The Law Society

No-deal Brexit: civil and commercial cooperation

October 2018

Introduction

This paper forms part of a series published by the Law Society. The aim of this paper is to highlight the changes that will occur should the UK leave the EU on 29 March 2019 without having concluded an agreement with the EU beforehand.

In such a scenario, the EU and UK will have failed to sign both a Withdrawal Agreement (governing the terms of the UK's departure from the EU) and an agreement governing the future relationship between the two parties.

This paper underlines the steps solicitors should consider taking to prepare their practice for such an eventuality.

This note does not replace legal advice or a consultation on an individual basis with the relevant regulators and/or experts. We cannot accept any liability resulting from any action taken (or lack thereof) on the basis of the information contained in this note.

Points for solicitors to consider under a no-deal Brexit

In the event of a no-deal Brexit, solicitors should consider the following points:

- National law rules will apply to this area of the law in the UK and in EU/EEA member states (unless otherwise stated below), as all reciprocal elements of EU law will cease to have effect. In the UK, they will be repealed by the UK Government.

- In some cases, bilateral treaties and conventions pre-dating EU member state may exist between the UK and EU member states. To ascertain whether this is the case, you may need to consult the national law of the state concerned and contact a local lawyer in that country.

- Where the parties have an exclusive choice of court agreement, the UK will accede to the 2005 Hague Convention. This will be applied between the UK and EU/EEA states, and other states party to that Convention.[1]

[1] See the Hague Convention website https://www.hcch.net/en/home for further information.

- In addition, in relation to Service of Documents and Taking of Evidence, the Hague Conventions will continue to apply.

- In the event of a no deal Brexit, EU rules governing the enforceability of UK judgments in EU will cease to have effect after the withdrawal date. This will apply to all UK judgments that have not been enforced before that date. However, the UK has indicated that it will continue to enforce judgments given in other EU/EEA states where the proceedings were initiated before that date.

Solicitors should also be aware of the following points:

- The Brussels I Regulation will no longer apply between the UK and EU27. It is likely that England and Wales will fall back on pre-existing common law rules for the recognition and enforcement of foreign judgments. Judgments from EU member states will be treated in the same way as those coming from third countries where there is no agreement in place between the UK and the country in question on the recognition and enforcement of judgments.

- The Government has signalled its intention to adopt the 2005 Hague Convention on choice-of-court agreements in the event of a no-deal Brexit. This is applied in all EU countries except Denmark, and some non-EU states (e.g. Singapore and Mexico). This Convention, unlike the Brussels regime, provides only for the recognition and enforcement of judgments where the parties have concluded an exclusive choice-of-court agreement. As an example, many banking contracts contain asymmetric clauses and as such are not covered under the 2005 Convention.

- Similarly, the national law of each EU/EEA state will determine whether a foreign UK judgment can be recognised and enforced in that jurisdiction. Some EU member states do not have rules allowing for the recognition of judgments from non-EU/EEA states. The Law Society will publish further information on the national laws of different EU/EEA states in due course.

- The Insolvency Regulation will no longer be applicable between the UK and EU27 member states. An insolvency officeholder appointed in the UK will have difficulty obtaining recognition in the EU. The only member states that have implemented the

UNCITRAL Model Law on Insolvency (other than the UK itself) are Greece, Poland, Romania and Slovenia. Except in those countries, the UK officeholder would have to seek recognition under local law on a case-by-case basis.

- Other EU regulations concerning the creation of special instruments in specific fields (e.g. the Motor Insurance Directive) will no longer apply. EU rules protecting the weaker party, for example victims of motor accidents, will no longer apply in the UK.

- The Service Regulation[2] and the Evidence Regulation[3] will no longer apply. However, in most cases it will be possible to rely on the Hague Service Convention[4] and the Hague Evidence Convention.[5]

Current system

1. Brussels I Regulation

As a member state of the EU, the UK currently applies the Brussels I Regulation to legal disputes of a civil or commercial nature. The Brussels regime sets out the rules regulating which courts have jurisdiction in such disputes between individuals and businesses resident in different EU member states. In disputes between parties who are domiciled in a member state, jurisdiction is assigned to the courts of the state in which the defendant is domiciled (except in cases where the regulation imposes mandatory jurisdiction on a certain court). It also includes weaker party protection for consumers, employees and insured parties whereby they can sue and be sued in their domicile. In other cases, the Regulation also allows the parties in a dispute to choose a forum.

The system currently in place allows for an affordable and effective process for the recognition and enforcement of intra-EU judgments. For example, small traders or consumers can easily take cases in their home court, using a local lawyer. The judgment is

[2] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000.
[3] Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.
[4] Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.
[5] Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

then recognised and enforced in another EU state court almost as easily as if it were a domestic judgment (i.e. a judgment from the same jurisdiction). The Brussels I Regulation enforcement process only allows challenges to enforcement on appeal.

2. Wider EU directives

In addition to the Brussels I Regulation, the EU has adopted regulations on the service of documents and the taking of evidence, as well as special instruments in specific fields. One example of the latter is the Motor Insurance Directive. This directive, in combination with the Brussels I Regulation, gives the advantage to victims of motor accidents in claims against insurers where the accident has taken place in another EU country. Under the Directive, claimants can sue insurers in their home courts if the claim is disputed.

Another example is the EU Regulation on Insolvency Proceedings, which at present allows UK insolvency proceedings to benefit from recognition in other EU states. The Regulation also contains ‘safe harbour’ provisions that apply the parties’ choice of governing law in priority to any rules of local insolvency law (e.g. in relation to employment contracts under Article 10 or detrimental acts under Article 13). Other similar instruments relate to disputes in financial services and specific expedited processes for small claims.

The role of Regulation 606/2013 on the mutual recognition of protection orders, which aims to help to enforce orders made to protect victims of domestic violence or harassment across borders, is also worth noting. The Regulation sets up a mechanism allowing for the direct recognition of protection orders issued as a civil law measure between EU member states. This means that, at present, if you benefit from a civil law protection order issued in your state of residence you can invoke it directly in other EU states by presenting a certificate to competent authorities certifying your rights.

a. Lugano Convention

The Lugano Convention operates in tandem with the Brussels I Regulation and was adopted in 1988 by the EU and EFTA States. This Convention provides a framework for the recognition and enforcement of judgments to be applied between the EU and EFTA states (and Switzerland). It does not give access to the EU instruments and is instead a stand-alone agreement. The Lugano Convention, like Brussels I, provides for the recognition and enforcement of a wide range of judgments.

The UK, as one of 28 EU member states, currently applies all abovementioned EU instruments in civil and commercial law and is a member of the Lugano Convention. However, once the UK leaves the EU, none will apply.

Some commentators have suggested that the UK should join the Lugano Convention post-Brexit in order to ensure the continued cross-border recognition and enforcement of UK judgments. In its White Paper on the future UK-EU relationship[6], the UK Government stated that it would aim to re-join the Lugano Convention post-Brexit. However, the Lugano Convention is an agreement between EFTA and EU states, and the UK cannot simply accede to Lugano unilaterally and immediately after leaving the EU. Instead, it will need to be invited by one of the participating states (EU or EFTA, Article 70 of the Lugano Convention). The EU will need to ratify the UK's accession to Lugano (it can do this as a block under qualified majority voting in the European Council, as the EU has exclusive jurisdiction in this area). Similarly, the EFTA member states will have to ratify. The Convention provides for a one-year time limit for ratification.

The Lugano Convention is not as advanced as the recently reviewed Brussels I Regulation. For example, where parties to a contract have concluded a choice-of-court agreement, under Brussels I the court chosen by the parties but second seised of the action may proceed without having to wait for the court first seised to decline jurisdiction. However, under Lugano rules that court must wait for the pronouncement of the first court before proceeding. The Lugano Convention's rules can be used by parties trying to frustrate a case by bringing cases before courts in slow-moving jurisdictions (this is commonly referred to as the 'Italian torpedo').

In addition to the above, it is worth emphasising that the UK will not automatically be part of the Lugano Convention post-Brexit should a no-deal scenario arise. Instead, the UK will need to request access to the Convention from EU and EFTA states, who are also required to ratify any changes to the Convention itself.

[6] https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union

b. Hague Convention

The 2005 Hague Choice-of-Court Agreements Convention provides for recognition and enforcement where there is an *exclusive* choice-of-court agreement between the parties. The Convention does not include any other civil or commercial cases and is therefore a far more limited regime than that set out by the Brussels I Regulation.

Furthermore, the Hague regime is time-limited, meaning that it applies only where the parties have agreed an exclusive choice-of-court agreement after the entry into force of the Convention.

As the Convention entered into force for the EU in 2016, this leaves many agreements outside the scope of the Convention. A further question is whether the UK can remain party to the Convention or whether it needs to re-join post-Brexit. In the latter case, only choice-of-court agreements concluded after the UK has joined the Convention will be covered by these rules.

No-deal scenario

Some commentators have argued that the UK will be able to fall back on the rules set out in the Brussels I Regulation's predecessor, the Brussels Convention 1968. The possibility of doing so effectively is doubtful given that this Convention is a European Convention that is applied between member states and the EU. Additionally, that Convention has not been applied by Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia or Slovenia. Therefore, a situation arising that would see the rules of the Convention applied between the UK and some member states, but not all, would almost certainly be referred to the CJEU for judicial review.

1. National law

In a no-deal scenario, it is possible that the UK will **fall back on national law rules** for the recognition and enforcement of cross-border judgments. At present, the High Court of England and Wales (Queen's Bench Division), Court of Session in Scotland and High Court of Northern Ireland are the relevant courts in which to bring an application for the recognition and enforcement of a (non-EU/EFTA) foreign judgment in each respective part of the UK.

Common law rules relating to the recognition and enforcement of judgments currently apply in England and Wales where the originating jurisdiction does not have applicable treaties in place with the UK, or in the absence of any applicable UK statute. At common law, a foreign judgment is not directly enforceable in the UK, but instead will be treated as if it creates a debt between the parties. The creditor will need to bring an action in the relevant UK jurisdiction for a simple debt. Summary judgment procedures will usually be available.

In Scotland, Schedule 8 of the 1982 Civil Jurisdiction and Judgments Act has introduced the jurisdictional rules of the Brussels Regulation into Scots law.

Any judgment obtained will be enforceable in the same manner as any other judgment of a UK court. However, courts in the UK will not grant jurisdiction in this manner where the original court lacked jurisdiction according to the relevant UK rules on the conflict of laws, where it was obtained by fraud, or where it is contrary to public policy or the requirements of natural justice to do so. The judgment must be for a definite sum, be final and must not have been issued in respect of taxes, penalties or multiple damages awards. The leading case on the enforcement of judgments at common law is *Adams v Cape Industries plc (1990) Ch 433*. The Court of Appeal recently issued further guidance on the principle of finality, saying that a foreign judgment will be considered final and binding "where it would have precluded the unsuccessful party from bringing fresh proceedings in the [foreign] jurisdiction" (*Joint Stock Company 'Aeroflot-Russian Airlines' v Berezovsky and Glushkov [2012] EWHC 317*).

It is important to note that the domestic courts do not consider reciprocity when determining the enforceability of specific judgments.

Regarding the applicability of Regulation 606/2013 on protective orders (see above), the Government has stated that all parts of the UK would unilaterally recognise incoming Civil Protection Measures (CPMs) from EU states. However, they will repeal the regulation that enables civil courts within the UK to issue CPM certificates as they would not necessarily be recognised by the EU post-Brexit. This is in keeping with the Government's overarching policy of repealing elements of EU law that depend on the principle of reciprocity. The Government has not expanded on what measures will be taken to ensure UK judgments are recognised in the EU post-Brexit. In the absence of such measures, solicitors should consult the national law of the state concerned and contact a local lawyer in the relevant jurisdiction who can advise whether such orders are enforceable.

2. Pre-Brussels Convention international treaties

Additionally, the UK also maintains a number of pre-Brussels Convention treaties with certain EU and EFTA member states, which were incorporated into English law under the Foreign Judgment Act 1933 (FJA). While it might be argued that judgments from these states should be enforceable under the FJA, this is likely to be the subject of litigation. The relevant states are France, Italy, Austria, Germany, the Netherlands, Belgium and Norway.

However, in all of these states the older conventions have been superseded by the Brussels Regulation. This means that the conventions may need to be re-introduced into member states' national law in order to have effect with regard to the UK.

Accordingly, the most likely case is that the national law of each state will determine whether these judgments can be recognised and enforced. This means that the parties will need to devote more resources to procedural issues to determine if the judgment can be recognised and enforced. Some EU countries do not recognise or enforce foreign judgments without a separate agreement. In these cases, the parties will be forced to start new proceedings in those states, which may lead to parallel cases being taken in separate jurisdictions and ultimately to conflicting judgments. The Law Society will publish further study in due course into the different national regimes that will interact with UK law in this area post-Brexit.

3. Hague Conventions

In addition, a number of Hague Conventions relevant to civil justice co-operation will apply in the UK, even in the event of a no-deal Brexit. The Hague Conference on Private International Law is an intergovernmental organisation that develops and administers international conventions, protocols and soft law in the area of private international law. The Government noted in its technical notice on a no-deal Brexit[7] that, where the UK participates in Hague Conventions through its membership of the EU (namely the 2005 Hague Convention on Choice of Court Agreements and the 2007 Hague Convention on Maintenance), in a no-deal scenario it would make the necessary arrangements to continue to participate in these international agreements in its own right. The Government anticipates that the 2005 Convention will come into operation in the UK on 1 April 2019. Solicitors

[7] https://www.gov.uk/government/publications/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexit-deal/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexit-deal

should review and assess any existing choice of court agreements made under both Brussels and the Hague Convention to ensure their validity given the change in circumstances. Solicitors should also monitor the Government's progress in implementing the 2005 and 2007 Hague Conventions as both are subject to ratification.

The Service Regulation[8] and the Evidence Regulation[9] will no longer apply if the UK leaves the EU in a no-deal scenario. These regulations set out common rules on the cross-border service of documents and the taking of evidence in multiple jurisdictions. However, in most cases it will be possible to rely on the Hague Service Convention[10] and the Hague Evidence Convention[11]. For a full list of the signatories to each convention please consult the links set out in the footnote below.

In addition, the Government has noted that all parts of the UK would retain the Rome I[12] and Rome II[13] rules on the applicable law in contractual and non-contractual matters. In general, these instruments do not rely on reciprocity to operate.

4. On-going cases

It is important to note that, under a no-deal Brexit scenario, the existing EU regimes that apply at present in the UK will cease to take effect. In such circumstances, the reciprocity on which these EU structures are based will no longer apply to the UK, and the UK will leave the jurisdiction of the CJEU. In the absence of a governing and applicable international convention governing the area of law concerned, the rules set out in the national law of each state will apply. These can vary from jurisdiction to jurisdiction. The Law Society, together with the other UK Law Societies and Bars, is currently carrying out research on the applicable civil justice rules in each member state. These rules will apply to UK judgments adopted post-Brexit. The outcome of this research will be published before the end of 2018.

[8] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000
[9] Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.
[10] Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters
[11] Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters
[12] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008R0593
[13] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:0049:EN:PDF

The EU regime will not apply to any case taken after 29 March 2019. Similarly, the EU Commission has confirmed that the existing regime will no longer apply to UK judgments that have not been enforced in a member state by the withdrawal date[14]. In addition, this principle applies to judgments delivered in the UK before the withdrawal date and to on-going enforcement proceedings taken in a member state before that date.[15] For its part, the UK government has indicated that it will continue to enforce judgments given in other EU and EEA states where the proceedings were initiated before the withdrawal date.[16]

Bilateral agreements with EU member states

The UK will not be able to conclude separate bilateral agreements with each member state as the EU has sole competence regarding these matters. Individual member states cannot conclude agreements with third countries, a fact which is clearly set out in Opinion 1/09 on the Lugano Convention.

In its White Paper on the future UK-EU relationship[17] the UK Government signalled its intention to re-join the Lugano Convention and to negotiate a new treaty with the EU on matters relating to civil justice and co-operation in family law. The Law Society will continue to encourage the Government to pursue this aim, even in a case where a no-deal Brexit arises.

Additional resources for solicitors

UK Government – Handling civil legal cases that involve EU countries if there's no Brexit deal

European Commission – Notice to Stakeholders: Withdrawal of the UK and EU rules in the field of civil justice and private international law

European Commission – Notice to Stakeholders: Withdrawal of the UK and EU rules in the field of civil justice and private international law

[14] One exception to this approach relates to instruments requiring exequatur, for more information on this point please consult the relevant Commission notice.
[15] https://ec.europa.eu/info/sites/info/files/notice_to_stakeholders_brexit_civil_justice_rev1_final.pdf
[16] http://www.legislation.gov.uk/ukdsi/2019/9780111176726/contents
[17] https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union

EU Justice Sub-Committee - Brexit: civil justice cooperation and the CJEU inquiry
Law Society hosts seminar on post-Brexit civil justice cooperation

Hague Conference website: https://www.hcch.net/en/home