EVERSHEDS SUTHERLAND

What does Brexit mean for...
EU-wide dispute resolution?

Overview
The United Kingdom's vote to leave the European Union creates uncertainty with regard to the EU legislative framework with regard to several key areas in the management of EU-wide litigation. EU regulations such as the Recast Brussels Regulation (which covers jurisdiction, recognition and enforcement of judgments), Rome Regulations I and II (on the choice of law applicable to contractual and non-contractual obligations), and EU regulations on service and taking of evidence (together, "the European Regime") make cross border EU litigation much easier. But being derived exclusively from the UK's membership of the EU, without agreement to the contrary, they are set to be expunged from UK law when we exit the EU. With the clock already ticking, litigators are still looking for certainty in terms of whether they will be able to continue to benefit from the European Regime. In an effort to address this, the Government has set out a proposal to deal with the continued applicability of EU legislation under the Great Repeal Bill (the "Bill") in its White Paper 'Legislating for the United Kingdom's withdrawal from the European Union', which was published on 30 March 2017 (the "White Paper"). This briefing contains our updated and consolidated thinking on how Brexit might affect the recognition and enforcement of judgments; choice of law; jurisdiction clauses; and service and taking of evidence. We have separately updated our notes on **contractual termination** and **arbitration** which can be read here.

What will change?
In the short term, very little. The Government announced its plans to introduce the Bill at the beginning of October 2016 and published further information in the White Paper in March 2017. The aim of the Bill is to repeal the European Communities Act 1972 and convert EU law as it stands at the moment of exit into UK law. This means that unless and until repealed or amended by Parliament, EU generated law will continue to apply in the UK. The European Regime, the absence of which would have been a concern to litigators, will be enacted into UK law in this way. A draft Bill is expected to be made available shortly. This is welcome news to businesses with current or pending cross-border disputes as it will seek to maintain the status quo, which could help to avoid potential increases in time and costs when dealing with EU-wide disputes.

Should I be worried?
The Bill needs Parliamentary consent before it can receive Royal Assent. The Bill may face challenge from the devolved legislatures within the UK and the House of Lords. But we think that the effect of any such opposition will be limited and it is likely that it will receive Royal Assent, if necessary in some amended form. If that happens, then the European Regime will be adopted into UK law.

Once passed, it is likely the Great Repeal Act would take effect when the UK leaves the EU on or before 29 March 2019. Parliament can then review which provisions it will retain, repeal or amend. The provisions relating to jurisdiction, reciprocal recognition and enforcement of EU judgments, choice of law, service and evidence are beneficial to the UK within the context of EU dispute resolution. We think it is unlikely that Parliament will want to repeal or amend substantially those parts of the law.

The White Paper outlines a number of 'challenges' raised by the proposed Bill. There are concerns that the UK cannot simply adopt EU legislation back into UK law in its current form. For example, some EU generated law refers to EU regulatory authorities or processes, which, absent agreement to the contrary, will not be available to the UK once it leaves the EU. The Bill will also rewrite legislation that is not designed to be used or enforced by a non-EU member state. Absent an agreement with the EU, this makes it doubtful that the CJEU and the individual member states' courts will endorse full reciprocity with the UK. As a result, the White Paper notes that '*a very significant proportion of EU-derived law... contains some provisions that will not function appropriately if EU law is simply preserved.*'[1]

Some degree of amendment will be necessary in the

1 Paragraph 3.5 Legislating for the United Kingdom's withdrawal from the European Union Cm 9446 March 2017

immediate term to avoid a situation where UK enactments of the European regime are legally unworkable. The White Paper sets out details of proposed delegated powers to make minor amendments to correct the statute book to make EU legislation workable after Brexit, using secondary legislation which does not require full Parliamentary approval. The powers exclude matters of policy change and may not extend to the type of changes which might cause parties to litigation to be concerned.

Nevertheless, the Bill will deal with rewriting legislation that is not designed to be used or enforced by a non-EU member state. The UK's unilateral adoption of the European Regime will provide other EU member states with a degree of certainty as to how the English and Welsh courts will address issues such as jurisdiction or enforcement. However, the UK's unilateral agreement to enforce EU Regulations and Directives such as the Recast Brussels Regulation does not automatically confer an obligation on the remaining EU member states to reciprocate following Brexit. Many of the Regulations themselves refer only to EU member states – and the UK will no longer be one. Whilst it is possible that they would elect to reciprocate, they would not be compelled to do so.

Finally, there remains concern about regulatory divergence issues arising as a result of differing EU/UK interpretation of the European Regime. The White Paper states that historic CJEU law will be given the same precedent status in our courts as decisions of our own Supreme Court. Whilst the Supreme Court will become the final arbiter on questions of interpretation on EU legislation for the UK. The Government expects the Supreme Court to take a sparing approach to departing from CJEU case law. Further guidance may be issued about when such a departure would be desirable. Parliament will also be free to change the law, and therefore overturn case law, where it decides it is right to do so. That may lead to a divergence with the remaining member states on the interpretation of the European Regime, for example, on the legality of injunctions preventing claims being brought in a particular jurisdiction.

"Eversheds Sutherland's expert prediction

Parliamentary strategy with regard to repeal or reform of the European Regime will become clear as any proposed significant changes pass through Parliament, and in any event, well before those changes are due to take effect. This will give parties involved in litigation plenty of warning of any potential change in policy or regime. Whilst parties have a sufficient window of certainty not to become unduly concerned about EU-wide dispute management issues at the present time, a careful review of any existing, pending or threatened claims with a cross EU border element, with a view to obtaining and enforcing judgment under the existing regime, may be advisable.

In terms of trends in litigation, we are seeing a renewed emphasis on ADR and/or uptake of the current Shorter and Flexible Trials Pilot Schemes to help expedite resolution of existing matters before the ramifications of Brexit, whether financial or in terms of changing legislation, can take effect. On the other hand, we anticipate that businesses may wish to use the existing jurisdiction rules before March 2019 for certainty of application. Conversely, we also expect to see defendants using tactical delay, taking advantage of the current political and economic uncertainty to increase pressure on their opponents, to the extent that this is possible.

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