



Civil jurisdiction after Brexit: where are we now?

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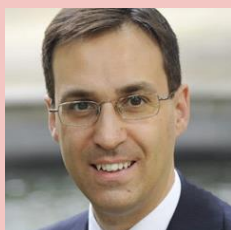
One of the many uncertainties created by Brexit has concerned its implications for the law relating to civil jurisdiction and the recognition and enforcement of judgments given by the Courts of EU and EFTA member states (and the recognition and enforcement of English or Scottish judgments within the EU and EFTA).

Prior to Brexit, a common set of rules determined the allocation of jurisdiction between the civil courts of the UK and those of other EU and EFTA states. These rules were laid down in the Brussels Regulation (Recast) No. 1215/2012 (for the EU) and the Lugano Convention 2007 (for EFTA member states). Common rules similarly determined when judgments given by the courts of those states would be recognised and enforced in the other EU/EFTA member states. The existence of these rules created a broad measure of certainty as to which court within the EU/EFTA states would have jurisdiction to determine litigation involving parties from more than one such state. They also established that other EU/EFTA states would recognise and enforce judgments that had been given by the court granted jurisdiction under those rules.

EU regulations also provided common rules on the identification of the applicable law to determine claims in both contract and tort (in the form of the Rome I and Rome II regulations).

There is no real reason why any of those rules could not have continued to apply post-Brexit. But there has been considerable uncertainty as to whether they would and similar uncertainty as to what (if any) rules would replace them if they did not continue in effect.

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Silk Date: 2020

The free-trade agreement between the UK and the EU which was concluded on Christmas Eve raised the prospect of resolution to these uncertainties. It might have been hoped that the agreement would address whether the existing rules would continue to operate, or to outline an alternative arrangement that would take its place.

Unfortunately, a review of the free-trade agreement reveals that it has nothing much at all to say on this topic. There appears to be no agreement between the UK and the EU covering this ground that addresses the post-Brexit position.

Where does that leave us, and what is the law now in this area? I set out below eight points which summarise the current position.

1. With effect from 11pm on 31 December 2020, the Civil Jurisdiction and Judgments Act 1982 has been significantly amended. Many previously important provisions have been repealed, with the effect of removing the legal effect of the Brussels Regulations (and its predecessors), the Lugano Convention 2007 and the agreement on jurisdiction between the EU and Denmark (insofar as it applied to the UK).
2. Although the Lugano Convention 2007 has (at least for now) ceased to have effect as a matter of English law, the UK has applied to re-join the Lugano Convention as a party in its own right (having previously been a party through its EU membership). For the UK to re-join the Lugano Convention, the consent of all of the existing parties will be required. All existing parties have given that consent apart from the EU (and Denmark, which is treated separately for these purposes despite being an EU member). It might have been expected that the free-trade agreement would have provided a convenient mechanism for the EU to commit to giving its consent. Yet, despite it being difficult to see any good reason for

the EU to withhold its consent to the UK's re-accession, the silence on the issue leaves uncertainty over whether and when the Lugano Convention will re-apply to the UK. Even if the EU does give its consent to the UK's re-accession to this agreement, it is far from certain that the effect of the convention will be backdated to 1 January 2021; there may be a period in which it does not apply, giving rise to unhelpful confusion in the inter-relationship of the various regimes which may end up having effect over a relatively short period of time.

3. In place of the old law, ss. 3C, 3D and 3E have been introduced into the Civil Jurisdiction and Judgments Act 1982 which give legal effect to the 1996, 2005 and 2007 Hague Conventions respectively. The legal effectiveness of these Conventions is not new to English law; they were previously given legal effect through the UK's membership of the EU.

The 1996 and 2007 Hague Conventions both concern aspects of family law which have always been dealt with separately to the Brussels Regulations.

The 2005 Hague Convention is of wider significance to civil and commercial litigation which was previously governed by the Brussels Regulations. The 2005 Hague Convention deals with choice of court agreements and provides for the parties to the Convention to give effect to exclusive jurisdiction agreements in certain circumstances, and for judgments given by courts which have been designated in such an exclusive jurisdiction agreement to be recognised and enforced in every country which is a party to the Convention.

Some aspects of the scope of the 2005 Hague Convention are yet to be worked out. Two difficulties are worth highlighting.

First, the precise ambit of what does or does not constitute an “exclusive” jurisdiction agreement for these purposes remains unclear. Secondly, there is uncertainty over when the Hague Convention took effect. The UK government has adopted the position that the 2005 Hague Convention applies to choice of jurisdiction agreements entered into on or after 1 October 2015 (when the convention first came into force in the UK by reason of its EU membership). That starting point gives rise to potential difficulty as to the rules governing contracts pre-dating October 2015 which could still very easily be the subject of yet-to-be commenced litigation. The EU’s stance is that the Hague Convention 2005 as now in effect as regards the UK is applicable only to choice of jurisdiction agreements entered into on or after 1 January 2021 (i.e. the point when the UK began to apply the Convention as a party in its own right). Whatever position is reached on this question in the English courts, difficulties will potentially remain when it comes to enforcement of English judgments in EU jurisdictions.

Although the parties to the 2005 Hague Convention extend beyond the membership of the EU and EFTA, it is far narrower in its scope than the previously applicable EU law. One consequence of that change is a narrowing of the English Court’s jurisdiction to provide interim relief in support of foreign proceedings under s.25 of the Civil Jurisdiction and Judgments Act 1982. In its amended form, s.25 gives the Court jurisdiction to provide interim relief only where the subject matter of the foreign proceedings in support of which the English Court is being asked to act falls within the scope of the 2005 Hague Convention. Any claim before a foreign court in which that court’s jurisdiction is not founded on an exclusive jurisdiction agreement (which will include many fraud claims in which the English court’s s.25 jurisdiction has previously proved very helpful) will now fall outside the scope of the English court’s jurisdiction to provide interim relief under s.25.

4. Although the changes to the rules on civil jurisdiction and the recognition of judgments are significant, it is important to note that they are not retrospective and that they apply only to proceedings commenced on or after 1 January 2021. Regulation 92 of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (which must be read in conjunction with paragraph 1(1) of Schedule 5 to the European Union (Withdrawal Agreement) Act 2020) provides that the old law will continue to apply:
 - where a court in the UK was seised of proceedings before 11pm on 31 December 2020 and those proceedings remain ongoing at that time; and
 - in relation to the recognition or enforcement in the UK of a judgment of a court of an EU or EFTA member state where that court was first seised of the proceedings in which the judgment was given before 11pm on 31 December 2020 (even if the judgment and the question regarding recognition or enforcement only arises later).

Under article 67(1) of the Withdrawal Agreement governing the UK’s departure from the EU, the courts of EU member states will similarly continue to apply the old law in relation to proceedings before UK courts where the proceedings were instituted before 11pm on 31 December 2020.

5. As a consequence of these various changes, Part 6 of the CPR has been significantly revised. The 107th and 126th amendments to the CPR took effect at 11pm on 31 December 2020 and remove from Part 6 the various provisions implementing the old rules. In particular, r.6.33(1), which previously permitted service of claim forms out of the jurisdiction without permission in EU and EFTA member states, has been deleted. At the time of writing, neither the version of the CPR on the Ministry of Justice

website, nor the White Book, have been updated to show the effect of these changes. Great care will be required until these resources are updated.

6. English law in relation to the service of proceedings in EU/EFTA member states is no longer any different from the law as regards other countries. That means that:
 - Permission will need to be obtained to serve proceedings out of the jurisdiction in an EU/EFTA member state.
 - There is scope for parallel proceedings which the Brussels/Lugano regime would previously have prevented.
 - It ought now to be possible to obtain an anti-suit injunction to restrain proceedings within an EU/EFTA state.
7. Whether an English court will recognise or enforce a judgment given in an EU/EFTA state will (as with many other jurisdictions) turn on a complex mixture of common law and statutory provisions depending on the state in question and the basis on which

that state has taken jurisdiction over the dispute. The status of English judgments within the EU and EFTA countries will now depend on the domestic law of each state (including any relevant EU law). As the Brussels Regulation addresses only the recognition and enforcement of judgments given in other EU member states, there is no uniformity of position between different EU states. Where overseas enforcement of an English judgment is likely to be necessary, separate consideration will need to be given to the position in each jurisdiction likely to be relevant.

8. In contrast to the unsatisfactory position in relation to the rules on jurisdiction, the position as regards the choice of law rules is much more straightforward. Under the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019 (S.I. 2019 No. 834), the Rome I and Rome II regulations are effectively incorporated into English law. This aspect of the law is therefore unchanged and unaffected by Brexit.

