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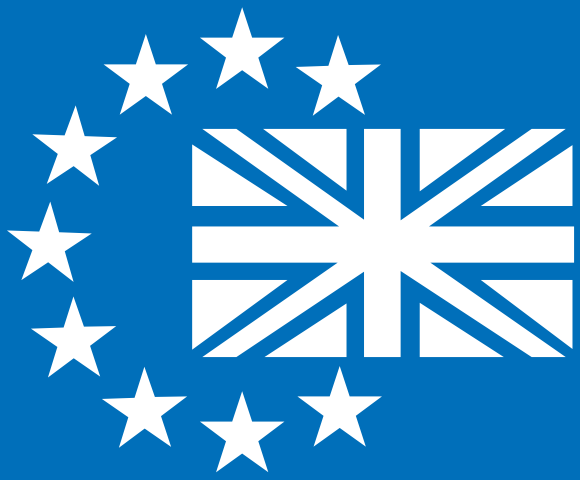
Making sense of Brexit

What does no-deal mean for commercial litigation across the EU?



Notwithstanding attempts by parliament to block a no-deal exit, Britain is inching closer to the latest Brexit deadline. With continued uncertainty, UK businesses need to continue preparing for a possible departure from the EU without an exit agreement.

In this booklet we consider what a no-deal Brexit would mean for UK businesses engaged in or contemplating litigation involving other EU Member States.

What does no-deal actually mean?

No-deal means there will be no agreement between the EU and the UK on the framework for (amongst other things) ongoing and future cross-border civil judicial cooperation. The UK formally triggered Article 50 in March 2017, starting a two-year countdown to the UK's exit from the EU. The UK and EU subsequently agreed an extension until 31 October 2019 or such later date as may be agreed ('Exit Day'). If, during that extension, Parliament does not approve a deal and without any other intervening act, the UK will leave the EU on Exit Day with no-deal. In those circumstances, all EU Regulations and other legislation ('the EU Regime') will cease to have effect in the UK on Exit Day. No-deal means no transition period in relation to the reciprocal elements of judicial cooperation between the EU and the UK. Any proceedings not concluded by the exit date will be subject to the post-Brexit regime.

What will replace the EU Regime in a no-deal situation?

The government has legislated to deal with the loss of the EU Regime by passing the European Union (Withdrawal) Act 2018. This statute will repeal the European Communities Act 1972 and adopt into UK law 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 framework includes the Recast Brussels Regulation (which covers jurisdiction, recognition and enforcement of judgments), Rome I and Rome II Regulations (on the choice of law applicable to contractual and non-contractual obligations respectively) and EU regulations on Service and Taking of Evidence, all of which operate to facilitate cross-border litigation within the EU.

The relevant authorities in Northern Ireland are currently conducting a review of Northern Irish court rules and procedures to ensure that they still work without reference to the EU regime, both in a 'deal' and 'no deal' scenario, whichever occurs.

Is this a complete solution?

The adoption and rewriting of the EU Regime into UK law is not a complete solution. Many EU regulations, including Brussels Recast, rely on reciprocal arrangements between EU Member States. Whilst the UK will unilaterally elect to adopt and apply the EU Regime after exit, the remaining EU Member States will be under no obligation to do the same in respect of the UK (except for in limited circumstances[1]). For choice of court, enforcement of civil judgments in the EU, or the taking of evidence in one country for use in proceedings in another, parties from the UK will need to rely on the local laws in the relevant EU country to determine what can and cannot be achieved.

This is what no-deal means in the following key areas for dispute management:

Choice of law

On the whole, the laws that govern the choice of law applicable to a cross-border dispute will not change. All parts of the UK will retain Rome I and Rome II Regulations. These regulations generally do not rely on reciprocity to operate, which means that parties can generally continue to rely on the same rules for choice of law in cross-border disputes.

Jurisdiction

In a no-deal Brexit, the following rules, which rely on reciprocity between EU Member States, would be repealed in all parts of the UK[2]:

- ☑ Brussels Recast, which governs jurisdiction between the UK and EU, and the recognition and enforcement of civil and commercial judgments between the UK and the EU
- ☑ the Enforcement Order, Order for Payment and Small Claims Regulations which establish EU procedures for dealing with uncontested debts and small claims worth less than €5,000
- ☑ the EU/Denmark Agreement, which provides special rules in relation to jurisdictional issues and recognition and enforcement of judgments between Denmark and the EU
- ☑ the Lugano Convention ("Lugano") which is the basis of our civil judicial relationship with Norway, Iceland and Switzerland. The UK is a party to Lugano only by virtue of its membership of the EU. There is nothing preventing the UK from seeking to re-join in its own right at a later date, although it would need the agreement of the EU to do so

[1] e.g. jurisdiction to determine disputes over land in an EU Member State
[2] The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, No. 479

Hague 2005

To minimise the impact of this, the UK Government ratified the 2005 Hague Convention on Choice of Court Agreements ('Hague 2005'), in its own right, in December 2018. Hague 2005 governs jurisdiction and enforcement of judgments between the EU, Mexico, Singapore and Montenegro. Currently, the UK participates in Hague 2005 only by virtue of its membership of the EU. The UK cannot accede to Hague 2005 in its own right until it has left the EU so the accession has been suspended to reflect the extension to the Article 50 withdrawal period. The government's intention is that, in the event of a no-deal, the date of accession should facilitate "seamless continuity" of the Convention's application to the UK.

The convention provides some certainty that the contracting states (importantly including the EU) will uphold exclusive jurisdiction clauses and enforce judgments in favour of other contracting states (including the UK) in the event of a no-deal exit. That said, Hague 2005 only applies where the parties have agreed an exclusive jurisdiction clause and so agreements containing asymmetric or non-exclusive agreements will not be covered.

In addition, there is an argument that the UK's 'change of status', from being a contracting state by virtue of its membership of the EU to being an independent contracting state, may not make Hague 2005 a fully effective solution. Article 16.1 of Hague 2005 states that it shall apply only to exclusive choice of court agreements concluded after its entry into force for the state in question. It seems logical that the "seamless continuity" of the UK's membership of Hague 2005 should mean that it applies to all exclusive jurisdiction clauses entered into after 1 October 2015 (the date on which the EU acceded to Hague 2005). However, a footnote in European Commission guidance published in April 2019 appears to suggest that their interpretation is that Hague 2005 only enters into force in the UK from its date of accession as an independent contracting state. If this interpretation is correct, Hague 2005 would only be an effective solution for exclusive jurisdiction clauses entered into post-Exit Day.

Where Hague 2005 is found not to apply, parties and their legal advisors will need to consider the existing domestic law of both the UK and the relevant EU Member State in determining jurisdiction and recognition/enforcement of cross-border judgments. Some Member States have legal frameworks which provide for the recognition of an exclusive jurisdiction clause in favour of a non-Member State subject to certain conditions. Member States will, however, still be subject to the requirements which are set out in Brussels Recast which may, in some circumstances, override the ability in domestic law to stay proceedings in favour of a third party (such as the UK), if the Member State's court is first seized. There remains a large amount of uncertainty around the practicalities (in terms of time and costs) of enforcing jurisdiction clauses in the event of a no-deal.

What are the key points to consider for a no-deal?

The immediate prospect of a no-deal exit raises three key questions for parties who contract across the EU, or those with existing or contemplated legal proceedings with a cross-border element involving another EU Member State, that may require consideration and urgent action before Exit Day:

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

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

Recognition and enforcement of judgments

The same legislation that governs the recognition of jurisdiction clauses deals with recognition and enforcement of judgments between EU Member States. Hague 2005 may help in certain circumstances but only applies to judgments in proceedings where there was an exclusive jurisdiction clause in favour of the courts of the country in which the judgment was given. As noted above, there are also concerns as to the applicability of Hague 2005 to contracts entered into prior to Exit Day.

Irrespective of the position under Hague 2005, the UK is currently proposing to recognise and enforce civil and commercial judgments from EU Member States under the Brussels Regime as long as the judgments were given in proceedings that commenced before Exit Day[3]. For proceedings commenced after Exit Day, unless there is a statutory basis for recognition, the common law will apply.

The EU's position is stricter, with automatic recognition of a UK judgment in an EU Member State court being reliant on whether the judgment has been exequatured (but not yet enforced) in an EU Member State before Exit Day. In all other cases, in the absence of a statutory basis, domestic law in the country in question will determine the process. Parties engaged in litigation with a cross-border element within the EU therefore face the possibility of increased time and cost associated with enforcement of UK judgments within the EU Bloc or vice versa.

A new Hague Convention on enforcement of judgments has recently been finalised. It goes further than the Hague 2005 Convention as it is not limited to exclusive jurisdiction agreements and will apply to employment and consumer contracts. Drafted to operate in a similar way to the 1958 Convention on the Recognition of Enforcement of Foreign Arbitral Awards ("the New York Convention") which provides for worldwide enforcement of arbitral awards, the new convention has so far only been signed by Uruguay. However this convention could provide much needed future certainty on enforcement if, as anticipated, the UK and other states including the EU, ratify it.

Service of documents and taking of evidence

The EU Service Regulation and EU Taking of Evidence Regulations will be repealed and will no longer apply in the UK since they cannot operate effectively without reciprocity. The UK Government has published a statutory instrument to cover outstanding requests made before Exit Day but otherwise the position will depend on the relevant local provisions of the countries in question, including whether that country has signed up to the Hague Service Convention from 1965 and the Hague Evidence Convention from 1970.

There is a separate issue to consider in relation to service. Currently, a party can serve court documents on defendants overseas without the Northern Irish Court's permission if the court has jurisdiction over the defendant and/or matter through the EU Regime or Hague 2005. The UK's entry into Hague 2005 should provide comfort that this position will continue in relation to cases falling within its scope. As noted above, Hague 2005 only applies to exclusive jurisdiction clauses, and may only apply to clauses agreed post-Brexit. Therefore, where there is no enforceable exclusive clause or the subject matter of the dispute is otherwise outside the scope of Hague 2005, permission to serve out of the jurisdiction will be required. Parties should expect delays when applying for permission to serve out and act expeditiously wherever time limits are an issue.

[3] Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019

Arbitration

Arbitration remains unaffected by Brexit, even in a no-deal situation. The key legislation that provides the framework for arbitration in the UK, the Arbitration Act 1996, is unaffected by EU law, and will continue in force following the UK's exit from the EU. Similarly, the UK will remain a signatory in its own right to the New York Convention which provides for the enforcement of arbitral awards across 159 jurisdictions, including all EU Member States. A no-deal Brexit may see the popularity of arbitration increase with arbitration clauses in contracts attracting the 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.

Mediation

The EU Directive on Mediation, applicable to cross-border disputes in civil and commercial matters since May 2011, will be revoked on Exit Day. The Directive currently allows parties to convert cross-border mediated settlement agreements to a court order by consent to help enforce the agreement. The strong culture of mediation in the UK means that parties rarely renege on mediated settlement agreements, but it was nevertheless a useful tool should the counter-party seek to backtrack. The new Singapore Convention on Mediation may fill that void. The Convention provides a global regime for the enforcement of mediated settlement agreements. Modelled on the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards, the new Convention will give mediation settlements the same status as the New York Convention gives to arbitral awards. The text was finalised in June 2018 and so far has been signed by 46 states including the United States and China. The EU (and the UK as a current Member State) has not yet signed. Post Brexit, the UK would be able to sign in its own right. The Convention will enter into force six months after three states have acceded.

What is the impact?

The disruption to civil proceedings involving EU countries caused by a no-deal Brexit should be mitigated. The adoption of Rome I and II provides certainty that the UK courts will continue to recognise parties' choice of law. The UK's accession to Hague 2005 as an independent contracting state after Brexit, should replicate many of the rights in relation to jurisdiction and enforcement currently afforded by the EU Regime. The 'change of status' point concerning the applicability of Hague 2005 to pre-Brexit jurisdiction agreements should be monitored. Further mitigation can be achieved by considering switching from non-exclusive to exclusive jurisdiction clauses in contracts and taking urgent steps to register any judgments obtained before Exit Day in the jurisdiction in which enforcement will be sought.

Cross-border litigation within the EU following a no-deal Brexit is likely to be more time consuming and costly. In Northern Ireland, parties, practitioners and the courts will need to follow a revised set of rules, particularly with regard to service where the changes may be extensive, and it may be some time before there is any judicial guidance on the application of the revised rules. Parties contemplating or engaged in litigation involving another EU country, that will be ongoing when the UK exits the EU, should take legal advice to ascertain the extent to which their disputes may be affected and may be advised to take urgent steps to commence or progress matters before Exit Day. Please speak to your usual Eversheds Sutherland contact or one of the contacts detailed overleaf.

Contacts

For more information please contact:

Brexit Specialists (Litigation) – Northern Ireland

Matthew Howse
Partner, Dispute Resolution & Litigation

+44 28 9568 0139
matthewhowse
@eversheds-sutherland.ie

Conor McAleese
Solicitor, Dispute Resolution & Litigation

+44 28 9568 0826
conormcaleese
@eversheds-sutherland.ie

Brexit Specialists (Litigation) – England and Wales

Hannah Nichols
Head of Professional Support

+44 115 943 7614
hannahnichols
@eversheds-sutherland.com

Helen Eastwood
Head of Professional Support

+44 121 232 1435
heleneastwood
@eversheds-sutherland.com

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