EVERSHEDS SUTHERLAND

Taking a closer look at Brexit

What changes could mean for dispute resolution and litigation

1. What are the key legal issues arising because of Brexit?

Under the Withdrawal Agreement[1], the parties have agreed to a transition period up to at least 31 December 2020.

Most of the EU litigation framework is to be preserved during the transition period, meaning that:

- choice of law clauses in contracts entered into prior to the end of the transition period will be recognised
- jurisdiction rules will continue to apply to actions commenced before the end of the period
- European Enforcement Orders (EEO's) will be enforceable where the application was commenced before the end of the period; and
- documents for service received before the end of the period will be served

What is the position if there is a "no-deal Brexit?"

'No-deal' means there will be no agreement between the EU and the UK (including Northern Ireland) on the framework for, amongst other things, ongoing and future civil judicial cooperation. In the absence of a deal or any other intervening act, the UK (including Northern Ireland) will leave the EU on 31 October 2019[2], and all EU Regulations and other legislation will be expunged from the UK's legal system.

1.1 Automatic Recognition – the EU litigation framework

The most significant impact of a no-deal Brexit on dispute resolution and litigation will be that judicial co-operation and common jurisdictional rules will no longer be automatic and seamless.

The lack of automatic recognition on these key litigation processes will inevitably lead to delays and increased costs where court applications will be required to deal with previously routine matters.

The European Union (Withdrawal) Act 2018 (the "*UK Withdrawal Act*") provides that the UK will adopt the acquired body of EU Law as at the date of exit. This includes the EU legislative framework, which governs the key areas in the management of EU-wide litigation (the "*EU Litigation Framework*"). This includes Regulation (EU) No 1215/2012 (recast) (the "*recast Brussels Regulation*") on jurisdiction and recognition of judgments; Rome I and Rome II Regulations on the choice of law applicable to contractual and non-contractual obligations respectively, Regulation (EC) No 1393/2007 (the "*Service Regulation*") and Regulation (EC) No 1206/2001 (the "*Taking of Evidence Regulation*").

The passing of the UK Withdrawal Act signifies that currently the UK intends to apply existing EU rules. However, it is unclear whether the UK will "*keep updated*" with future amendments to the EU Litigation Framework and how the EU (including Ireland) will provide for co-operation in relation to litigation emanating from the UK courts.

The adoption of the EU litigation framework into UK law does not go far enough to replicate the status quo as far as EU-wide dispute management is concerned. Many EU regulations such as the recast Brussels Regulation, the Service Regulation and the Taking of Evidence Regulation, rely on reciprocal arrangements between EU Member States. After it has left the EU, the UK will no longer be party to these arrangements. As far as the recognition of the parties' choice of court, enforcement of civil judgments in the EU, or the taking of evidence in one country for use in proceedings in another is concerned, the parties from the UK (including Northern Ireland) will need to rely on the local laws in the relevant EU country to determine what can and cannot be achieved.

1.2 Jurisdiction

The question as to whether the Irish courts or UK courts have jurisdiction in a civil commercial dispute is currently governed by the recast Brussels Regulation. This provides a comprehensive regime on jurisdiction and recognition and seeks to avoid the risk of multiple sets of proceedings across several countries of the EU. Following the UK's exit from the EU, the recast Brussels Regulation will cease to apply to the UK.

1. As of today's date, this is a dead letter having been rejected by the British Parliament in its current form but developments are awaited.

2. Or such other extended date as may be agreed as Exit Day. References in this document to 31 October 2019, should be read as meaning any such extended date.

In light of the UK Withdrawal Act, the UK courts will, it seems, continue to recognise the jurisdiction of Irish courts (and EU courts generally) under the recast Brussels Regulation. However, Irish courts will have no legislation or Treaties to govern jurisdictional issues involving the UK so Irish courts will apply common law rules. In a no-deal Brexit scenario, this uncertainty will increase the risk of complex and costly jurisdictional disputes.

The recast Brussels Regulation applies only to choice of jurisdiction clauses that designate the courts of a member state. Where the jurisdiction clause designates the courts of a non-member state, the Hague Convention on Choice of Court Agreements ("*Hague 2005*") may apply. Hague 2005 governs jurisdiction and enforcement of judgments between the contracting states of the EU, Mexico, Singapore and Montenegro. It applies in 'international cases' ie where parties are resident in different contracting states and only applies where the parties have agreed an exclusive jurisdiction. The UK currently only participates in Hague 2005 by virtue of its EU membership. The UK Government has committed to taking the necessary steps to join Hague 2005 in its own right.

Once the UK has formally re-joined Hague 2005, the convention would provide some certainty that the contracting states (including the EU) would uphold agreed exclusive jurisdiction clauses and enforce judgments obtained in other contracting states (including the UK).

Where a matter is outside the remit of Hague 2005, parties and their legal advisors will need to consider the existing domestic common law and statutory laws of both the UK and the relevant EU Member State in determining jurisdiction and recognition/enforcement of cross-border judgments. This may lead to an increase in the time taken to commence or serve proceedings and to enforce any judgment, with a corresponding increase in legal costs.

1.3 Enforcement of judgments

Although the shape of the UK's exit from the EU remains a matter of speculation, one outcome is for the UK to seek to accede to the Lugano Convention, 2007 ("*Lugano*") in its own right. As with Hague 2005, the UK is a party to Lugano only by virtue of its membership of the EU. Accession to Lugano requires unanimous support from its existing signatories. This model allows for a straightforward process of reciprocal enforcement between contracting states which, although less streamlined than under the EU procedure (being based on an earlier version of the recast Brussels Regulation), would provide greater clarity with regard to enforcement of UK judgments (including Northern Irish judgments) in Ireland and vice versa. Problems can arise using Lugano however, as it does not always recognise exclusive jurisdiction clauses and will allow cases that have been issued "first in time" to have precedence. This has led in the past to "torpedo actions" where a party rushes to issue proceedings first in order to gain tactical advantage (for example, if the courts in a particular country are particularly slow).

Hague 2005 can also be used for enforcement of foreign judgments in applicable cases (where there is an agreed exclusive jurisdiction clause). It is different to the EU enforcement regime however, and much more limited in scope. There are some grounds on which a party can object to enforcement and so it is not as seamless.

If the UK does not accede to a convention on the reciprocal enforcement of judgments or agree a formal regime with the EU, then enforcement of UK judgments in Ireland (including Northern Irish judgments) will be subject to international conflict of laws rules. Irish courts have discretion as to whether to recognise a foreign (non-EU) judgment, although traditionally they are well disposed towards doing so.

A new convention, the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters ("Hague 2019)" was signed and adopted in July 2019 by the Hague Convention on Private International Law. It is broader than Hague 2005 and is not limited in scope to exclusive jurisdiction agreements. However, the EU and the UK have yet to ratify it before it enters into force.

1.4 Service of proceedings and taking of evidence

The Service Regulation and the Taking of Evidence Regulation will no longer apply following the UK's exit from the EU. Furthermore, those Regulations are not covered by the UK Withdrawal Act and so will no longer apply in the UK under the Act. Therefore, the service of Irish proceedings on UK defendants and the taking of evidence from UK witnesses (and vice versa) will also be significantly more difficult[3].

Local legal advice will be required where service of documents or the taking of evidence is required. This will greatly increase the costs and time involved in what was formerly a straightforward process.

1.5 Termination of contracts

There is a theoretical possibility of parties terminating contracts on the basis of hardship, material adverse change, frustration or even *force majeure* post Brexit. However, we believe it is unlikely such actions would withstand judicial scrutiny.

1.6 Arbitration

Arbitration will be largely unaffected by Brexit. The enforcement of arbitral awards across borders is governed by the New York Convention (1958) (to which the UK will remain a signatory post-Brexit), which provides for the enforcement of arbitral awards across 156 jurisdictions including the UK and Ireland. This, of course, sits outside the EU Treaties and will be unaffected by Brexit.

2. How will these issues affect businesses in dispute resolution and litigation?

2.1 Increased cross-border litigation costs

The ending of automatic recognition will inevitably lead to an increase in the number of court applications and associated costs. In the past cross-border litigation procedures within the EU were automatically recognised without the requirement of court applications. We now have the prospect of protracted litigation (and strategic opposition by unscrupulous litigants) on jurisdiction issues. Costs associated with service of court documents and obtaining evidence cross-border will also increase.

2.2 Conflict of laws, uncertainty and risk

There will be an increased risk of parallel proceedings being commenced on the same dispute in both the UK (including NI) and Irish courts, leading to the risk of conflicting judgments and increasing delay and costs.

[3] If the UK accedes to an international convention such as Hague 2005, this will assist but will not be as seamless.

2.3 Other issues

A no-deal Brexit may see the popularity of arbitration increase both inside and outside the EU, with arbitration clauses in contracts attracting certainty that choice of law and choice of seat will be applied and that arbitral awards will be recognised and applied worldwide, not just in the EU. Arbitration and other out-of-court processes may become more popular as alternative dispute mechanisms as they are unaffected by Brexit.

On choice of law in a no-deal scenario, on the whole, the laws that govern cross-border disputes will not change. All parts of the UK will retain Rome I and Rome II Regulations, which do not rely on reciprocity to operate. Parties should therefore generally be able to continue to rely on the current rules for cross-border disputes.

On jurisdiction in a no-deal scenario, whilst the UK Government has committed to taking the necessary steps to join Hague 2005 in its own right (as set out above), which would provide some certainty that the contracting states (including the EU) will uphold exclusive jurisdiction clauses and enforce judgments in favour of other contracting states (including the UK), this only applies where the parties have agreed an exclusive jurisdiction clause, rather than situations involving asymmetric or non-exclusive jurisdiction clauses. Hague 2005 is, however, more limited in scope than the EU regime and allows parties the opportunity to object in court to enforcement. Where a matter is outside the remit of Hague 2005, the parties will therefore need to consider the existing domestic common law and statutory laws of both the UK and the relevant EU state in determining jurisdiction and recognition/enforcement of cross-border judgments. All of this may lead to an increase in time and cost.

Lugano may be available as an alternative to the UK provided the current signatories assent. It is less sophisticated, however, and more longwinded and leaves open the possibility of torpedo actions slowing down the litigation.

It is is therefore of course possible that parties may start to think of ways around this, including choosing an EU member state as its contractual choice of law and jurisdiction (including Ireland as the only English speaking common law jurisdiction left in the EU).

The increased costs, delay and uncertainty in debt recovery and other litigation involving the UK may impact on the decisions of lenders, investors and public institutions with interests in several jurisdictions.

The engagement of both Irish and UK (including NI lawyers in relation to disputes on the island of Ireland) qualified lawyers will now be required more frequently in cross-border litigation. Where previously the EU Litigation Framework governed many aspects of cross-border litigation, now local rules will apply and local advice will be required.

3. How would you advise businesses today if they asked how best to prepare for these issues?

This advice is of course dependent on the outcome of any exit deal. If the Withdrawal Agreement[4] is approved by the British Parliament, the transition period provisions discussed above will apply and, where appropriate, consideration should be given to taking enforcement action on foot of any Irish judgments against UK entities or UK assets before 31 October 2019. For example, if debt recovery proceedings have been issued and a EEO involving a UK entity is available, this should be processed before 31 October 2019. Where a client has an existing dispute but has not yet issued proceedings, there is merit in considering issuing proceedings in the preferred forum before 31 October 2019.

Claimants can now take advantage and press on with existing cases and/or commence litigation while the position for cross-border enforcement is clear. A renewed focus on alternative dispute resolution (ADR), such as arbitration, expert determination and mediation, may help to expedite resolution. On the other hand, defendants may seek to tactically delay, taking advantage of the approaching expiry of the pre-exit window to increase pressure on their opponents.

It is extremely important that businesses review clauses in key contracts to ensure that the appropriate choice of jurisdiction and choice of laws clauses are still effective and practicable. For businesses with interests in both the UK and Ireland or another EU member State, they should make sure they understand the potential risks associated with managing disputes and carefully consider the choice of jurisdiction/laws clauses in key contracts.

4. Or an amended version

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Summary: what are the key points to consider for a no-deal?

The immediate prospect of a no-deal Brexit raises key questions for parties who contract with the UK, or those with existing or contemplated legal proceedings with a cross-border element involving the UK, that may require consideration and urgent action before the 31 October 2019:

1. What do the jurisdiction clauses in my contracts say?
2. Do I need to issue and/or serve a claim in the UK?
3. Do I need to take steps to register an existing judgment in the UK?

Your usual Eversheds Sutherland contact can help you assess your risk and advise you on any protective measures that should be taken.

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EVE.DUB.2369 09/19