A "Hard Brexit" for Commercial Litigators, and the "Brave New World" of Civil Procedure

On 24 December 2020, the EU and the UK finally reached agreement on the terms of the "*EU-UK Trade and Cooperation Agreement*" (the "**Brexit Agreement**"). Its 1200 plus pages do not contain much that need detain litigators as it is entirely silent on matters relating to rules on service, jurisdiction, choice of law and enforcement of judgments. As a consequence, the existing network of EU law rules that practitioners in the EU have used for the last few decades have fallen away as regards litigation involving the UK, and potentially significant changes will result. For civil litigators, this represents a "*hard Brexit*" and the resulting patchwork of rules is complex and will require great care to navigate accurately.

This "*brave new world*" began on 1 January 2021, when the transitional period, that was in place following the UK's formal departure from the EU on 31 January 2020, expired. The transitional period effectively maintained the status quo of the network of EU rules. Some of those rules have since been absorbed into UK law, and will therefore -- in substance at least -- continue to apply, albeit without the previous EU apparatus. Others will apply for a run-off period, for example, in relation to proceedings issued prior to 31 December 2020, but many will be replaced by the Hague Convention or common law rules. We set out below an overview of some of the key changes for civil litigation.

Choice of Law

The EU adopted rules for choice of law in relation to contractual (Regulation (EC) No 593/2008 "**Rome I**") and non-contractual (Regulation (EC) No 864/2007 "**Rome II**") liability. Those rules continue to apply, post-Brexit, as the UK chose to incorporate Rome I and Rome II into domestic law as part of its Brexit arrangements, thereby electing to oblige the UK courts to apply those rules. As far as the courts of the remaining EU Member States are concerned, Rome I and Rome II continue to represent the law they must apply. The fact that the UK is no longer a member of the EU is irrelevant because Rome I and Rome II do not require that the applicable law is the law of an EU Member State. Consequently, as far as choice of law is concerned, Brexit will not bring about any substantive change.

Jurisdiction and Enforcement of Judgments

The EU also adopted rules on the jurisdiction and enforcement of judgments in civil and commercial matters which is governed by the Brussels Recast Regulation (Regulation (EU) No 1215/2012). The extent that these rules continue to apply depends on the date when proceedings were commenced.

<u>Proceedings commenced prior to 31 December 2020</u>: 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 were commenced before the end of the transition period, namely before 31 December 2020. As a result, the Brussels Recast Regulation, and the case law of the Court of Justice of the EU ("**CJEU**"), the bete-noire of the Brexiteers, will hold sway for many years to come.

<u>Proceedings commenced after 1 January 2021</u>: The Brussels Recast Regulation will not however apply in respect of proceedings commenced after the end of the transition period, namely from 1 January 2021. Instead, those rules are replaced by a combination of international agreement and pre-existing common law rules that have always applied to litigation that fell outside the scope of the Brussels Recast Regulation.

The UK has taken steps towards acceding to two international conventions in the field of civil judicial cooperation, the effect of which would be largely to plug the gap left by the Brussels Recast Regulation: the Lugano Convention and the Hague Convention.

The UK deposited an instrument of accession to the 2007 Lugano Convention on 8 April 2020. The Lugano Convention governs jurisdiction and the recognition and enforcement of judgments between the EU, Norway, Iceland and Switzerland. Although it is less complete than the Brussels Recast Regulation, if the UK is able to accede, it will allow "*business as usual*" as regards jurisdiction and the recognition and enforcement of judgments to a significant degree.

For the UK to be able to accede to the Lugano Convention, however, the unanimous approval of all contracting parties, including the EU, is required. Norway, Iceland and Switzerland have already issued statements of support of the UK's accession but the European Commission is yet to make any statement in this regard. Therefore, it cannot be taken for granted that the UK will eventually accede to Lugano.

As regards exclusive jurisdiction clauses, the UK has already acceded as an independent contracting state to the 2005 Hague Convention on Choice of Court Agreements (the "**2005 Convention**"). The UK was a contracting state by virtue of its membership of the EU, but from 1 January 2021 it will be an independent member for the first time. This Convention is designed to give effect to exclusive jurisdiction clauses, in particular by requiring that contracting states respect such clauses, and enforce judgments resulting from them. Its utility is, therefore, limited to exclusive jurisdiction clauses and, specifically, it is not understood as applying to asymmetrical clauses. Crucially, as far as enforcement is concerned, it does not apply to interim measures, such as freezing orders or injunctions.

One matter in relation to which there is some uncertainty concerns the application of the 2005 Convention to any exclusive jurisdiction clauses concluded between the 2005 Convention's entry into force on 1 October 2015 and 31 December 2020, the date on which the UK became a contracting party in its own right. The UK has passed regulations which provide that the UK will apply the 2005 Convention to any exclusive jurisdiction clauses concluded in that period but it is unclear if other countries will do the same. Importantly, it appears that the EU and certain EU Member States currently do not intend to do so.

In the event that the UK is not able to accede to the Lugano Convention, or if the matter is not within the scope of the 2005 convention, matters will fall back on bilateral treaties, and general principles of international comity. In practice, that is likely to mean that respect for, and enforcement of, clear jurisdiction agreements will be the norm, even where no binding commitment to do so exists. The UK Government is considering becoming a contracting party to the 2019 Hague Convention on the Recognition and Enforcement of Judgments, but even if it does become a contracting party, it will not come into effect in the UK in the short-term.

Service of Proceedings

The rules regarding service have already changed. The EU Service Regulation (Regulation (EU) No 1393/2007) applied to judicial and extrajudicial documents received by the "*receiving agency*" in the Member State within which service was to be effected before 31 December 2020. Thus, if proceedings were issued in, say, England on Christmas Eve and were to be served on a party in Germany, if the German receiving agency had not received those proceedings by 31 December 2020, the EU Service Regulation ceased to apply and the post-Brexit rules would have to be followed.

Those post-Brexit rules are those set out in the Hague Convention of 15 November 1965 on the service abroad of judicial and extra judicial documents in civil and commercial matters. Essentially, those rules require service through a central authority, which serves following the rules of that state.

Taking Evidence

The Taking of Evidence Regulation (Council Regulation (EC) No 1206/2001) sought to establish a framework for the swift and efficient transmission of requests for the taking of evidence in another EU Member State in support of either litigation or arbitration. It afforded three mechanisms to bring this about: (i) active assistance (the forum court requests a court in another EU Member State to take the evidence on its behalf); (ii) passive assistance (the forum court seeks permission from a court in another EU Member State to take evidence directly in that State); and (iii) dialogical assistance (the forum court conducts the evidence taking in the presence of a court in another EU Member State).

Requests received before 31 December 2020 are still governed by the Regulation. From 1 January 2021, however, recourse now has to be had to the Hague Convention of 18 March 1970 on taking of evidence abroad in civil or commercial matters, which means that for request to most EU Member States, it will be necessary to issue letters of request.

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If you have any questions about the issues addressed in this Client Alert, or if you would like a copy of any of the materials we reference, please do not hesitate to contact us:

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