EU-UK FUTURE RELATIONSHIP: PREPARING FOR THE END OF TRANSITION
FAQS FOR BARRISTERS

Part III Choice of Law, Jurisdiction, Recognition and Enforcement: the rules governing Cross-border Civil Claims, post-transition

Introduction: State of Play EU-UK negotiations

1. Following the departure of the UK from the EU[1] on 31 January 2020, and in accordance with the terms of the binding withdrawal agreement **2019** (WA) we are now in the latter stages of the Transition Period provided for in the WA during which the EU and UK are negotiating the terms of their future relationship – the Future Partnership Agreement (FPA). There having been no UK request to extend it, the transition period will end at 11 pm GMT on Thursday 31 December 2020. As things currently stand, all UK rights and obligations under EU law (which were temporarily extended during the Transition Period) will end[2], with the UK becoming a "third country" in the full sense.

2. The current expectation is that there will be no, or at best a limited, FPA in place to replace /complement the Withdrawal Agreement by 31 December 2020. At the time of this document going to press, there is mention in the context of the continuing EU-UK negotiations that certain parts of any FPA might be subject to review after an agreed period of time. That would allow the parties to agree terms on a minimum basis in order to get any deal 'over the line' before the end of the transition period, but on the clear understanding that such terms could be reviewed thereafter. Whether or not such an interim solution is found, the expectation is that any imminent FPA will not provide for future EU-UK civil judicial cooperation adequately or at all.

Why does this matter?

[1] Note that, as the UK was a Contracting Party to the European Economic Area (EEA) Agreement (between the three EFTA States, Iceland, Liechtenstein and Norway and the EU) by virtue of its EU membership, 31 January 2020 also marked its departure from the EEA.

[2] The WA does preserve certain limited EU rights and obligations on and in the UK. Where relevant, these are expressly referred to in this paper.

A quick recap of the benefits of the EU Civil justice acquis

3. On 1 May 1999, the Treaty of Amsterdam entered into force. From that date, cross-border judicial cooperation in civil matters (CJC), particularly where seen as linked to the completion of the internal market, moved from intergovernmental to "Community" competence. Since then, the EU has adopted a lot of binding legislation in the civil justice field, for the most part focussed on facilitating intra-EU litigation and access to justice, rather than any attempt at harmonising substantive civil law itself. Thus, the cornerstone EU CJC instruments[3] govern service of proceedings, choice of law, jurisdiction, recognition and enforcement of judgments and decisions as between the Member States. These have made cross-border litigation simpler and more predictable, making service out of the jurisdiction easier, reducing the risk of the race to court, or of having competing or parallel proceedings in different jurisdictions leading to incompatible rulings. They also ensure that judgments are automatically recognised and enforced in other Member States and indeed, that there are assets against which to enforce them.

4. Over time, these overarching conflict of law rules have been supplemented by more targeted measures in areas like family law, insolvency and succession. In addition, the EU has adopted cross-border procedural measures, such as the European Small Claims Procedure, the European Enforcement Order, or for those needing to extend the protection of an urgent personal injunction, the European Protection Order.

5. UK departure from the EU means that these measures will no longer apply between the UK and the EU Member States. The terms of the Withdrawal Agreement agreed last year extended the UK's rights and obligations under EU law to the end of the transition period, the Civil justice acquis included. That will end on 31 December 2020.

6. In the absence of formal EU-UK arrangements on CJC in place by year's end, we are bracing for a cliff-edge on 31 December 2020 insofar as UK claims involve defendants from the EEA[4]. As things stand, that means an immediate fall back to national law, though, (as explained below) as of 1 January 2021, that body of EU retained law will incorporate existing EU legislation where appropriate e.g. in the cases of Rome I and II , as well as new Statutory Instruments (SIs) replicating other elements of EU legislation within the domestic sphere. Beyond such domestic provisions, this area of law will be governed by any existing international conventions to which the UK and the other relevant jurisdiction[5] is already party. But there will be gaps, bringing a risk of both litigation opportunism, legal uncertainty and chaos. For example::

- There will be greater opportunity for Defendants to contest service out and jurisdiction, on the basis of *forum non conveniens*.

[3] Full references and links are provided in the annotated extract of the Withdrawal Agreement, in Annex 1 to this paper.

[4] The position as regards Defendants domiciled in the UK and Defendants domiciled in non-EU States will largely remain as before.

[5] There are one or two bi-lateral arrangements that may be revived, but they are of limited application and scope. For example, see: The Amendment Agreement on the continued application of our 1961 Bilateral with Norway

- Use of anti-suit injunctions to deprive a court of jurisdiction will likely increase.
- In the absence of agreed jurisdiction rules, two courts, i.e. in the UK and an EEA Member State, may consider themselves competent to hear a given case, potentially leading to parallel proceedings and irreconcilable judgments.
- Or it may be that no court has jurisdiction to hear the case.
- Exclusive choice of court agreements may help, but only for certain categories of cases and, in some cases, cannot override domestic provisions (such as consumer protection and employment law) or mandatory provisions of *ordre public*.
- Recognition and enforcement will become more expensive and tortuous (unless there is an existing bilateral convention between the UK and the relevant jurisdiction – see more below), if indeed possible at all.

Thus, justice may be delayed, made more complex and expensive, and in some cases, denied. The legal uncertainty does however, mean that many clients are seeking advice and there is likely to be a surge in litigation, at least in the short to medium term.

7. For practitioners to be able to advise their clients through this uncertainty, an understanding, within the limits of what is known, of what rules will apply and when is essential. For cases in which proceedings have already been launched, the situation will be reasonably clear – see Phase I below. For future cases on which you may already be advising and in which proceedings have not yet been issued, you should seek a thorough understanding of the strategic interests of your client, and the impact of say, issuing proceedings this year, or at different moments thereafter. Moreover, in anticipation of these changes, your clients' interests may be best served by, say, bringing forward the signature of a contract, or changing its terms, for example, to include an exclusive court agreement or arbitration clause and/or choice of law clause. Whilst there is no substitute for practitioners informing themselves thoroughly, the rest of this paper seeks to assist you in that exercise by setting out a framework for the unfolding scenario we now expect to see and providing links to other useful sources.

The approach in this paper

8. In the absence of a solution for CJC in any EU-UK agreement ratified by the end of this year, the rules on service out, jurisdiction, recognition and enforcement[6] of court decisions as between the UK and EEA States) could be changing three times. Accordingly, the advice below examines the law as we expect it to stand during three different phases, starting from now and likely unfolding over the next 12 months or so, though it could be both shorter and longer:

Phase I The Transition period - The Withdrawal Agreement extends the CJC acquis to 31 December 2020. Specifically, cases pending before that date will benefit from the application of the CJC acquis thereafter. See Phase I below.

Phase II The period from 1 January 2021 until new international instruments and/or an

[6] As regards applicable law (see below), Rome I/ II become part of domestic law from 1 January 2021. The changes will thus be minimal, and there is little expectation of any major change thereafter. That said, we are aware that the European Commission is undertaking a review of Rome II - see: https://www.biicl.org/projects/com-study-on-the-rome-ii-regulation.

EU-UK agreement[7] on CJC are in place. Proceedings issued, claims arising from events occurring, during this period, will be governed by national law and any applicable existing international instruments – see Phase II below.

Phase III The period following ratification of a future EU-UK CJC agreement, and/ or comprehensive international instruments – see Phase III below.

9. It will be immediately apparent that over the next few years courts will be faced with the added complexity of dealing with cases which, whilst apparently similar, are nonetheless subject to different CJC rules depending on when the cause of action occurred, or proceedings were issued. Whilst the judiciary is itself being specifically prepared for this, the Bar will also have a crucial role to play in assisting the courts and by extension, the administration of justice, through this legal minefield.

Phase I. TRANSITION PERIOD – UP TO 23H00 GMT 31 DECEMBER 2020

The Withdrawal Agreement 2019

10. **Articles 66 – 69[8] of the WA** provide specific protection for cases between parties in the UK and an EU Member State which are pending before 31 December 2020.

Applicable law in contractual and non-contractual matters

11. **Article 66 WA** effectively preserves the application of the Rome I regulation, on choice of law in contractual obligations, in the UK, *for contracts concluded before the end of the transition period*. Ditto for the law applicable to non-contractual obligations (**Rome II**) (OJ L 199, 31.7.2007, p. 40) which shall apply in respect of events giving rise to damage, where *such events occurred before the end of the transition period*.

Jurisdiction, recognition and enforcement of judicial decisions, and related cooperation between central authorities

12. **Article 67(1) WA** preserves the application of the *jurisdiction* provisions of:

- **Brussels I recast** (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters);
- **Brussels IIa",** concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility;
- **The Maintenance Regulation**" on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations
- As well as of the **General Data Protection Regulation "GDPR**") regard the processing of personal data and on the free movement of such data

[7] In the short to medium term however, in light of the narrow ambition of, inter alia, the Political Declaration on the Framework for the Future Relationship 2019 (see more at para 33 below), there is no expectation that any EU-UK level agreement would cover more ground than the Lugano Convention 2007 and some family law initiatives.

[8] The specific provisions are reproduced in full annotated form in Annex I, including links to relevant EU legislation.

"in the UK, as well as in the Member States in situations involving the UK, in respect of *legal proceedings instituted before the end of the transition period* and in respect of proceedings or actions that are *related to such legal proceedings"*

13. Thus, to take a family law[9] example, provided that divorce, children, or maintenance claims have been commenced before the end of the year, jurisdiction and prior forum will remain even though the proceedings are concluded in or after 2021. It will *not* be possible for identical proceedings to be commenced in another country after 1 January 2021 and gain priority or secure jurisdiction.

14. **Article 67 (2)** extends the protection for pending cases of the provisions on *recognition and enforcement* in the above measures, *as well for small claims, European Protection Orders, etc and in the area of insolvency.* Thus, provided legal proceedings are commenced before the end of 2020, recognition and enforcement in the UK or the EU as applicable will continue as now.

Mutual Assistance/ Procedural Measures – Articles 68 & 69 WA

15. Articles 68 and 69 (again reproduced in full in Annex 1) extend the protection of the WA to pending cases involving EU mutual assistance measures, such as on the taking of evidence, service of documents, provision of legal aid, etc as well as those utilising an EU civil procedural measure, such as the Mediation Directive. To benefit from this, it would appear that the specific procedural provisions need to be invoked by the end of December – e.g. the claim under the Small Claims procedure itself must be instituted.

Supplementary Questions

16. **Does "proceedings instituted" mean issued or served**?

Whilst there is no definitive interpretation in EU primary or secondary law, it is widely agreed both on the EU and UK side, that issuance of proceedings suffices. The same phrase is used in other EU Regulations/ versions of the Brussels Convention whenever one superseded another; and would be consistent with when an English court is seised under Art 32 of Brussels I recast.

17. **Which proceedings must be issued?**

In order to benefit from the provisions of Article 67(2) on recognition and enforcement, is it sufficient for the *original proceedings to have been launched* prior to the end of this year, or is it necessary to launch separate proceedings for recognition and enforcement in that timescale? This question was answered on 27 August 2020 when the Commission published a practical guide for stakeholders on the differing rules that will apply on jurisdiction, recognition and enforcement and applicable law, as well as rules specific to certain practice areas, in EU-UK civil proceedings launched both before, and after, the end of the transition period **(Commission Preparedness Notice[10])**. This notice replaced the earlier one from January 2019 plus subsequent Q&A. We

[9] Specific advice on the impact of the end of transition on family law can be found on the Bar's Brexit webpage at: https://www.barcouncil.org.uk/uploads/assets/6e9e0297-34dd-4195-8a5f7f642f2bd3b8/Brexit-and-Family-Law-papers.pdf

[10] See: https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/civil_justice_en.pdf

will return to it below, but for present purposes, the Commission notice clarifies that launch of the original proceedings is sufficient. That said, there are likely to be grey areas e.g. where new parties are brought in or an amendment is made to an existing claim after 1 January 2021.

18. **ACTION pre-31 December 2020, 23h00 GMT**:

- Any practitioner who is advising on or representing parties in a civil or commercial case which would ordinarily have relied on the provisions of the EU Civil Justice acquis on choice of law, jurisdiction, recognition and enforcement, or would have invoked any of the specific mutual assistance or procedural measures contained therein, should read the provisions of Articles 66 – 68 WA as well as the interpretative advice in the Commission Preparedness Notice (see link above) and the UK links provided in Annex 2 very carefully.
- As regards choice of law, the CJC rules will continue to apply to contracts concluded, or tortious events occurring, before the end of the transition period. This is so even if the proceedings themselves are commenced after the end of the transition period.
- However, if it is in the best interest of your client that their case benefit from any of the other provisions of the existing CJC under the WA, as outlined above, then the relevant proceedings should be *issued* prior to 11pm GMT on 31 December 2020.
- Other strategic assessments – even if your client's case does not fall within those that can be grandfathered under the terms of the WA itself, there may be other decisions and actions to be taken in their best interests before year's end. Practitioners should consider now the impact of the different rules that will govern CJC in the different phases as outlined below and adapt their advice accordingly.

Phase II FROM 1 JANUARY 2021 UNTIL *NEW* INTERNATIONAL INSTRUMENTS and/ or an EU-UK CJC AGREEMENT ARE IN PLACE

19. Parties to civil proceedings involving the UK and EU Member State(s) in the period immediately post-31 December 2020 will be faced with a patchwork of domestic and international jurisdiction and PIL rules governing their case. We again direct you to the Commission's Preparedness Notice, link above, which examines various post transition scenario, detailing existing international conventions, to which both the UK and the EU or (some) Member States are (already) signatories, and the circumstances in which they, or national law, would apply. We explore key elements below. It remains to be seen how long this "interim" period will last, and indeed what will bring it to an end – an EU-UK CJC agreement[11], and/or the entry into force as between the parties of international conventions that cover the ground, or some middle-ground solution, perhaps involving ratification of more limited international conventions, such as on service and evidence, which will provide partial solutions. Some of these possibilities are explored further under Phase III below.

[11] The level of ambition for an EU-UK CJC agreement is low however and is unlikely to extend to anything beyond the Lugano Convention 2007 and some family law rules for the foreseeable future. See more below.

Applicable law in contractual and non-contractual matters

20. This is the one area where the end of transition will effect minimal change in practice. The UK has in fact enacted the salient provisions of both the Rome I and Rome II regulations into retained EU law so they will continue to apply seamlessly in English courts (see Annex 2 for details). Moreover, unlike the other key EU CJC measures, both these regulations apply in the EU Member States regardless of where the litigation is taking place and even if the choice of law is not that of an EU Member State.

Jurisdiction, recognition and enforcement of judicial decisions

21. Here, the loss of the EU acquis will be most keenly and immediately felt post-transition. The most significant[12] of the EU measures that will be lost is **Brussels I recast**, governing jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Unlike for Rome I and II above, save for consumer and employment matters[13], Brussels I recast has not been enacted as retained EU law in the UK as it would have led to automatic recognition and enforcement of EU judgments in the territory without reciprocity in EU courts. Absent that instrument, we drop back to existing international conventions in force from 1 January 2021 as between the UK and the EU Member States (on which, see more below), and/ or domestic rules[14].

The position in English law from 1 January 2021

22. HMG has tabled a raft of Statutory Instruments (SIs) defaulting to English common law PIL rules in all areas not covered by existing international conventions. The vast majority of these SIs was passed in preparation for 'no deal' in 2018/2019, and two more are due for adoption by year's end.

These are set to come into effect on 1 January 2021. The most important of these in the civil and commercial field is the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (CJAA). Its effects are largely administrative, but in one major respect it bucks the trend and does not default to the common law: the CJAA will preserve the protection afforded by Brussels I recast to the "weaker party" – i.e. UK-domiciled consumers and employees, and the

[12] There are several other important but more focussed measures that will also be lost, such as the (recast) Insolvency Regulation 2015/848, for which there is no obvious fallback, the UNCITRAL Model Law not applying to foreign judgments or nor having been widely ratified by other Member States. And see footnote 9 above for a link to our Family law advice.

[13] The relevant provisions regarding special jurisdiction for consumer contracts and employment disputes have been carried across in the new ss. 15B to 15E of the Civil Jurisdiction and Judgments Act 1982. This means that consumers and employees will be able to sue in the courts of their habitual residence (regardless of any contractual choice of law clause) and can only be sued in their home courts. Those provisions cannot be derogated from by contract, save in limited circumstances.

[14] In some areas, there may not be material differences between the rules of English common law and the RBR – for instance, in the absence of a contractual choice of law clause, jurisdiction for contractual claims is conferred on the courts where the place of performance of the contractual obligations; for tortious claims, where the damage was suffered. However, in mass torts like competition law or data breaches, there may be multiple courts having parallel jurisdiction in respect of the same conduct and no clear rules to determine which court should take priority. There may also be different approaches to the scope of jurisdiction clauses and whether they extend to particular types of claims such as competition law infringements which were not within the parties' contemplation.

consequential provisions, rendering many or most English jurisdiction clauses in such contracts ineffective. Links to all relevant SIs, plus related guidance, can be found in Annex 2 to this paper.

So, what does default to domestic conflict of law rules look like in the area of civil jurisdiction and judgments?

23. A drop back to domestic conflict of law rules and applicable international conventions could have a variety of immediate consequences for proceedings brought after 1 January 2021, or in respect of claims arising from contracts concluded, or tortious events occurring, thereafter. The most salient ones include:

- With the exception of those protected by Hague 2005 (see below) EEA Courts will no longer be obliged to respect jurisdiction clauses in favour of UK courts. There will be no protection from the so-called "Italian Torpedo" – launching proceedings in another jurisdiction as a delaying tactic. Likewise, UK claimants will be able to launch proceedings to seise jurisdiction before the English courts and/or seek an anti-suit injunction to pre-empt proceedings from being issued in EEA Courts that would otherwise have parallel jurisdiction.
- The lis pendens, court first seised rule will no longer apply so courts will not be obliged to decline or stay proceedings, which could lead to parallel proceedings (whether between the same parties or related proceedings) and indeed irreconcilable judgments.
- Again, with the exception of cases falling within Hague 2005, in England & Wales, Common law jurisdiction rules will apply. Thus we will see more applications for service out of the jurisdiction with permission. This could also lead to more Forum non conveniens disputes in service out cases, which, whilst not complex, are costly and cumbersome to resolve.
- We will no longer be bound by the Court of Justice of the EU (CJEU) ruling in *Turner v Grovit* case (extended in *West Tankers*), that an anti-suit injunction prohibiting a party from bringing or continuing proceedings in the court of another EU Member State is an inadmissible interference with the jurisdiction of that court, and runs contrary to the principles underpinning Brussels I.
- Most importantly, we will lose the automatic right to recognition and enforcement of English judgments in EEA courts (and vice versa). That means that those questions will fall to be determined in accordance with the national law of the particular Member State. Parties will need to obtain local advice on both the substantive and procedural criteria. (There are a number of old bi-lateral treaties[15] between the UK and EEA Member States which may still be available, though views differ on that. In any event, they are of limited scope and value. Practitioners are advised to double check re the jurisdiction concerned.)

24. All of this adds up to greater legal uncertainty, additional cost and delay. As a result, some predict moves away from English courts, or at least a rise in recourse to arbitration rather than litigation.

[15] See e.g. The Amendment Agreement on the continued application of our 1961 Bilateral with Norway

Are there existing international PIL Conventions that may apply from 1 January 2021?

25. As mentioned above, the only other PIL provisions that could apply as 1 January 2021 are existing international conventions to which both the UK and the EU are parties as at that date. To prepare its side, in February 2020, HMG introduced to Parliament the **Private International Law (Implementation of Agreements) Bill** (PIL Bill). It is a short, largely administrative instrument, which will implement the Hague Conventions of 1996, 2005 and 2007[16] into national law with immediate effect and provide for the implementation of other international agreements (including Lugano) on private international law going forward. As at the time of writing, the PIL Bill is awaiting royal assent and is expected to be on the statute books by year's end. If so, the issue then becomes, which Conventions might be available?

How about the Lugano Convention 2007?

26. The Lugano Convention 2007 is the best existing international fallback to Brussels I recast. It governs jurisdiction and the enforcement of judgments in civil and commercial judgments, including maintenance obligations[17], between the EU and European Free Trade Association (EFTA) states — Switzerland, Iceland, and Norway. It also includes jurisdiction rules which protect weaker parties (consumers, insured parties or employees). Dating from 2007, it is modelled on the Brussels I regulation 2001, and thus lacks the improvements introduced by the Recast, such as the abolition of exequatur. In addition, whilst it does contain lis pendens rules, it lacks the anti-torpedo rule (introduced in the recast Regulation) to deal with proceedings commenced in the courts of another Contracting State in breach of an English exclusive jurisdiction clause. Nonetheless, it is the closest existing substitute to Brussels I recast. Unfortunately, it will not be in place as between the EU and UK by 1 January 2021.

Why isn't Lugano available?

UK accession to Lugano

27. As for all other international conventions to which the EU is a party, the UK is a signatory to the Lugano Convention by extension of its rights and obligations as an EU Member State under the WA, up to 11pm GMT, 31 December, but not beyond. For it to apply thereafter, the UK needs to accede as an independent state. Accession is a four-step process:

1. Requesting to join (Article 72(1), Lugano Convention). The UK requested accession on 8 April 2020[18].

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[16] 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children
2005 Hague Convention on Choice of Court Agreements
2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance

[17] The Lugano Convention applies to maintenance orders, but only to a limited extent as the EU and Norway have ratified the 2007 Hague Convention on Maintenance, which takes precedence over the Lugano Convention (Article 67). However, the 2007 Hague Convention has not been ratified by Switzerland and Iceland, so Lugano would help with the enforcement of maintenance claims in those jurisdictions.

[18] And laid the Treaty before Parliament in November 2020 – see: https://www.gov.uk/government/publications/convention-on-jurisdiction-and-the-recognition-and-enforcement-of-judgments-in-civil-and-commercial-matters-and-amendments-to-the-convention-of-20112

2. Unanimous approval by the current contracting parties: the EU (including Denmark, which is a contracting state in its own right[19]) and the EFTA states (Article 72(3)).
3. Depositing the instrument of accession by the UK, as the party requesting to join (Article 73(4), 72(1)).
4. Entry into force on the first day of the third month following the deposit of its instrument of accession. During that interval, a contracting state that previously approved the UK's accession may still object. If a contracting state objects, the Convention will not enter into force between the UK and that party (Article 72(4)).

Thus, for UK Lugano accession to have been effective on 1 January 2021, the contracting states, most especially the EU, would have had to have given their approval by 1 October 2020 at the very latest. Instead, as at late-November, we still await that approval.

28. There were rumours that, if an EU-UK agreement on an FTA were agreed by now, there might have been a way to conclude an implementation or phasing-in of the Lugano Convention in 2021, possibly avoiding the otherwise inevitable gap until it applies to UK-EU Member State proceedings. The thinking was that since the EU has exclusive competence in the area, it could make decisions quickly. However, given the lateness of the hour, and the known difficulties that have handicapped progress in the negotiations, we are not expecting any such solution. Consequently, practitioners should assume that Lugano will not apply as of 1 January 2021[20].

Alternative, limited solution: Hague Choice of Court Agreements Convention 2005

29. As it turns out therefore, Hague 2005 is the only existing international[21] PIL[22] Convention outside the family law field [23] to which the UK will be a party in its own right as of 1 January 2021, having successfully submitted an instrument of accession in September 2020.

30. Unfortunately, Hague 2005 is a much narrower instrument than Brussels I recast or Lugano. It only covers *exclusive* choice of court agreements in civil and commercial matters and excludes, *inter alia* consumer and employment contracts, IP disputes, personal injury cases and competition claims. Moreover, in the EU, it largely excludes insurance by virtue of a declaration made at the time of ratification (which it seems the UK is likely to replicate): https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1044&disp=resdn

31. For matters that *are* covered however, Hague 2005 does offer legal certainty: it obliges the contracting parties to decline jurisdiction in the face of a relevant English *exclusive* jurisdiction clause, *and* to recognise and enforce judgments from the chosen courts.

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[19] Because of its exclusion from the Treaty basis pursuant to which the Regulation was concluded.

[20] As noted above, the bilateral arrangement with Norway has been revived and amended to address the gap period: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/932354/CS_Norway_2.2020_UK_Norway_Agreement_Enforcement_Judgement_Civil_Matters.pdf

[21] The other signatories are the EU and its Member States plus Mexico, Montenegro and Singapore.

[22] There are e.g. the Hague Service and Evidence Conventions, to which the UK is already party and which were superseded by EU instruments whilst the UK was in the EU. Their application as between the UK and EU will revive.

[23] Hague 1996 and 2007 being the two family law Conventions. See footnote 9 above and links to family law papers.

Application to exclusive jurisdiction clauses concluded between 1.10. 2015 and 31.12.2020?

32. The EU's Preparedness Notice (see above) takes the position that Hague 2005 only applies to Exclusive Jurisdiction Clauses in contracts concluded after the Convention comes into force with the UK as an independent Contracting State i.e. as of 1 January 2021. The UK's approach, as set out in the PIL Bill (see para 25 above) and the Hague Choice of Courts Regulations, is that it would apply to clauses dating back to the EU's ratification of Hague 2005 on 1 October 2015, at which time of course, the UK was still an EU Member State and thus a party qua EU. In advising in this area therefore, practitioners should be aware that there is a significant risk that EEA courts will refuse to stay proceedings in favour of an English EJC concluded after 1 October 2015 but before 1 January 2021. It is widely expected that this issue will come before the CJEU soon.

ACTION

31. Clients often base strategic decisions on the advice they receive from their lawyers: when and where to sign a contract; whether or not to include a choice of law or court clause or recourse to arbitration; when and where to launch proceedings, etc. Having assessed the risk of different options, EJCs are frequently chosen as a means to avoid complications and increase legal certainty. The changes we now face make these assessments more complex than before, not least because the timings will have such a marked effect on the rules that will then apply. It may be for example, that businesses with existing choice of court agreements would need to rewrite (that is re-date) the agreements to ensure that they are re-affirmed after the UK becomes a party to Hague 2005 in its own right, in order to avoid the uncertainty outlined in the preceding paragraph, or at least, take into account the national laws of the jurisdictions in question.

32. Practitioners should therefore consider these possible permutations with their clients and adapt their advice accordingly. If in a given case, it is/was not possible to avail of the grandfathering protection of Articles 66-69 WA[24] and Hague 2005 does not assist (e.g. due to timing, or the choice of court agreement is not exclusive), then there is no alternative in the short term but to familiarise yourself with the domestic rules governing jurisdiction, recognition and enforcement in the different jurisdictions that are relevant to your client's case and to advise them of the variables to which their case will now be exposed, including but not limited to those outlined in this paper.

[24] It is worth reemphasising that the WA does not grandfather existing English jurisdiction clauses unless the proceedings are commenced before 31 Dec 2020. The UK's request for a general grandfathering of all historic English jurisdiction clauses that would hitherto have been valid under the Regulation was, we understand, rejected.

Phase III LOOKING AHEAD: A FUTURE EU-UK CJC AGREEMENT, AND/ OR UK RATIFICATION OF COMPREHENSIVE INTERNATIONAL INSTRUMENTS

What might we expect from the future EU-UK relationship?

The Bar's original ambition

33. The Bar Council originally sought a separate EU-UK agreement[25] for CJC in which much of the existing EU civil justice acquis would be preserved on a reciprocal basis. The intergovernmental origins of many of the key measures mean that they lend themselves well to such a stand-alone arrangement without the full EU acquis in support. However, the UK's red lines, in particular regarding the jurisdiction of the CJEU, proved to be a challenge. Moreover, the EU also took the view that CJC is a Single Market issue, rather than a horizontal access to justice / rule of law issue as we would have it. And since the UK is leaving the Single Market, it cannot cherry pick the best bits. So a comprehensive EU-UK solution, retaining on a reciprocal basis the sort of judicial cooperation in the civil justice area that we have grown accustomed to, is off the table, certainly for the foreseeable future. This lack of ambition in the civil justice field, with the limited exception of family law, has been reflected in successive European Council Mandates and in the non-binding Political Declaration setting out the Framework for the Future Relationship, which merely states that "The Parties will explore options for judicial cooperation in matrimonial, parental responsibility and other related matters."

The EU's underlying attitude

34. Against that background, and further informed by the intervening months of tortuous negotiations and political grandstanding, the EU's view has, if anything, hardened. It sees damage to legal services and harm suffered by UK consumers and businesses due to the loss of the CJC acquis to be collateral losses flowing from Brexit. With all the immediate trade and infrastructure-related challenges that the end of transition will bring, the EU seems to be content to wait to see how bad the reality of a lack of formal judicial cooperation is, and in particular, whether *EU* citizens and businesses suffer as a result of disputed jurisdiction, and the difficulties in recognising and enforcing EU judgments and orders in the UK.

35. It is perhaps noteworthy that the Commission Preparedness Notice from August this year, to which your attention is drawn at several points above, stops short of exploring anything speculative, including the possible implications of future accession e.g. by the UK to Lugano 2007, or the UK and EU to the Hague Judgments Convention. What follows below therefore, is informed guesswork for now.

2021 UK accession to Lugano?

36. The advantages of the Lugano Convention 2007 are detailed at paragraph 26 above. We know that the EU has so far withheld its consent to UK accession, though the other Contracting

[25] See: https://www.barcouncil.org.uk/uploads/assets/bc021f2c-06c1-4d21-9a1b6d3bb89375a9/barofenglandandwalesbrexitjudicialcooperationproposaljuly2018.pdf

States are clearly supportive[26]. The Bar, Law Society and others have been lobbying to try to muster support among EU stakeholders for UK Lugano accession, pointing to the fact that Lugano is a stand-alone Convention, which does not give access to a wider range of EU instruments on private international law, and nor is it linked with the EEA or Swiss arrangements with the EU. Furthermore, as it is already in operation between the EU and the EFTA states, it provides existing and known solutions on jurisdiction, recognition and enforcement of judgments, which would bring much-needed legal certainty for business and consumers on both sides.

37. The best case scenario would be that the EU consents to UK Lugano accession before the end of this year, from which moment, as described at paragraph 27 above, there would be a three month delay before accession could occur. So, at the time of writing, UK accession on 1 March 2021 is the best we could hope for, and that date will slip the longer the EU withholds its consent. The Bar and other UK legal stakeholders will continue our work in support of this important step.

We have already mentioned "the Hague Judgments Convention". What about that?

A quick overview of the Hague Judgments Convention

38. In July 2019 the Hague Conference completed work on the long-awaited **Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019** (hereafter "Hague 19") (see: https://bit.ly/2ZDpxUw). Hague 19 is a limited version of Brussels I recast, with no jurisdiction provisions, but with potentially worldwide application. A few key characteristics*:*

- The exceptions to the scope of application of the Convention include those in Brussels I Recast 2015/2012 (arbitration, insolvency, maintenance obligations etc) but also go further into more technical fields e.g. IP, defamation, carriage of passengers and goods, antitrust…
- Habitual residence rather than domicile is key.
- The Convention does not apply to judgments handed down prior to its entry into force in *both* the State of origin and the requested state.
- Unlike Brussels I Recast, Recognition and enforcement is not automatic - Exequatur is needed, and unless defined by the Convention, is governed by the law of the requested state.
- The Convention has a give way clause, by which it cedes to other more specific treaty arrangements entered into at any time.
- It also allows contracting states to impose a blanket refusal to recognise judgments coming from another by making a declaration to that effect, usually at the time of ratification.

39. Hague 19 is not yet in force. As of now there are 2 signatories: Ukraine and Uruguay. The European Commission has spent much of this past year considering whether or not the EU itself

[26] https://www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007

should accede to it. A recent EC public consultation posing just that question appears to have met with a positive response.

40. Commentators are quick to point out that the EU only acceded to Hague 2005 in October 2015 (see above) and therefore that EU accession to Hague 19 is unlikely to be rapid. Against that is the argument that it might suit the EU and its Member States to have Hague 19 in place to govern litigation with the UK as an alternative to Lugano. It is immediately apparent that it offers much less legal certainty than does Lugano, but for those on the EU side seeing Brexit as an opportunity to gain competitive advantage in the civil and commercial field, that might be a positive. The lack of rules governing jurisdiction is an obvious further disadvantage, though there are extensive negotiations underway to conclude a Hague Convention on jurisdiction, which should eventually fill that particular gap: https://www.hcch.net/en/projects/legislative-projects/jurisdiction-project

41. The UK, meanwhile, is also considering accession to Hague 19 (anticipated in the PIL Bill), but no formal steps have been taken as yet. Since it will only cover judgments handed down after both have acceded, it is clear that it provides no real solution in the short to medium term.

41. **So, where does all that leave us?**

- We remain hopeful that the EU will formally consent to UK accession to Lugano in the coming weeks / months. We will continue to pursue that objective and will keep you informed.
- As noted above, beyond possible solutions in the family law field, the EU-UK agreement that may emerge in the coming days is not expected to provide for judicial cooperation in civil matters. The best we can hope for is that discussions will continue going forward and that solutions will be sought and found once the reality of the difficulties that arise as a result of the absence of EU-UK CJC become apparent, especially if that were to lead to pressure from EU businesses and consumers to find a comprehensive solution. The Bar Council will again remain fully engaged and keep you informed.
- Pending clarity on these issues, or indeed in the event that the UK does not accede to Lugano nor the EU-UK relationship provide for CJC, the analysis outlined under Phases I and II above, and the advice that flows therefrom, continue to apply.

The Bar's Future Relationship Working Group & EU Law Committee
November 2020

FAQs for the Bar Part III
Annex 1

Annotated Extract of Withdrawal Agreement 2019

TITLE VI
ONGOING JUDICIAL COOPERATION IN CIVIL AND COMMERCIAL MATTERS

Article 66 Applicable law in contractual and non-contractual matters

In the UK, the following acts shall apply as follows:

a) Regulation (EC) No 593/2008 on the law applicable to contractual obligations (**Rome I**) (OJ L 177, 4.7.2008, p. 6) shall apply in respect of contracts concluded before the end of the transition period;
b) Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (**Rome II**) (OJ L 199, 31.7.2007, p. 40) shall apply in respect of events giving rise to damage, where such events occurred before the end of the transition period.

Article 67 Jurisdiction, recognition and enforcement of judicial decisions, and related cooperation between central authorities

1. In the UK, as well as in the Member States in situations involving the UK, in respect of *legal proceedings instituted before the end of the transition period* and in respect of proceedings or actions that are *related to such legal proceedings* pursuant to Articles 29, 30 and 31 of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters "**Brussels I recast**") (OJ L 351, 20.12.2012, p. 1); Article 19 of Regulation (EC) No 2201/2003) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility "**Brussels IIa",** or Articles 12 and 13 of Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations "**The Maintenance Regulation**" (OJ L 7, 10.1.2009, p. 1, the following acts or provisions shall apply:

a) the provisions regarding jurisdiction of **Brussels I recast** Regulation (EU) No 1215/2012;
b) the provisions regarding jurisdiction of Regulation (EU) 2017/1001, of Regulation (EC) No 6/2002, of Regulation (EC) No 2100/94, of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, (**General Data Protection Regulation "GDPR**") (OJ L 119, 4.5.2016, p. 1 and of Directive 96/71/EC on the **posting of workers** in the framework of the provision of services (OJ L 18, 21.1.1997, p. 1);
c) the provisions of the (EC) No 2201/2003 **Brussels IIa**, regarding jurisdiction;
d) the provisions of the **Maintenance Regulation** (EC) No 4/2009 regarding jurisdiction.

2. In the UK, as well as in the Member States in situations involving the UK, the following acts or provisions shall apply as follows in respect of the recognition and enforcement of judgments, decisions, authentic instruments, court settlements and agreements:

a) **Brussels I Regulation** (EU) No 1215/2012 shall apply to the recognition and enforcement of judgments given in legal *proceedings instituted before the end of the transition period*, and to authentic instruments formally drawn up or registered and court settlements approved or concluded before the end of the transition period;

b) The provisions of **Brussels IIa Regulation** (EC) No 2201/2003 regarding recognition and enforcement shall apply to judgments given in legal proceedings instituted before the end of the transition period, and to documents formally drawn up or registered as authentic instruments, and agreements concluded before the end of the transition period;

c) The provisions of **Maintenance Regulation** (EC) No 4/2009 regarding recognition and enforcement shall apply to decisions given in legal proceedings instituted before the end of the transition period, and to court settlements approved or concluded, and authentic instruments established before the end of the transition period;

d) Regulation (EC) No 805/2004 creating a **European Enforcement Order** for uncontested claims (OJ L 143, 30.4.2004, p. 15 shall apply to judgments given in legal proceedings instituted before the end of the transition period, and to court settlements approved or concluded and authentic instruments drawn up before the end of the transition period, provided that the certification as a European Enforcement Order was applied for before the end of the transition period.

3. In the UK, as well as in the Member States in situations involving the UK, the following provisions shall apply as follows:

a) Chapter IV of **Brussels IIa** Regulation (EC) No 2201/2003 shall apply to requests and applications received by the central authority or other competent authority of the requested State before the end of the transition period;

b) Chapter VII of **Maintenance Regulation** (EC) No 4/2009 shall apply to applications for recognition or enforcement as referred to in point (c) of paragraph 2 of this Article and requests received by the central authority of the requested State before the end of the transition period;

c) Regulation (EU) 2015/848 on **insolvency proceedings** (OJ L 141, 5.6.2015, p. 19) shall apply to insolvency proceedings, and actions referred to in Article 6(1) of that Regulation, provided that the main proceedings were opened before the end of the transition period;

d) Regulation (EC) No 1896/2006 creating a **European order for payment procedure** (OJ L 399, 30.12.2006, p. 1) shall apply to European payment orders applied for before the end of the transition period; where, following such an application, the proceedings are transferred according to Article 17(1) of that Regulation, the proceedings shall be deemed to have been instituted before the end of the transition period;

e) Regulation (EC) No 861/2007 establishing a **European Small Claims Procedure** (OJ L 199, 31.7.2007, p. 1 shall apply to small claims procedures for which the application was lodged before the end of the transition period;

f) Regulation (EU) No 606/2013 on **mutual recognition of protection measures** in civil matters (OJ L 181, 29.6.2013, p. 4) shall apply to certificates issued before the end of the transition period.

Article 68 Ongoing judicial cooperation procedures

In the UK, as well as in the Member States in situations involving the UK, the following acts shall apply as follows:

a) Regulation (EC) No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (**service of documents**)(OJ L 324, 10.12.2007, p. 79) shall apply to judicial and extrajudicial documents which were received for the purposes of service before the end of the transition period by one of the following:
   (i) a receiving agency;
   (ii) a central body of the State where the service is to be effected; or
   (iii) diplomatic or consular agents, postal services or judicial officers, officials or other competent persons of the State addressed, as referred to in Articles 13, 14 and 15 of that Regulation;

b) Council Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the **taking of evidence** in civil or commercial matters (OJ L 174, 27.6.2001, p. 1) shall apply to requests received before the end of the transition period by one of the following:
   (i) a requested court;
   (ii) a central body of the State where the taking of evidence is requested; or
   (iii) a central body or competent authority referred to in Article 17(1) of that Regulation;

c) Council Decision 2001/470/EC establishing a **European Judicial Network** in civil and commercial matters (OJ L 174, 27.6.2001, p. 25 shall apply to requests that were received before the end of the transition period; the requesting contact point may request an acknowledgement of receipt within 7 days of the end of the transition period where it has doubts as to whether the request was received before the end of the transition period.

Article 69 Other applicable provisions

1. In the UK, as well as in the Member States in situations involving the UK, the following acts shall apply as follows:

   a. Council Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to **legal aid** for such disputes (OJ L 26, 31.1.2003, p. 41) shall apply to applications for legal aid that were received by the receiving authority before the end of the transition period. The requesting authority may request an acknowledgement of receipt within 7 days of the end of the transition period where it has doubts as to whether the request was received before that date;

b. Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (OJ L 136, 24.5.2008, p. 3) shall apply where, before the end of the transition period:
    i. the parties agreed to use mediation after the dispute had arisen;
    ii. mediation was ordered by the court; or
    iii. a court invited the parties to use mediation;

c. Council Directive 2004/80/EC relating to compensation to crime victims (OJ L 261, 6.8.2004, p. 15) shall apply to applications received by the deciding authority before the end of the transition period.

2. Point (a) of paragraph 1 and point (a) of paragraph 2 of Article 67 of this Agreement shall also apply in respect of the provisions of Regulation (EU) No 1215/2012 as applicable by virtue of the agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (88).

3. Point (a) of Article 68 of this Agreement shall also apply with regard to the provisions of Regulation (EC) No 1393/2007 as applicable by virtue of the agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil and commercial matters (89).

FAQs for the Bar Part III

Annex 2

UK end of transition - CJC Legislation and guidance

The PIL Act gained Royal Assent on 14 December.

In addition, the UK has adopted more than a dozen SIs relevant to CJC at the end of the Transition Period. Many of these were passed in preparation for 'no deal' in 2018/2019:

1. the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019
2. the Jurisdiction and Judgments (Family) (Amendment Etc.) (EU Exit) Regulations 2019
3. the Civil Partnership and Marriage (Same Sex Couples) (Jurisdiction and Judgment) (Amendment etc.) (EU Exit) Regulations 2019
4. the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019
5. Insolvency (Amendment) (EU Exit) Regulations 2019: https://www.legislation.gov.uk/uksi/2019/146/contents
6. Insolvency (Amendment) (EU Exit) (No. 2) Regulations 2019: https://www.legislation.gov.uk/ukdsi/2019/9780111188842/contents
7. the Cross-Border Mediation (EU Directive) (EU Exit) Regulations 2019
8. the Service of Documents and the Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provision) (EU Exit) Regulations 2018
9. the European Enforcement Order, European Order for Payment and European Small Claims Procedure (Amendment etc.) (EU Exit) Regulations 2018
10. the Mutual Recognition of Protection Measures in Civil Matters (Amendment) (EU Exit) Regulations 2019
11. the Civil Procedure (Amendment) (EU Exit) Rules 2019
12. Civil Procedure Rules 1998 (Amendment) (EU Exit) Regulations 2019 https://www.legislation.gov.uk/uksi/2019/521/made
13. the Family Procedure Rules 2010 and Court of Protection Rules 2017 (Amendment) (EU Exit) Regulations 2019
14. the Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018
15. the International Recovery of Maintenance (Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance 2007) (EU Exit) Regulations 2018
16. the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) (No.2) Regulations 2019
17. The Civil and Family Justice (Amendment) (EU Exit) Regulations 2020

Note also The Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020. This 'fixing' SI remedies deficiencies in domestic legislation arising from the UK's withdrawal from the EU.

The website GOV.UK provides guidance on CJC aimed at legal professionals:

- A contents page of all relevant advice
- Cross-border civil and commercial legal cases: guidance for legal professionals from 1 January 2021
- Family law disputes involving the EU: guidance for legal professionals from 1 January 2021

The Ministry of Justice has also published guidance for the public on family law:

- Divorce
- Maintenance
- Parental responsibility

These sit alongside the EU Commission's guidance on the topic.

Both the Bar Council and the Law Society have organised webinars in this area recently, to which officials from the MoJ and other relevant government departments, contributed. See:

- BC: https://www.barcouncil.org.uk/training-events/calendar/end-of-transition-substantive-law-issues.html
- LS: Civil & commercial law
- LS: Family law