Civil litigation: the impact of Brexit

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A. Introduction

1. **Introduction.** On 31 January 2020, the United Kingdom left the European Union under the terms of the Withdrawal Agreement,[1] which was brought into effect at a domestic level by the European Union (Withdrawal) Act 2018 (**"the Act"**[2]). The Withdrawal Agreement established a transition period, which ended at 11pm on 31 December 2020 (referred to in the Act as 'IP completion day').

2. **The scope of this paper.** This paper addresses: (i) the structure of the Act, and how it is expected to operate in practice; and (ii) the implications of withdrawal for civil litigation.

3. It is important to remember when considering the implications of withdrawal, that the domestic legislation only forms one part of the analysis. One also needs to consider how Member States will continue to apply jurisdictional rules, and determine conflicts of private international law, because of the UK becoming a "third country". The European Commission has produced a useful summary of the sources of law that will impact on that question.[3]

[1] The Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 19 October 2019 (**"the Withdrawal Agreement"**) [2019] OJ C 384 I/1, 12.11.2019.

[2] The Act was amended by the European Union (Withdrawal Agreement) Act 2020, which came into force on 23 January 2020, in order to amend its provisions in light of the Withdrawal Agreement.

[3] *Notice To Stakeholders: Withdrawal Of The United Kingdom And Eu Rules In The Field Of Civil Justice And Private International Law* (27 August 2020). It has issues a series of other sector-based guides including, for example, the impact on Company Law, Intellectual Property and Data Protection: https://ec.europa.eu/info/relations-united-kingdom/overview/consequences-public-administrations-businesses-and-citizens-eu_en

B. The Relevant Sources of European Law

4. The EU law that will continue to apply domestically derives from three sources, reflecting the structure of the exit negotiations between the UK and the EU. Understanding the interaction of those sources is helpful when identifying what the law is:

   a. First, there is the *existing corpus of EU Law*, as it stood on 31 December 2020, which is incorporated domestically (subject to amendment) as discussed below.

   b. Secondly, there are the *terms of withdrawal* agreed between the UK and the EU and embodied in the Withdrawal Agreement. The latter operates as an international treaty, imposing obligations of public international law on the UK state. The treaty assumes that its provisions will be directly enforceable[4] but, under our dualist constitution, some domestic legislation was necessary to give domestic effect to those obligations. Section 7A of the Act makes provision for implementation of the Withdrawal Agreement and provides that rights and remedies "*from time to time created or arising*" under the agreement are to be "*recognised and available in domestic law; and enforced, allowed and followed accordingly*".

   c. Thirdly, in December 2020 the UK and the EU agreed a Trade and Cooperation Agreement in order to govern their *future relationship*.[5] That, similarly, is implemented domestically by the European Union (Future Relationship) Act 2020, s.29.

5. Since the Trade and Cooperation Agreement did not contain any provisions relevant to the questions of private international law addressed by this talk, it can be set to one side. As between the two remaining sources of law, obligations under the Withdrawal Agreement take precedence.[6] Any rights or remedies existing under retained EU law, are therefore subject to any inconsistent rights to which the UK is obliged to give effect under the Withdrawal Agreement.

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[4] Thus, **article 4(1)** provides that persons shall be able to rely directly on those provisions of the Withdrawal Agreement which meet the conditions for direct effect under Union law. **Article 4(2)** requires the UK to ensure compliance with that obligation, including by providing the necessary judicial powers to disapply inconsistent or incompatible domestic provisions.

[5] Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2020] OJ L 414/14, 31.12.2020.

[6] **Section 7A(3)** of the Act requires every enactment, including the Act itself, to be read and to have effect, subject to the obligation in paragraph 3(b) above. Because of the structure of the exit deal, some provisions might have taken effect *both* as retained EU law *and* under the Withdrawal Agreement. Because of that, and because Withdrawal Agreement law is governed by different principles of interpretation, any such provision takes effect only as Withdrawal Agreement law: **Act, ss.3(2)(a)(bi), 4(2)(aa)**. The restrictions on the principle of EU supremacy, and the right not to follow decisions of the CJEU, are themselves subject to Withdrawal Agreement law: **ss.5(7), 6(6A)**.

C. Retained EU Law under the Act

6. **The core structure of the Act.** The Act adopts (so far as relevant to this talk) a 4-part approach to ensuring the continuity of the law, consisting of the following:

   a. repealing the European Communities Act 1972 (s.1);

   b. transplanting into domestic law, a body of law referred to as "*retained EU law*" (ss. 2-5) and explaining how that is to be given effect and interpreted (ss. 6-7);

   c. creating a wide, rule-making power for "*dealing with deficiencies arising from withdrawal*" (s.8). It is under this provision that swathes of sector-specific statutory instruments have already been passed in order to prescribe how the law will continue to apply, with or without modification, after 31 December 2020; and

   d. incorporating the Withdrawal Agreement into domestic law, and providing for further secondary legislation for that purpose (ss.7A, 8A-8C).

7. **Repeal of ECA 1972.** The 1972 Act has been judicially described as the conduit pipe which not only permits EU Law to become a source of law in the United Kingdom, but also enables it to take precedence over all domestic sources of UK law, including statutes.[7] It is the mechanism that provides authority, and constitutional legitimacy, for EU law to be given precedence over inconsistent national law.

8. By repealing section 2 of the 1972 Act, rights and obligations created or arising by or under the European Treaties, and which the UK was obliged under EU Law, as a Member State, to recognise in its domestic law, would cease to be "*recognised and available*" in national law. It was under that provision (via the UK's Treaty obligations) that enforceable EU rights could arise from enforceable Treaty obligations, EU Regulations, and EU Directives that were capable of having direct effect.[8] The repeal of that enactment has made it necessary to define what happens to that body of law.

9. **What is 'retained EU law'?** It has the following aspects:[9]

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[7] R. (Miller and another) v Secretary of State for Exiting the European Union [2017] 2 WLR 583 (SC), at [60].

[8] Case 26/62 van Gend en Loos NV v Nederlandse Belastingadministratie [1963] ECR 1 (direct effect of clearly-defined treaty provisions); Art. 288 TFEU (direct applicability of EU Regulations); Case 41/74 Van Duyn (Yvonne) v Home Office (No 2) [1974] ECR 1337 (direct effect, as between private citizens and emanations of the State, of provisions in EU Directives that are sufficiently clear, precise and unconditional). Further, because of the obligation to interpret all domestic legislation, if at all possible, so as to comply with EU law (see Case C-106/89 Marleasing SA v La Comercial Internacional de Alimentación SA [1990] ECR I-4135), EU Law could have a broader reach, in more limited circumstances, as between private individuals.

[9] For a more detailed consideration, visit the excellent article "*Retained EU law: a guide for the perplexed*" maintained by Jack Williams (Monkton Chambers).

a. EU-derived domestic legislation (s.2): this includes any domestic primary or secondary legislation that implements EU obligations. Moreover, it covers domestic law that *relates to* EU law, and so would include provisions where the UK's transposition went beyond any minimum harmonisation prescribed by EU Directives. It is not controversial that this statute law is preserved and "*continues to have effect in domestic law on and after IP completion day*".

b. Direct EU legislation (s.3): this covers directly-effective EU legislation (not Directives).[10] It would—but for the changes discussed below—have included EU Regulations such as the Brussels recast Regulation and the Insolvency Regulation. It "*forms part of domestic law on and after IP completion day*".

c. Directly-effective EU rights (s.4): this includes Treaty rights, Directive rights and other rights, which satisfy the requirements of EU law for having direct effect. These "*continue on and after IP completion day to be recognised and available in domestic law*".

d. Retained case law, and retained General Principles of EU law (s.6): this includes EU and domestic case law relating to EU law, but only judgments or decisions handed down *before* IP completion day. The purpose, and restrictions on the use, of existing case law in the future development of the law, merits further discussion below.

10. All that 'retained EU law' is transposed into domestic law. It is worth highlighting that what is transposed is a snapshot of that corpus as it exists at a fixed point in time, *i.e.* on 31 December 2020.[11] Its ongoing development *after* that date will depend partly on subordinate legislation (*i.e.* the extent to which the UK government chooses to expressly disapply it), and partly on the direction to UK courts to "*have regard*" to developing EU jurisprudence.

11. Retained EU law is capable of being amended by subordinate legislation passed under section 8 of the Act within a period of 2 years after 31 December 2020, if the appropriate Minister considers that necessary to address any failure of retained EU law to operate effectively, or to address any other deficiency in EU law.

12. **The interpretation of retained EU law after 31 December 2020.** The effect of the Act

[10] Some legislation has been deliberately excluded. Thus, anything that the UK had decided not to keep during the transition period, and certain "*exempt EU instruments*" in **Schedule 6** (particular legislation for which the UK had negotiated exemptions and carve-outs while it was a Member State, such as protocol on the Schengen *acquis*.) are not transposed.

[11] **Act, ss.2(1),3(1),4(1), 6(3); Sch. 8, paras. 1-2**.

can be summarised as follows:

a. The principle of EU law supremacy no longer applies to *future* UK legislation. A domestic Act passed after 31 December 2020 will take precedence over any inconsistent, retained EU law (s.5(1)).[12]

b. The position is similar in relation to case law. In relation to *future* case law, a domestic court is not bound by a decision of the CJEU made after 31 December 2020, but "*may have regard*" to it, so far as relevant to any matter before the domestic court.[13] No court or tribunal can make a reference to the CJEU.[14]

c. The objective of the Act is that the meaning or effect of retained EU law is to be decided in accordance with any *retained* case law (of the CJEU or of domestic courts), and any retained general principles of EU law (s.6(3)). But the Act recognises that that retained case law will be "*modified by or under this Act or by other domestic law from time to time*" (s.6(7)).[15] The Supreme Court and the Court of Appeal are not bound by any retained case law but, in deciding whether to depart from it, must apply the same test as they would apply in deciding whether to depart from one of their own decisions.[16]

13. Thus, so far as retained EU law remains unmodified after 31 December 2020, its validity, meaning or effect is to be decided, so far as they are relevant to the question, in accordance with *existing* CJEU or domestic case law, and existing general principles of EU law. The principle of supremacy of EU law continues to apply in order to interpret any *existing* enactment. In this situation, at all levels below the Court of Appeal, the courts will continue to apply existing case law. The position is formally different in the Court of Appeal and the Supreme Court. All courts court may have regard to (but are not bound to follow) decisions of the CJEU made *after* 31 December 2020, so far as relevant to the issue in question.

14. By contrast, if domestic provision is made to modify any existing (pre 31 December 2020) enactment or rule of law, the relevance of existing case law will depend on the court's

[12] There is a wrinkle where the new, domestic legislation is *amending* legislation, which amends any enactment or rule of law passed or made before 31 December 2020. The principle of supremacy of EU law is then capable of applying "*if the application of the principle is consistent with the intention of the modification*" (**Act, s.5(3)**).
[13] **Act, s.6(1),(2)**.
[14] **Act, s.6(1)(b)**. There is, however, a power to obtain interpretative rulings of the Withdrawal Agreement (**Part 6**).
[15] Where there is a modification of retained law, the court will first need to consider "*the intention of the modifications*" in order to determine whether, consistently with those, any retained case law and any retained general principles of EU law remain relevant to determining the meaning and effect of the modified provision: **Act, s.6(3),(6)**.
[16] **Act, s.6(4)**; *European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020*, SI 2020/1525.

analysis of the purpose of the modification. Retained case law and existing general principles of EU law *might* still be considered, as relevant to the validity, meaning or effect of the amended provision, if doing so is consistent with the intention of the modifications. The principle of supremacy *might* still apply, depending on the same question.

15. That begs the question as to how the UK courts are likely to go about their function of "*having regard*" to future decisions of the CJEU, when interpreting and developing retained EU law. The discretion is remarkable for both its breadth and its lack of direction, and gave rise to expressions of concern by senior members of the judiciary who gave evidence to the House of Lords Constitution Select Committee. It is a familiar canon of statutory construction that, where a statute is passed in order *to give effect* to the UK's international obligations under a treaty, the statute should if possible be given a meaning that conforms to that treaty.[17] But section 6 of the Act is almost unique in requiring the UK courts to have regard to a system of jurisprudence that, by virtue of triggering of article 50 of the Lisbon Treaty, it has no international obligation to comply with. It has the potential to draw the courts into the arena of policy-making, which they are unlikely to take up.

16. Some cautious observations can be made:

    a. It is clear that future decisions under EU Directives cannot give rise to directly-enforceable rights if they are "*not of a kind recognised*" by the existing jurisprudence of the CJEU or domestic courts.[18] Any such newly-recognised enforceable right will not form part of "*retained EU law*" as that concept is defined in the Act.

    b. The best guidance can perhaps be drawn from the context of the provision within the scheme of the Act. The principal area of application will be in a situation where EU law has been retained and has not been modified by any statutory instrument (since, in that situation, the court is instructed to have regard to the purpose of the modification: see paras. 11 and 13 above). Consequently, the courts may well consider future EU case law to have persuasive effect as to the meaning of retained EU law, not least because of the need for consistency in the law.

[17] *Bennion on Statutory Interpretation* (7th ed, 2017), section 24.16.
[18] **Act, s.4(2)(b)**. Similar restrictions govern the use of EU general principles. They can no longer be used to ground a right of action (**Act, Sch. 1, para 3**), and the UK courts are not bound to recognise newly-developed general principles (**Act, Sch. 1, para. 2**).

D. The impact on civil litigation

17. I deal separately with: (i) the rules on establishing jurisdiction; (ii) the rules for determining the applicable law; (iii) service out to Member States of the EU; (iv) recognition and enforcement of judgments; and (v) other procedural questions. For each of those I summarise the main changes.

D1. Jurisdiction

18. **The position until 31 December 2020.** For historical reasons, the rules applicable to establish jurisdiction in civil and commercial matters were split between the 2007 Lugano Convention[19] and the EU Brussels (recast) Regulation.[20] The former applied to jurisdictional conflicts with courts in Norway, Iceland and Switzerland; the latter applied to jurisdictional conflicts between the EU Member States.

19. **What changes?** The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 2019/479) modify the position described in Part C above. In summary:

    a. the Brussels Recast Regulation and the Lugano Convention, are revoked from 1 January 2021 (regs. 82, 89), subject to transitional provisions; however, the UK has applied to join the Lugano Convention and, although the European Commission has initially sought to block the UK's accension to the Convention on 14 April 2021, the commission's decision is not final on behalf of the EU; any decision would need to be taken by a qualified majority of the European Council; this decision could be made over the next few weeks (i.e. late April or early May 2021); Switzerland and Iceland have already formally consented to the UK's accension to the Lugano Convention;

    b. no rules are made to replace Brussels Recast Regulation and the Lugano Convention, with the consequence that jurisdiction for Defendants in EU states is determined by the common law, together with various statutory provisions including, in particular, CPR Part 6 (notably Practice Direction 6B);

    c. for contractual claims, brought under contracts with *exclusive* jurisdiction clauses, the

[19] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 339, 21.12.2007
[20] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

UK is now a member of the 2005 Hague Convention, which ensures some limited reciprocity with EU Member States; and

d. new jurisdictional rules are introduced for consumer and employment contracts.[21]

20. **Analysis.** The previous rules on jurisdiction depended on reciprocity. They could not continue to operate in the absence of agreement from the EU. This explains why the previous regime has had to be revoked. The revocation of the Brussels Recast Regulation is subject to transitional provisions for claims begun (in the UK or an EU Member State) before 31 December 2020, and to related actions (whether or not begun before that date).[22]

21. The UK court's jurisdiction over a defendant in a Member State will, for the time being, be determined by the common law rules reflected in **CPR PD6B**. Jurisdiction is no longer tied to the Defendant's jurisdiction, but on an appropriate connecting factor between the claim and the UK as the forum. As has always been the case, those grounds provide a jurisdictional gateway but the court must still be satisfied that in all the circumstances (a) England is clearly or distinctly the appropriate forum for the trial of the dispute; and (b) the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.[23]

22. Special jurisdictional rules are retained for consumer contracts and for individual contracts of employment, which are more generous to the consumer/employee and provide them with a broader discretion as to where to initiate proceedings.[24]

23. Conversely, the EU Member States will continue to apply the recast Brussels Regulation. Note that:

a. That will not lead them to resolve jurisdictional conflicts in favour of UK courts, since the UK will no longer be a Member State.[25] The courts of each Member State will apply

[21] **2019 Regulations, reg. 26**, inserting new sections 15A-15E into the Civil Jurisdiction and Judgments Act 1982.
[22] **2019 Regulations, regs. 92-93**, giving effect to art. 67 of the Withdrawal Agreement. The references to "exit day" are corrected to mean "IP completion day" by the European Union (Withdrawal Agreement) Act 2020, **s.41 and Sch.5, para. 1**.
[23] VTB Capital Plc v. Nutritek International Corp [2012] 2 Lloyds Rep 313 (CA).
[24] The **2019 Regulations, reg. 26**, introduce new sections 15B to 15E of the Civil Jurisdiction and Judgments Act 1982.
[25] The regulation requires a connection (generally founded on the defendant's domicile) between the relevant proceedings and the territory of Member States (recital 13). **Art. 6** provides that, if the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall generally be determined by the law of that Member State.

its own national law to determine its own jurisdiction in such conflicts, unless there is a bilateral treaty in force between that state and the UK.

b. Conflicts between related proceedings will be dealt with by the Member State Court applying articles 33 and 34 of the recast Brussels Regulation.

    i. If proceedings are pending in the UK concerning the same parties and cause of action, the Member State court will have a discretion to stay its proceedings, but only if: (i) it is expected that the judgment obtained in the UK will be capable of recognition and enforcement in that Member State; and (ii) the stay is necessary for the proper administration of justice.

    ii. If the two sets of proceedings are not identical, but related, there is an additional requirement that it must be expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments.

c. There are weaknesses in those provisions, not least that they are discretionary and only apply where the EU proceedings are founded on particular forms of jurisdiction. In consequence, the EU court would not be bound to decline jurisdiction where, for example, those proceedings are brought in breach of an exclusive jurisdiction clause. Once the recast Brussels Regulation ceases to apply to the UK that may be dealt with by the availability of an anti-suit injunction.

24. The disapplication of the recast Brussels Regulation has a number of further consequences.

Choice of law clauses.

a. Because the UK is now a third country, Member States (still applying Brussels Recast) will not be bound to uphold contractual jurisdiction agreements in favour of the UK.[26] That has been mitigated, in a limited way, by the UK acceding independently to the 2005 Hague Convention on Choice of Court Agreements.[27] The Convention only

[26] **Recast Brussels Regulation, art. 25**, relates to agreements to confer jurisdiction on "the courts of a Member State".

[27] The Convention was ratified by the EU on 11 June 2015 and it came into force on 1 October 2015 for Member States (including the UK). The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) Regulations 2015 (SI 2015/1644), gave domestic effect to it by amending the Civil Jurisdiction and Judgments Act 1982. But the Convention had little practical significance because the recast Brussels Regulation would apply between Member States, and the only other signatories are Mexico, Montenegro and Singapore. The UK has acceded as a signatory in its own right as from 1 January 2021 and section 1(2) of the Private International

applies as between Contracting States and only applies to *exclusive* jurisdiction clauses (defined by art. 3 as agreements that designate the courts of *one* contracting state to the exclusion of the jurisdiction of any other court (Article 3(a)), so is of more limited effect. But it deals with both jurisdiction and the recognition and enforcement of judgments, and would substantially ensure that English exclusive jurisdiction clauses were upheld in the Member States.

b. Note that the Hague Convention only applies to choice of court agreements concluded *after* the date when the Convention entered into force in a Contracting State (art.16), and the UK and EU have taken divergent views on when the UK is treated as being a member.[28] The importance of that will dwindle as time progresses, but in the meantime it is worth recalling that it is the date of the choice of court agreement (not any underlying contract on which the cause of action is based) that is important. Article 3(d) treats that agreement as separate from any substantive contract in which it is contained. In respect of older (pre-accession) contracts, parties should consider entering into a supplementary choice of court agreement where the recognition and enforcement of UK judgments within any of the EU states is critical.

c. The Hague Convention does not apply to certain types of matters (as set out in art.2) including contracts with consumers, contracts of employment, Insolvency and analogous matters, carriage of passengers and goods matters, and many others.

Other restrictions

d. Some controversial restrictions on the powers of English courts, would in principle be removed. The unavailability of anti-suit injunctions to restrain proceedings in a Member State;[29] the inability of the UK Court to decline jurisdiction (which it would otherwise have had) on the basis that it is an inconvenient forum;[30] and the refusal of recognition of Member State judgments obtained in breach of a jurisdiction clause; are each now subject to reconsideration. Each of those restrictions had been held to be inconsistent

Law (Implementation of Agreements) Act 2020 now provides that the Convention shall have the force of law in the UK (by introducing a new s.3D to the 1982 Act).

[28] Domestic law provides that it is 1 October 2015: Private International Law (Implementation of Agreements) Act 2020, **Sch. 5, para. 7**. The EU is instead adopting the more recent date when the UK acceded to the Convention in its own right, *i.e.* January 2021.

[29] In Turner v. Grovit [2004] 3 WLR 1193 (CJEU) the Court held that such an injunction, which amounted to a review of the jurisdiction of another Member State court, was incompatible with the principle of mutual trust that underpinned the Brussels Convention. That reasoning was extended in Allianz SpA v. West Tankers Inc (Case C-185/07) [2009] AC 1138 (CJEU) to proceedings brought in breach of an arbitration agreement.

[30] Owusu v. Jackson [2005] 2 WLR 942 (CJEU)

with the system of mutual trust established under the recast Brussels Regulation.

25. As set out above in relation to jurisdiction, the UK has applied to join the Lugano Convention, but consent has not yet been obtained. In due course, jurisdictional rules for EU and EFTA Defendants may be determined under that Convention, which would ensure a similar regime providing for harmonised rules of jurisdiction, and recognition and enforcement of judgments, between the UK and the EU.

D2. Applicable law

26. **Until 31 December 2020**, rules determining the applicable law in cross-border situations are the Rome I (for contractual disputes) and Rome II (for non-contractual disputes) Regulations.[31]

27. **What changes?** The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations, SI 2019/834,[32] operates as follows:

    a. Rome I and Rome II are retained as "retained EU Law", with some amendments so that they operate effectively as domestic legislation;

    b. the Contracts (Applicable Law) Act 1990 (applying the Rome Convention) continues to apply to contracts entered into between 1 April 1991 and 16 December 2009.[33]

28. **Analysis.** Since the Rome Regulations are of universal application, *i.e.* they apply whether or not the identified law is that of a Member State, they do not create the same problems as the jurisdictional rules considered above. They are not based on reciprocity and are maintained after 31 December 2020. Consequently:

    a. For contracts made after 17 December 2009: The Rome I Regulation continues to apply. Its wording is amended only to make minor modifications to EU terminology (*i.e.* the reference to the UK as a Member State).

[31] Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) and Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II).
[32] These regulations were amended by the Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020 (SI 2020/1574) to ensure compatibility with art. 66 of the Withdrawal Agreement (requiring the application of Rome I to contracts concluded before the end of the transition period; and of Rome II for events, giving rise to damage, occurring before the end of the transition period).
[33] **Reg. 3**, making amendments to the Contracts (Applicable Law) Act 1990.

b. For contracts made after 1 April 1991 but before 17 December 2009: The 1980 Rome Convention continues to apply, by virtue of the Contracts (Applicable Law) Act 1990.

c. For non-contractual obligations: The Rome II Regulation continues to apply (with similar amendments).

29. One important consequence of the universal application of the Rome I Regulation is that EU Member States will continue to give effect to English governing law clauses. Member States ought to continue to give effect to English choice of law clauses.

D3. Effecting Service in Member States of the EU

30. **The position until 31 December 2020.** Two separate issues need to be considered. First, when permission will be necessary. As to that, CPR r.6.33 previously reflected the rules on exclusive and jurisdiction under the Lugano Convention and recast Brussels Regulation, and did not require permission for a claimant falling within them. Secondly, the mechanisms for effecting service in, and for procedural cooperation between, Member States. The EU had developed the Service Regulation (Reg. 1393/2007) and the Taking of Evidence Regulation (Reg. 1206/2001) in relation to the latter.

31. **What changes?** Changes to the rules permitting service have been made to CPR Part 6. In relation to the mechanisms for service in the EU, the Service Regulation and the Taking of Evidence Regulation have been revoked.[34]

32. **Analysis.** Permission to serve out is not required for the new jurisdictional rules for consumer and employment contracts (**CPR r.6.33(2)**). Nor is it required where each claim one that the court has power to determine under the 2005 Hague Convention and the defendant is a party to an exclusive choice of court agreement conferring jurisdiction on that court (**CPR r.6.33(2B)**).

33. A further amendment was introduced on 6 April 2021, to create a new **CPR r.6.33(2B)(b)**, to allow service out of the jurisdiction without the court's permission where the claim falls within a choice of court agreement in favour of the English courts.

34. The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in

[34] Service of Documents and Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provisions) (EU Exit) Regulations 2018 (SI 2018/1257).

Civil or Commercial Matters 1965 will become the central route for service in EU Member States (and is already applied for more than 60 contracting states). Its primary means of transmission is through a system of Central Authorities in each contracting state, which each being responsible for arranging for the service of documents in the State addressed. Unless the receiving state has objected, it also permits service by other means: (a) directly by diplomatic or consular officers of the state of origin (art.8); (b) by post (art. 10(a)); or (c) directly through the judicial officers or other competent persons of the state of destination (art. 10(b),(c)).[35]

35. The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970 is in force in the UK and in most Member States. It operates on the basis of letters of request issued by the judicial authorities (not arbitral tribunals) of a Contracting State in civil or commercial matters, to the central authority of another Contracting State, to obtain evidence intended for use in judicial proceedings, commenced or contemplated.

D4. Recognition and enforcement of judgments

36. **The position until 31 December 2020.** Chapter 3 of the recast Brussels Regulation governed the mutual recognition and enforcement of judgments given in a Member State, by or in another Member State. It contained a simple procedure for obtaining recognition (art. 37) with limited grounds for refusing recognition or enforcement (art. 45). Title III of the Lugano Convention contains a similar regime.

37. **What changes?** In summary:

a. as indicated above, the recast Brussels Regulation and the Lugano Convention are revoked and are not replaced (however, note the position may change if the UK joins the Lugano Convention);

b. under art. 67 of the Withdrawal Agreement, there are transitional provisions (applying the previous regime) for the recognition and enforcement of judgments given in legal proceedings *instituted* before the end of the transition period (whether the judgment is delivered before or after the end of the transition period);

c. for claims falling within the 2005 Hague Convention (i.e. those based on exclusive

[35] The Hague Convention Website maintains a register of objections received: https://www.hcch.net/en/instruments/conventions/specialised-sections/service.

jurisdiction clauses), that Convention provides a regime for recognition and enforcement that would apply to Contracting States;

d. otherwise, except where there is a bilateral agreement in force with particular countries, the recognition and enforcement of foreign judgments in the UK will be determined by common law rules.

38. **Analysis.** Following the revocation of the recast Brussels Regulation and the Lugano Convention, the rules by which a judgment *obtained in the EU/EEA* will be recognised here will revert: (i) in respect of those countries for which there are reciprocal, bilateral treaties in force (Austria, Belgium, France, Germany, Italy, Norway and the Netherlands), to those enacted under the Foreign Judgments (Reciprocal Enforcement) Act 1933 (however, note that there is some uncertainty as to application of some of these treaties because it is arguable that they ceased to apply when they were superseded by EU rules, unless there has been a more recent commitment to their continuation, so each should be checked carefully before reliance is placed upon them in order to avoid litigation regarding their application); and (ii) in respect of all remaining countries, to common law principles. Similarly, the recognition and enforcement of *English judgments* in the EU will depend on the national laws of the particular member state.

39. Recognition and enforcement of a foreign judgment in England under the common law rules would involve an action on the judgment to which CPR 74 would apply.

40. Judgments obtained in proceedings whose jurisdiction is founded on an exclusive jurisdiction clause falling within the 2005 Hague Convention, will be entitled to automatic recognition and enforcement in EU states. Article 9 limits the grounds on which recognition and enforcement might be refused. The enforcing court is precluded from reviewing the merits of the decision of the court of origin, and is bound by its findings of fact (art. 8).

D5. Other procedural questions

41. A series of other legislative instruments have been passed to revoke the continuation of numerous miscellaneous procedural measures, which were again thought to depend on reciprocity: the EU Enforcement Order, the EU Order for Payment, the EU Small Claims

Procedure, the EU Service Regulation and the Cross-Border Mediation Directive.[36]

E. Conclusion

42. The process of identifying the relevant law is now significantly more complex, especially with the range of different instruments involved, the greater use of international Conventions and the reliance on common law rules.

43. There may be further changes, particularly regarding jurisdiction, recognition and enforcement of judgments, if the UK joins the Lugano Convention. Make sure you are also up to date with the recent changes to the CPR.

44. It may be prudent to review clients' contracts involving counterparties based in the EU, particularly dispute resolution clauses and jurisdiction clauses. If there is a specific need or litigation risk in relation to a contract, it may be worth amending the jurisdiction clause in order to bring it within the Hague Convention.

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This article intends to state the law at the date indicated above. Although every effort is made to ensure accuracy, this article is not a substitute for legal advice.

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[36] Cross-Border Mediation (EU Directive) (EU Exit) Regulations 2019/469; European Enforcement Order, European Order for Payment and European Small Claims Procedure (Amendment etc.) (EU Exit) Regulations 2018/1311; Service of Documents and Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provisions) (EU Exit) Regulations 2018/1257