

Brexit: Dispute Resolution

In line with the revised Withdrawal Agreement negotiated in October 2019 which received royal assent on 23 January 2020, the UK left the EU on 31 January 2020. The European Union (Withdrawal Agreement) Act 2020 will implement the Withdrawal Bill into UK law. The Withdrawal Agreement provides that EU law will continue to apply during the implementation period (sometimes called the transitional period) until 31 December 2020 ("the exit date") subject to a possible extension. Therefore, EU law will continue to apply to disputes with an EU element, governing, in particular, jurisdiction, applicable law and the enforcement of judgments until the exit date.

During the implementation period the UK will attempt to negotiate a further deal in order to settle rules on (but not limited to) applicable law, jurisdiction and enforcement of judgments between the UK and the remaining members of the EU (the "EU27").

If at the end of the implementation period there is no deal, quite what will replace the existing framework is unclear. Certainly disputes with an EU element are likely to be more time consuming and uncertain.

What happens if a deal is reached?

The implementation period has been running since the end of the Article 50 negotiations (30 March 2019) and is scheduled to last until 31 December 2020, unless extended. This period may be extended by up to 1 to 2 years by agreement before 1 July 2020. However, this seems unlikely based on the position taken by the Conservative Government. During the implementation period the Withdrawal Agreement will preserve the status quo in relation to applicable law, jurisdiction and enforcement of judgments. Various directives in relation to service and taking of evidence will also remain in place. The UK will also be treated as a member of the EU for purposes of other international conventions such as the Lugano Convention 2007 which applies to European Free Trade Association ("EFTA") countries (Iceland, Norway and Switzerland).

During the implementation period the UK Government will negotiate with the EU to provide a cross-border civil judicial cooperation framework. In its August 2017 paper "Providing a cross-border civil judicial co-operation framework" the UK Government indicated that it would enter into a new agreement with the EU, similar to the current agreement under the Recast Brussels Regulation. It also proposed to join the Lugano Convention. The Lugano

Convention is in substantially the same terms as the old Brussels Regulation. However, all the proposals contained in the paper are subject to negotiation and, again, no final agreement has yet been reached. The Withdrawal Agreement contains various transitional provisions governing, in particular, applicable law, jurisdiction and the enforcement of judgments which will mean current rules will continue to have effect after the exit date if certain conditions are satisfied.

What are the key changes and what actions can you take if no further deal is reached by the exit date?

Where the transitional provisions do not apply after the exit date disputes containing an EU element are likely to be more uncertain.

Applicable law

- As there is no reciprocity required between the UK Government and the EU, both Rome I and Rome II will continue to apply. This means that, subject to certain exceptions relating to the application of mandatory rules, an express choice of law clause will continue to be upheld by UK and EU courts.

Jurisdiction

- Many of the rules between the EU and UK rely on reciprocity and will be repealed (e.g. Recast Brussels Regulation). However, the Withdrawal Agreement provides that these rules will continue to apply to proceedings that have been commenced prior to the exit date. This will generally be the case in both directions as between the UK and the EU27 countries.
- Where the transitional provisions do not apply parties may be able to rely on the Hague Convention on Choice of Court Agreements 2005 (the Hague Convention) when dealing with exclusive jurisdiction clauses. The UK is currently a member of the Hague Convention based on its membership of the EU. The UK Government has stated that it is its intention to re-join the Hague Convention in its own right following the implementation period so therefore this is likely to be on 1 January 2021. The Hague Convention does not apply to non-exclusive or asymmetric jurisdiction clauses and neither does it deal with employment, consumer and insurance matters. There are also concerns over the status of the UK's membership so its effect is uncertain for jurisdiction clauses entered into before the exit date. Assuming the UK re-joins the Hague Convention, exclusive jurisdiction clauses entered into after the exit date in favour of the UK or an EU27 country should be straightforward.
- Unless the UK reaches a new agreement with the EU, where the transitional provisions and the Hague Convention are not

applicable after the exit date, courts in the EU27 countries will not approach matters in the same way. The UK will be treated as a “third country”. Current proceedings will continue but new proceedings will require local law advice from the particular EU27 state.

- The transitional provisions for claims commenced prior to the exit date do not apply in the same way in EFTA countries. However, it seems likely that where proceedings were commenced prior to the exit date the UK courts will apply the current rules under the Lugano Convention. It is not clear at this stage whether the EFTA countries will take the same approach.

Jurisdiction clauses and service

- Where a clause provides for the courts of England and Wales to have jurisdiction, proceedings commenced after the exit date will require the claimant to obtain permission to serve out of the jurisdiction on an EU entity. Permission may not be required if the proceedings fall within the Hague Convention. When drafting these clauses, it may be possible to avoid having to seek permission by including a clause allowing for service to be effected in England and Wales. This could be achieved by requiring the EU party to nominate an agent here to accept service on its behalf within the jurisdiction. It would be advisable to require the appointment to be made on an irrevocable basis.
- Assistance may be provided by the Hague Service Convention to which the UK and the majority of the EU27 countries are contracting parties.
- For existing jurisdiction clauses consideration may be given to whether the contract might be amended or a new supplemental agreement made.
- Consider using arbitration as an alternative dispute resolution process. Recognition of arbitral awards arises under the New York Convention and should not be affected by Brexit.

Enforcement of Judgments

- The same points made in relation to jurisdiction above will be applicable to enforcement of judgments in terms of the transitional provisions for both EU and EFTA states where the proceedings were initiated before the exit date.
- Where EU judgments are obtained in proceedings commenced after the exit date, enforcement will be subject to UK common law rules unless the judgment can be enforced under the Hague Convention or some other bilateral arrangement.
- A UK judgment obtained where proceedings were initiated after the exit date will require local advice from the relevant

EU27 state. The Hague Convention may apply but the same warning as to its status is made.

- There is a new Hague Convention on the Recognition and Enforcement of Foreign Judgments which follows a similar framework to the New York Convention. It is not yet in force (ratification could take some time) but it is intended to apply to employment and consumer contracts and might therefore be a helpful solution.

For more information



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