

¹⁸ In addition to the repeal under the Jurisdiction SI, the [\(EU Exit\) regulation: the European Enforcement Order, European Order for Payment and European Small Claims Procedure \(Amendment etc\) \(EU Exit\) Regulations 2018, SI 2018/1311](#) (as amended) revoke the respective named instruments, subject to various transitional provisions.

¹⁹ The Foreign Judgments (Reciprocal Enforcement) Act 1933. Note also, in November 2020, the UK and Norway entered into the "2020 Amendment Agreement" which updates the UK-Norway Convention on the Reciprocal Recognition and Enforcement Judgments 1961: [UK Norway Agreement Enforcement Judgement Civil Matters.pdf](#). This has been implemented via [Order in Council under the 1933 by the Reciprocal Enforcement of Foreign Judgments \(Norway\) \(Amendment\) \(England and Wales and Northern Ireland\) Order 2020, SI 2020/1338](#), in force since 11pm 31 December 2020.

²⁰ For more information on the enforcement of EU judgments in England, see: [Enforcement of EU judgments post brexit: an exclusivity conundrum](#)

²¹ [\(EU Exit\) regulation: The Service of Documents and Taking of Evidence in Civil Commercial Matters \(Revocation and Saving Provisions\) \(EU Exit\) Regulations 2018, SI 2018/1257](#)

²² The Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Service Convention); and/or The Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention).

Clearly, the arrangements post-Brexit affect 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.

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