

Brexit Implications for Litigation

30 January 2020

EU Litigation

As it is now certain that the UK will leave the EU on Friday, 31 January 2020, on the terms of the Withdrawal Agreement, we take a closer look at what this will mean for commercial litigation, particularly during the transition period.

In headline summary, civil judicial co-operation will remain largely unchanged during the transition period to the end of 2020. There will then be a “run-off” period during which pre-Brexit arrangements will apply to some situations but not others. The regime that will overlap with, and over time take over from, this run-off period is not yet known.

Current status of exit arrangements

On 23 January 2020, the European Union (Withdrawal Agreement) Act 2020 received Royal Assent in the UK. This Act ratifies and implements the revised Withdrawal Agreement agreed between the UK and the EU in October 2019. The EU completed its ratification of the Withdrawal Agreement on 30 January 2020.

As a result, on 31 January 2020, the UK will leave the EU and enter into a “transition period”, governed by the terms of the Withdrawal Agreement.

The transition period is due to last until 31 December 2020, during which time the UK and EU hope to strike a long-term agreement covering the UK’s ongoing relationship with the EU. Whether that will happen remains uncertain. The transition period may be extended for a period of one or two years beyond 31 December 2020, but the UK Government has already ruled out an extension to the transition period. That position might later change, but for present purposes the deadline to strike any long-term agreement with the EU is 31 December 2020.

This alert considers the implications of the UK’s exit from the EU on 31 January 2020 with respect to commercial litigation.

During the transition period

Subject to some limited exceptions, EU law will continue to apply to the UK during the transition period, and the UK will continue to interpret and apply EU law in the same manner as it would be applied within the EU.

Therefore, in broad terms, the EU civil justice co-operation regime will continue to apply to the UK until 31 December 2020. For litigators, this will mean that the all-important Brussels Recast Regulation (1215/2012) will continue to apply to govern jurisdiction and the enforcement of

judgments as between the UK and EU Member States until the end of the transition period, and that the EU Service Regulation (1393/2007) will also continue to apply in relation to service of documents within the EU. The Rome I Regulation (593/2008) (governing the law applicable to contractual obligations) and Rome II Regulation (864/2007) (governing the law applicable to non-contractual obligations) will also continue to apply.

However, the position is different for international agreements to which the UK is a party through its membership of the EU. Examples of international agreements in this category of interest to litigators are the 2007 Lugano Convention (which governs jurisdiction and enforcement of judgments as between the EU, Switzerland, Iceland and Norway), and the 2005 Hague Convention on Choice of Court Agreements (which governs jurisdiction as between the EU, Singapore, Mexico and Montenegro). The Withdrawal Agreement provides that international agreements to which the UK is a member by virtue of its membership of the EU will continue to apply to the UK for the duration of the transition period.

The EU has said that it will notify other parties to these treaties that the UK should be treated as part of the EU for the purposes of those treaties during the transition period. Whilst these notifications are intended to preserve the *status quo*, such that the relevant international agreements will continue to be applied on a reciprocal basis between the UK and the other (non-EU) parties to them, it is uncertain whether all such other parties will continue to treat the UK in the same manner as an EU Member State during the transition period.¹

Where the UK is a party to an international agreement in its own right, then that agreement will continue to apply in the same manner as before regardless of Brexit. For example, the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters will continue to apply as between the UK and other contracting parties (except where the EU Service Regulation will still apply). The position for litigants on service of documents in civil and commercial proceedings should therefore be unchanged during the transition period.

After the transition period

The more significant change to the EU-UK civil litigation regime may take place at end of the transition period.

Articles 66 to 69 and 86 of the Withdrawal Agreement govern ongoing judicial co-operation in civil and commercial matters following the end of the transition period to a limited extent. Certain provisions of EU law specifically relevant to commercial litigation will continue to be applied within the UK after the end of the transition period, thereby creating a run-off period for the current regime:

- a. Article 66 confirms that the Rome I Regulation (governing the law applicable to contractual obligations) will continue to apply in the UK to contracts concluded before the

¹ The UK Government recently published statements received from Iceland, Norway and Switzerland, expressing support for the UK acceding to the 2007 Lugano Convention following the end of the transition period, which may be taken to suggest that these countries intend to treat the UK in the same manner as an EU Member State during the transition period for the purposes of the 2007 Lugano Convention, in accordance with the EU's notification.

end of the transition period, and that the Rome II Regulation (governing the law applicable to non-contractual obligations) will continue to apply in the UK to events giving rise to damage where those events occurred before the end of the transition period. As such, the *status quo* will be preserved for questions of governing law for a run-off period (at least).

- b. Article 67 provides, importantly, that the Brussels Recast Regulation will continue to apply as between the UK and EU in respect of jurisdiction and recognition and enforcement of judgments relating to proceedings which are commenced before the end of the transition period. It does not extend the Brussels Recast Regulation to choice of court agreements entered into during the transition period, as earlier drafts had done. As such, it again only creates a run-off period for the current regime.
- c. The Withdrawal Agreement does not extend to continuing to apply the 2007 Lugano Convention beyond the end of the transition period. It appears to be the UK's intention to apply a run-off period to the 2007 Lugano Convention (although it is unclear if Switzerland, Iceland and Norway will do the same).
- d. Article 68 confirms that the following will apply beyond the transition period in certain circumstances:
 - i. The EU Service Regulation will apply to judicial and extrajudicial documents received for the purposes of service before the end of the transition period;
 - ii. The Taking of Evidence Regulation (1206/2001) will apply to requests received before the end of the transition period; and
 - iii. The Council Decision governing requests for judicial cooperation (2001/470/EC) will continue to apply to requests that were received before the end of the transition period.

Again, this allows for a run-off period for these regimes².

- e. Article 86 provides that the CJEU will continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals in the UK which were made before the end of the transition period.

The general position is therefore that certain aspects of the EU regime will still apply to proceedings commenced in UK courts before the end of the transition period, and in relation to actions taken under the provisions of various EU instruments before the end of the transition period. There will therefore be a run-off period following the end of the transition period where, as a function of the date on which certain actions were taken, different regimes could apply.

² Article 69 also creates a run-off period for other relevant EU legislation in relation to mediation, legal-aid in cross-border disputes, and compensation to crime victims.

The regime that will overlap with, and over time take over from, this run-off period is not yet known. The UK has previously indicated bold ambitions for a bespoke arrangement with the EU on these issues. It remains to be seen how far down the negotiating list the two sides are able to get by 31 December 2020 and so whether such a bespoke deal is feasible in that timeframe.

The UK has also indicated that it may seek to become a party in its own right to certain international agreements to which it was previously a party by virtue of its membership of the EU. The UK has gone so far as to deposit a deed of accession to the 2005 Hague Convention on Choice of Court Agreements, which would have become effective in the event of a “no deal” Brexit. The UK Government has also indicated that it will in the future seek to become a party to the 2007 Lugano Convention in its own right.³

The shape of the future relationship between the UK and the EU after the end of the transition period is therefore still largely unclear. As litigators, we remain keenly focused on the shape of the future of civil judicial co-operation between the UK and the EU.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our EU Litigation practice:

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³ The UK Government recently published statements received from Iceland, Norway and Switzerland expressing support for the UK acceding to the 2007 Lugano Convention following the end of the transition period. The UK's accession to the 2007 Lugano Convention would require the agreement of each of those countries, as well as the EU (and, separately, Denmark).