

Brexit

Civil justice co-operation: what happens from 1 January 2021

9 October 2020

Background

The UK left the EU on 31 January 2020 (**exit day**). However, this profound change has so far had limited impact on UK law and regulation. Under the agreement on the UK's withdrawal from the EU (the **Withdrawal Agreement**), the UK continues in most respects to be treated as if it were still part of the EU from exit day until 31 December 2020. The Withdrawal Agreement provided a mechanism to extend this period but it has not been used. It therefore appears that the full legal consequences of Brexit will begin to be felt from 1 January 2021.

The Withdrawal Agreement does not regulate future trade between the UK and EU, or any other area of potential future EU-UK cooperation, except to a limited extent in relation to Northern Ireland. It remains unclear if a deal on future UK-EU relations will be agreed by 31 December 2020. In some areas there is an obvious legal fall-back framework in the absence of a deal (for example, if agreement is not reached on tariff-free trade, "WTO rules" will apply); in other areas there is not. Whatever happens, those trading between the UK and EU will face significant regulatory changes (for example, in relation to customs). It also seems likely that, if the UK and EU reach a deal in the coming weeks, it may be a fairly "thin" agreement, meaning that negotiations on some aspects of the UK-EU post-Brexit relations may continue well beyond 2020.

For more detailed background, click [here](#).

Below is a timely reminder of the likely no-deal position on civil justice co-operation after the end of the transition period.

1. Choice of law

The Rome I and Rome II Regulations deal with the law applicable to contractual and non-contractual obligations. The Withdrawal Agreement provides that the Rome I and Rome II Regulations will continue to apply in respect of contracts concluded before the end of the transition period and, in respect of events giving rise to damage, where such events occurred before the end of the transition period (Article 66).

The end of the transition period will have little practical impact because the provisions of Rome I and Rome II do not depend on mutual reciprocity. The courts of EU member states (other than Denmark) will continue to apply the provisions of Rome I and Rome II, subject to some specific exclusions, regardless of whether the stipulated governing law is that of an EU member state or not. The UK government intends to retain the provisions of Rome I and Rome II in domestic legislation and has prepared an SI for the purpose (The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) (Regulations) 2019).

2. Jurisdiction and Enforcement

The position is much trickier when it comes to jurisdiction and enforcement of judgments. The Recast Brussels Regulation governs which EU member state courts have jurisdiction to deal with disputes in civil and commercial matters and provides a system of reciprocal recognition and enforcement of judgments within the EU.

Little has changed so far. Article 67 of the Withdrawal Agreement provided for the Recast Brussels Regulation to stay in force during the transition period. English judgments resulting from proceedings commenced on or before 31 December 2020 will be enforceable in the EU under the current rules.

On 1 January 2021, the Recast Brussels Regulation will cease to apply in the UK. The hope is that the UK and EU will negotiate a future agreement regarding jurisdiction and enforcement that will replace the Recast Brussels Regulation. However, there is an increasing possibility that no such agreement will be in place by the end of the transition period as we move closer to the end of the year. The "fall-back" options for proceedings commenced on or after 1 January 2021 are the Hague Convention, the Lugano Convention if the UK accedes, and then domestic rules.

The Hague Convention

The 2005 Hague Convention on Choice of Court Agreements is an international framework of rules on jurisdiction and recognition and enforcement of judgments. Much like the intra-EU Recast Brussels Regulation, it is designed to provide greater certainty for contracting parties that their agreements on choice of jurisdiction will be respected, and that resulting judgments will be enforceable. An important limitation of the Hague Convention is that it only applies to contracts with exclusive jurisdiction provisions entered into after the Convention came into force for the state concerned. The EU acceded on behalf of its member states on 1 October 2015 and Singapore, Mexico and Montenegro are also members. The US and China have expressed an intention to accede.

The UK will accede to the Hague Convention in its own right, and use it as a straightforward route to enforcing judgments given pursuant to English exclusive choice of court agreements in the EU and in other Hague Convention countries. The UK deposited a new Instrument of Accession to the Hague Convention on 28 September 2020 and the instrument will take effect when the Brexit transition period comes to an end on 31 December 2020.

Unfortunately, the European Commission has expressed a view in its 27 August 2020 "Notice to Stakeholders" that the Hague Convention will only apply to exclusive English choice of court agreements concluded after the UK accedes to the Hague Convention in its own right, i.e. from 1 January 2021. If correct, the UK would not be able to rely on the Hague Convention for clauses in agreements made before that date. However, the EU Commission's approach is not determinative and there are arguments in favour of continuity of membership: the EU acceded to the Hague Convention on behalf of the UK on 1 October 2015, the UK has been treated as an EU member state for the purposes of the Hague Convention during the transition period, and the Hague Convention will apply in the UK from the end of the transition period.

The UK has not responded directly, but its position in the Private International Law (Implementation of Agreements) Bill is that the Convention has been in force without interruption from 2015. This reads:

".....the date on which the 2005 Hague Convention entered into force for the United Kingdom is 1 October 2015, and accordingly references in the Convention to a Contracting State are to be read as including, without interruption from that date, the United Kingdom."

In any case, exclusive jurisdiction clauses agreed on or after 1 January 2021 will be generally respected and judgments enforced in the EU under the Hague Convention. For proceedings brought pursuant to English exclusive jurisdiction clauses agreed between 1 October 2015 and 31 December 2020, it will be arguable that the Hague Convention should apply. Otherwise, for example, for proceedings pursuant to an exclusive jurisdiction clause agreed before October 2015 or where there is no exclusive jurisdiction clause, UK and EU courts will apply their own domestic rules, or they may be able to rely on the Lugano Convention.

The Lugano Convention

The Lugano Convention is also an international framework for jurisdiction and enforcement. It operates between the EU and Iceland, Norway and Switzerland. It also provides a streamlined process, but without the full benefits of the Recast Brussels Regulation (the main issue being that it does not prevent so-called "Italian torpedo" proceedings – the tactical commencement of proceedings in one member state, usually a state whose courts are slower to progress proceedings, in breach of an exclusive jurisdiction clause).

The Lugano Convention's ratification process requires the UK to gain the approval of all of its members, who have up to a year to respond. The UK received statements from Norway, Iceland and Switzerland in support of its intention to

accede to the Lugano Convention, and formally applied to accede on 8 April 2020. Press reports indicate that the EU Commission's officials have advised that they do not regard the UK's membership of Lugano as a given, and that member states should not seek to respond to the UK's request too soon. The desire seems to be to keep Lugano membership on the table as a bargaining chip in future negotiations. As member states have a year to respond to the UK's membership request, there is no obligation to respond before the end of the transition period.

Summary for proceedings commenced after 1 January 2021

The Recast Brussels Regulation will no longer apply. While the hope is that a replacement regime will be agreed as part of a UK-EU deal on future relations, it may be necessary to revert to other international and domestic rules.

The Hague Convention will apply where relying on exclusive English choice of court agreements made on or after 1 January 2021. There is uncertainty as to whether it will apply to such agreements entered into prior to 1 January 2021.

The Lugano Convention may apply if the member states agree to UK accession prior to the end of the transition period.

If the Hague and Lugano Conventions do not apply, jurisdiction and enforcement issues between the UK and EU countries will depend on each country's domestic rules on enforcement. EU member states would enforce most foreign judgments under their domestic rules, but the processes have varying degrees of complexity and will usually take significantly longer than is currently the case.

Parties concerned about potential disputes could also restate the jurisdiction clause in any relevant contract, with the agreement of the other contracting party, on or after 1 January 2021 to ensure that the Hague Convention will apply.

Contacts

Fiona Caldwell

Managing Practice Development Lawyer

D +44 141 271 5484

M +44 7741 252998

fiona.caldow@dentons.com



Jamie O'Connell

Associate

D +44 20 7002 8521

M +44 7741 322973

jaime.o'connell@dentons.com



With thanks to Elizabeth Duncan for her help in writing this article.

Law stated as at 9 October 2020