Civil Disputes: New Gaps, Old Solutions

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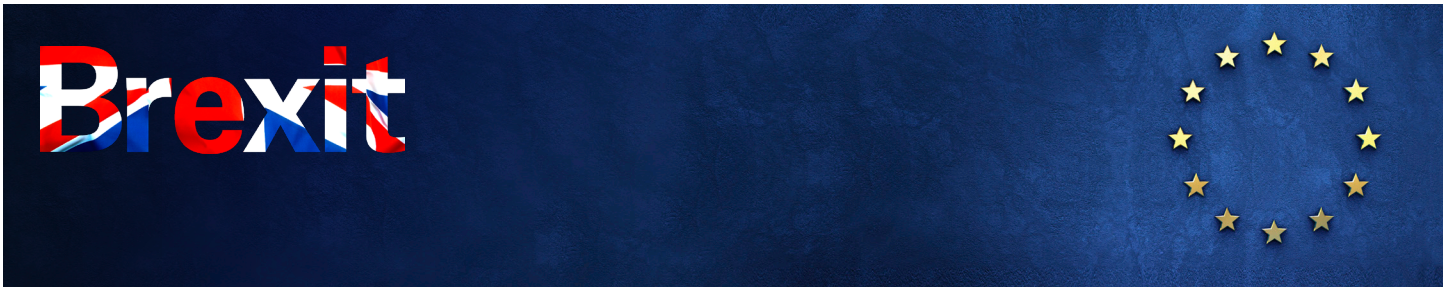

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Takeaways

- Key international agreements governing jurisdiction and enforcement in EU-connected civil cases fell away in the UK at the end of 2020.
- In negotiations, parties need to be aware where the gaps are — and what can be done to address them, including looking to old solutions such as the 2005 Hague Convention and English common law.
- Existing agreements may need to be updated in order to qualify under the remaining (Hague) Convention.
- If the UK rejoins the Lugano Convention, as hoped, that will fill some of the gaps.
- In the interim, the English courts are well equipped to resolve matters of jurisdiction and enforcement using the tried-and-tested methods that have continued to be developed and applied outside EU law.

The application within the UK of European Union rules on jurisdiction and enforcement, including the Recast Brussels Regulation, expired when the UK completed its formal separation from the EU on 1 January 2021. The gap is not filled by the Trade and Cooperation Agreement (TCA). Litigants and drafters of commercial contracts therefore must instead look elsewhere, for now to the 2005 Hague Convention and English common law.

Practical Considerations

At present, the UK is party to only one convention with the EU that addresses jurisdiction and enforcement, the 2005 Hague Convention. The UK's re-accession to the Lugano Convention 2007 (which largely replicates the Brussels Regulation among Switzerland, Norway, Iceland and the EU, including Denmark) has not yet been approved by the EU. In the interim (until at least May 2021), parties should consider the following steps:

- Include exclusive jurisdiction clauses in favour of the English courts in agreements currently being negotiated to ensure application of the 2005 Hague Convention.
- Restate exclusive jurisdiction clauses in existing agreements to ensure that they fall within the EU's restrictive interpretation of the 2005 Hague Convention (*i.e.*, that they have been agreed to post-1 January 2021).
- Elect English-seated arbitration rather than court litigation in agreements currently being negotiated, taking advantage of the fact that the operation of the New York Convention (applying to, *inter alia*, the UK, EU and each of its members) is unaffected by Brexit.
- Insert an address for service within the UK in existing agreements or those being negotiated to help establish jurisdiction in England under common law.

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- Consider tools such as anti-suit injunctions or actions for damages that apply to breach of exclusive jurisdiction agreements in disputes commenced from 2021, as those tools are no longer prohibited following the UK's withdrawal from the Brussels Regulation.

Notwithstanding the changes arising from Brexit, English courts and English law are likely to remain a common choice for commercial contracts. Key considerations favouring their use include legal predictability, strong case management, availability of disclosure and an experienced judiciary familiar with complex commercial disputes. Conversely, a choice of forum without these features could create greater commercial risk. A comprehensive comparative analysis would be necessary before shifting from a choice of English courts and law to those of an EU member state merely in order to utilise the Brussels Regulation or Lugano Convention, particularly if a mismatch between forum and law is proposed (*e.g.*, English governing law with a European member court as the forum).

Background

Not everything changed with the end of the Brexit transition period:

- Agreements to arbitrate will continue to be upheld by UK and EU member state courts, and the New York Convention still allows for enforcement of awards in all contracting states, which include the UK and EU members.
- The UK also has decided to retain the Rome I and Rome II Regulations on applicable law, meaning English courts will continue to apply the same rules to determine the applicable law for contractual and noncontractual obligations, and will continue to honour parties' agreements as to choice of law in the same way as before, although English jurisprudence could start to diverge from that of the European Court of Justice.
- Continuance arrangements remain in place, applying the Brussels Regulation and Lugano Convention in the UK to claims commenced and judgments and settlements obtained prior to 2021.
- The UK remains party to the 2005 Hague Convention, with English common law and some bilateral arrangements filling the gaps left by its departure from the Brussels Regulation and Lugano Convention.

2005 Hague Convention on Choice of Forum — Currently in Force

The UK rejoined the 2005 Hague Convention in its own right, effective 1 January 2021, to ensure it remained a party following Brexit. Under the convention:

- Where parties specify a choice of court in their agreement, the chosen court must hear the case brought before it.
- Courts in other contracting states must refuse to hear a case if they have not been designated as the chosen forum in a valid choice-of-court agreement.
- The judgment issued by the chosen court will be recognised and enforced by the courts of other contracting states.

Although these three pillars broadly replicate the Brussels Regulation and Lugano Convention, the 2005 Hague Convention has significant limitations:

- The convention only applies to exclusive choice-of-court agreements (which may exclude, for example, asymmetric clauses that provide only one party with the choice of forum).
- Although the convention will apply to agreements concluded on or after 1 January 2021, uncertainty remains as to its application to earlier agreements. The UK's position is that the convention applies to agreements concluded on or after 1 October 2015 (when the UK became party to the convention as an EU member), while the EU has indicated that it considers the convention to apply only to agreements concluded on or after 1 January 2021 (when the UK became a party in its own right).
- The convention does not apply to interim or procedural decisions (*e.g.*, freezing injunctions or default judgments).
- The convention does not apply to a variety of subject matters, including competition/antitrust laws, insolvency, and tort or intellectual property claims (other than copyright) that do not arise from a contractual relationship.
- While the convention has "anti-torpedo" provisions similar to the Brussels Regulation (*i.e.*, that require any court other than the chosen court to suspend or dismiss its proceedings, unless limited exceptions apply), it does not have general rules by which the courts of contracting states coordinate their approach to parallel proceedings.
- Lugano Convention members Iceland, Norway and Switzerland are not members of the convention, although other countries (Singapore, Mexico and Montenegro) are.

Brexit

Civil Disputes: New Gaps, Old Solutions

Residual Effect of Recast Brussels Regulation on Enforcement and Jurisdiction

The Brussels Regulation (supplemented by the EU-Denmark Agreement) — which governed enforcement and jurisdiction within and between EU members and, in certain circumstances, nonmember "third states" — was revoked in the UK as of 31 December 2020.

However, by operation of Article 67 of the Withdrawal Agreement, the Brussels Regulation will still apply in the UK and EU to: (1) proceedings commenced before 1 January 2021, (2) judgments delivered by English or EU courts in such ongoing proceedings (whenever decided), (3) settlements "approved or concluded" before 2021, and (4) certain public authority decisions "drawn up or registered" prior to 2021.

UK Expected To Rejoin Lugano Convention 2007 on Enforcement

The Lugano Convention was also revoked as of 31 December 2020, with its application in the UK to pre-2021 proceedings, judgments and settlements preserved in the same way as the Brussels Regulation. However, since Switzerland, Norway and Iceland were not party to the Withdrawal Agreement, the transitional applicability of the Lugano Convention in those jurisdictions requires local advice.

The Lugano Convention is very similar to the Brussels Regulation and would give the greatest continuity if the UK re-accedes. However, there are differences, such as:

- Priority is always given to the court first seised, regardless of whether it is the parties' chosen court; this opens the door to spoiling tactics (*e.g.*, "torpedo" actions for negative declaratory relief in another jurisdiction to create delay).
- At least one party must be domiciled in a contracting state.

The UK formally requested to accede to the Lugano Convention in its own right in April 2020. The convention requires other contracting states to "endeavour" to give their unanimous consent within one year. Switzerland, Norway and Iceland have expressed support or approved the UK's accession, leaving the EU (and Denmark, which retains an opt-out) as the remaining parties yet to provide their consent. A generally held view is that unanimous approval will eventually be given, following which the Lugano Convention will resume application to the UK after a stipulated period of three months (*i.e.*, not before May 2021 and probably later).

Common Law — Filling the Gaps

Where the 2005 Hague Convention does not apply and no other treaty arrangement is in place, questions of the jurisdiction of the courts of England and Wales in EU-connected proceedings will be governed by English common law, and enforcement of English judgments will need to proceed in accordance with the national law of the local EU member where enforcement is sought.

Jurisdiction under English common law turns upon serving the claim form on the defendant either in the UK or, with the English court's permission, outside the UK. If the defendant is outside the UK, whether jurisdiction arises will turn on analysis of whether: there is a serious issue to be tried; there is a good, arguable case; the defendant is a necessary and proper party; and England is the most appropriate forum.

Each EU member (and each of Switzerland, Norway and Iceland) has its own national rules for enforcement of foreign judgments, and local advice will be required for English court judgments delivered in proceedings commenced on or after 1 January 2021. This approach already applies to judgments delivered in the 150-plus jurisdictions outside the 2005 Hague Convention, Brussels Regulation and Lugano Convention. Dormant treaty arrangements may also be revived. For example, while the fate of the Lugano Convention is awaited, the UK and Norway have entered into a bilateral agreement to extend and update their 1961 arrangement.

Conclusion

The situation remains fluid and, while continued uncertainty can be expected at least in the short term, the English courts are well equipped to resolve matters of jurisdiction and enforcement using the tried-and-tested methods that have continued to be developed and applied outside EU law.

Useful resources include:

The UK government's "Cross-Border Civil and Commercial Legal Cases: Guidance for Legal Professionals," which was most recently updated on 31 December 2020.