

Brexit: Dispute Resolution

The UK left the EU on 31 January 2020. The Withdrawal Agreement provided that EU law would continue to apply to the end of the transitional period which was 31 December 2020 (“the exit date”). Therefore, EU law would continue to apply to disputes with an EU element, governing (in particular) jurisdiction, applicable law and the enforcement of judgments up to exit day.

From 1 January 2021, the position becomes more complicated. Outlined below are details of how cross border disputes between parties in the EU and the UK will be dealt with after the exit date.

For claims instituted before the exit date

- Article 67 of the Withdrawal Agreement provides that EU rules on jurisdiction, recognition and enforcement of judgments will continue to apply to UK–EU disputes where civil and commercial proceedings have been instituted before the exit date. This will mean that for proceedings issued before that date, enforcement will continue to be relatively straightforward.
- In relation to applicable law, Article 66 of the Withdrawal Agreement provides that rules for contractual and non-contractual matters under Rome I and Rome II will apply to contracts concluded or events giving rise to damages during the transitional period until the exit date. This means that an express choice of law clause will continue to be upheld by the UK and EU courts.

For claims instituted after the exit date

Applicable law

- After exit day both Rome I and Rome II become retained EU law under the Withdrawal Act 2020 and have been enacted into UK law so express choice of law clauses will continue to be upheld.

Jurisdiction

- If proceedings have not been issued by the exit date, what rules will apply in relation to jurisdiction and enforcement?

The Lugano Convention 2007

- The UK government has always indicated its desire to enter into a new arrangement with the EU to replace the Recast Brussels Regulation. The Lugano Convention 2007 is the UK’s preferred option in terms of providing cross-border cooperation for civil and commercial matters in dealing with jurisdiction and the enforcement of judgments. The Lugano Convention is in substantially the same terms as the old 2001 Brussels Regulation which set out the system of allocation of jurisdiction and the reciprocal enforcement of judgments between the EU and the UK, and its application is fairly broad.

- The UK’s membership of the Lugano Convention is based on being a member of the EU. The UK’s membership will therefore end on the exit date. The UK has applied to accede to the Lugano Convention in April 2020. Consent of all existing members is required for any new member to be admitted to the Lugano Convention. Iceland, Norway and Switzerland (the “EFTA countries”) have indicated their consent. The EU is yet to give consent. Even if all members consent the usual practice is that there is a three-month hiatus for objections before a member is permitted to join. Therefore, the Lugano Convention will cease to apply unless and until the UK has acceded to the Lugano Convention in its own right.
- If there is a deal between the UK and the EU, the general view is that the EU is likely to give consent to the UK becoming a member of the Lugano Convention as part of a deal, but this is far from certain. If there is no deal, it is likely that negotiations will commence at some point in the future for some sort of agreement dealing with cross-border cooperation for civil and commercial matters when dealing with jurisdiction and the enforcement of judgments.
- Even if the EU consent, unless the time period is abridged (i.e. there is no three-month delay to allow for objections), it is unlikely that the UK will become a party to the Lugano Convention before Spring 2021.

The Hague Convention 2005

- As an alternative, the Hague Convention on Choice of Court Agreements 2005 (“the Hague Convention 2005”) may apply. The Hague Convention 2005 is seen as a fallback position if the UK fails to join the Lugano Convention. However, its application is narrower than the Lugano Convention e.g. it does not apply to insolvency, consumer or employment disputes. The EU became a member to the Hague Convention 2005 in 2015. Therefore, the UK’s membership from 1 October 2015 until 31 December 2020 is based on its membership of the EU. The Hague Convention 2005 applies to contracts containing exclusive jurisdiction clauses and does not apply to non-exclusive clauses. A jurisdiction clause will be deemed exclusive unless the parties agree otherwise.
- For the Hague Convention 2005 to apply, the jurisdiction agreement containing the choice of court must have been concluded after it came into force in the state of the chosen jurisdiction. The UK contends that the Hague Convention 2005 came into force in the UK on 1 October 2015. However, the EU’s interpretation is at odds with that of the UK; it considers the UK will not become a member in their own right until 1 January 2021. If that is correct, the Hague Convention 2005 will only apply to jurisdiction clauses that were entered into after that date. This disagreement will be decided by the relevant country’s domestic law, the country being the one named in the jurisdiction clause. In the EU it may end up being determined by the European Court of Justice which, subject to an appropriate case being referred, may take a number of years.

If no convention applies

- If no convention applies, a potential claimant will have to consider the relevant domestic laws of both the UK and the EU country taking into account a number of factors including the location of potential defendant(s), any agreed jurisdiction clause and where any cause of action arose. It should be noted that the Recast Brussels Regulation will continue to apply as between EU countries and therefore the UK will be treated as a non-EU country (a third country) and certain aspects of the Recast Brussels Regulation may have an effect on the ability to enforce certain jurisdiction clauses.
- If the UK does not become a member of the Lugano Convention, it may be possible over time for bi-lateral agreements to be entered into between the UK and individual EU countries.
- The position where there is no convention in place between the UK and the EU will be unsatisfactory and there is no doubt claims between parties in the UK and the EU will become more complex and costly.

Jurisdictional clauses and service

- Where a jurisdiction clause in an agreement provides for the courts of England and Wales to have jurisdiction in relation to a dispute between the parties, proceedings commenced by a claimant in the UK after the exit date will require the claimant to seek the court's permission to serve out of the jurisdiction on an entity based in the EU in accordance with the Civil Procedure Rules. Again, this will add to the cost and time of bringing such a claim.
- Permission is not required if proceedings fall within the Hague Convention 2005. However, for proceedings where permission will be required after the exit date, concerns have been raised with the Civil Procedure Rules Committee. They have agreed in principle to change the rules so that where an agreement contains an English jurisdiction clause the rules will not require an application to seek permission to serve those proceedings. The wording is being finalised and it is hoped this rule change will come into force as near as possible to 1 January 2021.
- The Service Regulation which determined the mechanics of service of English proceedings in the EU will no longer be applicable as between the UK and EU after the exit date. Instead the Hague Convention of 15 November 1965 will become applicable as between the EU and the UK plus the EFTA countries and other states making a total of 78 contracting parties. It regulates numerous aspects of the service process which includes methods permitted as well as other methods of service as long as they are sanctioned by the receiving state's internal law. This convention is seen as more complex and may also add to the costs of service.
- To avoid potential applications for permission to serve proceedings outside the UK and the difficulties which may arise in effecting service, it may be possible when drafting jurisdiction clauses to include a clause allowing for service to be effected in England and Wales. This could be achieved by requiring a party based in the EU to nominate an agent in the UK to accept service on its behalf. It would be advisable for the clause in the agreement to require that such an appointment be made on an irrevocable basis.

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Recognition and enforcement of judgments

- The Recast Brussels Regulation will no longer apply where proceedings were not instituted before the exit date. Initially, for the reasons given above, it is also unlikely that the Lugano Convention will apply. Therefore, unless a party can rely on the Hague Convention 2005 to enforce the judgment, enforcement will be a more complicated and expensive process.
- Local law advice should be sought from the relevant EU country. It is advisable to obtain the information as early as possible in any dispute so as to avoid wasting costs of commencing proceedings in the UK if enforcement in the defendant's own country is going to prove difficult.
- On receiving a request to recognise and enforce an EU judgment the English courts will apply common law principles, such as whether the proceedings were properly served and was the party afforded an opportunity to participate in the proceedings.
- There is a new Hague Convention on the Recognition and Enforcement of Foreign Judgments 2019. Its aim is to facilitate cross-border recognition and enforcement of judgments from the courts of the contracting states. It is not yet in force (ratification could take some time) but it is intended to apply to a broad range of claims including employment and consumer contracts and might therefore be a helpful solution. The EU have indicated they may ratify this convention in 2021 or 2022 but the UK has yet to state its position in terms of timings of any ratification.

For more information



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