

BREXIT: THE WAY FORWARD FOR APPLICABLE LAW AND CIVIL JURISDICTION AND JUDGMENTS?

Both the EU and the UK have now published short papers setting out their positions on judicial cooperation in civil and commercial matters. A comparison of the two perhaps offers a hint as to what a withdrawal deal might look like regarding these issues, as well as guidance as to what parties can do now to safeguard their positions.

The rules for deciding the law that courts in EU member states must apply to both contractual and non-contractual claims are set out in EU Regulations - the Rome I and Rome II Regulations respectively. Similarly, the rules regarding jurisdiction over defendants domiciled in the EU, regarding choice of court agreements and regarding the enforcement of judgments are set out in another EU Regulation - the Brussels I Regulation (recast). If and when the UK leaves the EU, these Regulations will no longer apply. So where will that leave parties?

The EU set out its position in a paper dated 12 July 2017 on what the UK's withdrawal should mean for existing proceedings and for choices of law and courts made before withdrawal (*Essential Principles on Ongoing Cooperation in Civil and Commercial Matters*, TF50 (2017) 9/2). The UK responded with its own paper on 22 August 2017 (*Providing a cross-border civil judicial cooperation framework*). The UK's paper is wider in scope than the EU's in that it covers what a long-term deal should include as well as the withdrawal agreement, but a comparison of the two papers offers some insight into what a possible withdrawal deal might look like and provides some guidance for parties contracting now.

Both papers also recognise that there are other EU measures in this area that will need to be addressed, notably the EU's Insolvency Regulation (EU/2015/848). Neither paper offers any concrete proposals on these other areas, doubtless because they are more complicated than applicable law and court jurisdiction.

Withdrawal agreement: applicable law

Applicable law is the easiest aspect since no reciprocity is involved. Indeed, the Rome I and II Regulations apply whether the applicable law is that of an EU member state or of a non-member state (subject to minor points, seldom relevant in practice). Courts in EU member states will therefore continue to

Key issues

- The UK and the EU take very similar positions on governing law
- The UK and the EU take similar positions on pre-withdrawal jurisdiction agreements
- The UK proposes a fuller effect for judgments based on pre-withdrawal jurisdiction agreements

apply English law if that is what the parties have chosen regardless of the UK's withdrawal from the EU; English courts will similarly continue to apply the law of an EU member state if the parties have so decided. It is therefore unsurprising that the positions of the EU and the UK are basically the same.

EU	UK
<p>"The relevant provisions of Union law applicable on the withdrawal date on the applicable law for contractual and non-contractual obligations should continue to apply to contracts concluded before the withdrawal date, and (regarding non-contractual obligations) to events which occurred before the withdrawal date."</p>	<p>"[T]he existing EU rules governing the applicable law for contractual and non-contractual obligations should continue to apply to contracts concluded before the withdrawal date, and in respect on non-contractual liability, to events giving rise to damage which occur before withdrawal date."</p>

The general approach of both the EU and the UK is continuity and a respect for things done before withdrawal. It would be unfortunate if, for example, a tort committed before withdrawal was subject to one law if a court decision was made before withdrawal but a different law if the decision was made after withdrawal.

The only difference may be that the EU wants "Union law" to continue to apply, while the UK favours the continued application of "existing EU rules". These might be the same - and, for the vast majority of cases, they will in practice be the same - but the difference in wording may reflect a significant difference in underlying approach.

The EU's reference to "Union law" probably indicates that it considers that the UK should continue to apply EU law as such and, with it, accept that the Court of Justice of the European Union is the supreme arbiter of EU law.

The UK's reference to "existing EU rules" probably points to the text of Rome I and II being written into UK law by the European Union (Withdrawal) Act, but without its being treated as EU law or its being subject to the continuing reign of the CJEU. The UK's paper is clear that leaving the EU will "bring an end to the *direct* jurisdiction of the CJEU in the UK" (emphasis added), but it comments that the UK and the EU "will need to ensure future judicial cooperation takes into account regional legal arrangements, including the fact that the CJEU will remain the ultimate arbiter of EU law within the EU." Is this a hint that the CJEU could have a continuing, if indirect, role so far as the UK is concerned? Perhaps the UK courts might be obliged to follow CJEU decisions for a transitional period, at least absent strong reasons not to do so, but will not be able to refer cases to the CJEU. The European Union (Withdrawal) Bill, in its current form, would only require UK courts to follow pre-withdrawal CJEU decisions, though it would allow a UK court to follow post-withdrawal CJEU decisions "if it considers it appropriate to do so" (clause 6(2)).

But that may be to read too much into a single word. Perhaps it is a form of constructive ambiguity designed to ease tensions but with no real meaning. Or perhaps it merely reflects the obvious fact that if the UK continues to apply EU-derived rules, UK courts will inevitably pay some attention to the CJEU's post-withdrawal interpretation of those rules.

Withdrawal agreement: choice of court agreements

Again, the positions of the EU and the UK are similar, but with one potentially significant difference.

EU	UK
"Choices of forum made prior to the withdrawal date should continue to be assessed against the provisions of Union law applicable on the withdrawal date."	"[W]here a choice of court has been made prior to withdrawal date the existing EU rules should continue to apply to establishment of jurisdiction, and recognition and enforcement of any resulting judicial decision, where a dispute arises to which such a choice applies, whether before or after withdrawal date."

This again exposes the potential difference between "Union law" and "existing EU rules" (see above), but the UK's position goes further than the EU's in giving fuller effect to choices of court made prior to withdrawal. The UK proposes that a judgment given after withdrawal where jurisdiction was based on an agreement made prior to withdrawal should continue to be enforceable under existing EU rules after withdrawal. The EU is silent on the enforcement of judgments in these circumstances, but says elsewhere that the "relevant provisions of Union law applicable on the withdrawal date... should continue to govern all judicial decisions given before withdrawal date".

If the EU's proposal is that judgments given after withdrawal will not be enforceable under existing EU law even if a court took jurisdiction before withdrawal under that law (and silence does not necessarily indicate this), the UK's position is more helpful to business. Parties may have entered into agreements giving jurisdiction to courts in an EU member state or to the English courts well before Brexit was ever a serious possibility. If an agreement on choice of court made before withdrawal should continue to be respected, it might be appropriate also to give to any resulting judgment the effect it would have had prior to withdrawal.

Withdrawal agreement: court competency

The UK and the EU take the same position.

EU	UK
"The relevant provisions of Union law applicable on the withdrawal date establishing the Member State whose courts are competent should continue to govern all legal proceedings instituted before the withdrawal date."	"[T]he existing EU rules governing jurisdiction to determine disputes should continue to apply to all legal proceedings instituted before withdrawal date."

The potential difference between "Union law" and "existing EU rules" remains, but what the UK and the EU both appear to be saying in substance is that if a court in an EU member state or in the UK was properly seised of a case before withdrawal, that should be respected - ie it should not be possible after withdrawal to start new proceedings elsewhere, whether within the EU or the UK, on the same cause of action. This approach is prudent. It is no one's interest for the UK's withdrawal from the EU to provide a new opportunity for forum shopping.

There could be some minor frictional issues that will need to be resolved. For example, if a claim is started in the English courts before withdrawal, but the

English courts decide after withdrawal that they do not have jurisdiction under the Brussels I Regulation, can proceedings be started again immediately in England under whatever jurisdictional rules are then applicable, which might give the English courts jurisdiction?

Withdrawal agreement: recognition and enforcement of judgments

As indicated above, there is a temporal difference between the UK and the EU on this point.

EU	UK
"The relevant provisions of Union law applicable on the withdrawal date on recognition and enforcement of judicial decisions should continue to govern all judicial decisions given before the withdrawal date."	"[T]he existing EU rules governing recognition and enforcement of judicial decisions should continue to apply to judicial decisions given before the withdrawal date, and to judicial decisions given after the withdrawal date in proceedings which were instituted before that date."

If a court took jurisdiction before withdrawal under EU law, there is much to be said for the resulting judgment being enforceable in accordance with EU law even if the judgment was given after withdrawal. If two cases were commenced on the same day well before withdrawal, should a judgment that happened to be given on the day before withdrawal differ in its potential impact from a judgment that happened to be given on the day after?

After the withdrawal agreement: long-term arrangements

The EU's paper addresses only the position regarding a withdrawal agreement, not longer-term arrangements. The UK sets out its aspirations for the long term. The UK would like "new close and comprehensive arrangements for civil judicial cooperation with the EU" and will "therefore need to negotiate and agree a new civil judicial cooperation framework". This is obviously not in the UK's hands alone. The EU has the choice of whether to agree new arrangements and, if so, when to do so and what they should be.

Where, however, the UK can act unilaterally, the paper indicates that the UK will do so. The paper says that the UK will "incorporate into domestic law the Rome I and II instruments on choice of law and applicable law in contractual and non-contractual matters". This is sensible. The rules in these instruments are well-known and established, and there is no good reason for the UK to revert to the pre-EU common law rules. In the long term, the interpretation of the EU's Rome I and II Regulations may diverge from the UK's domestic versions as courts take different approaches, but Lord Keynes' aphorism about the long term may provide the appropriate response to that risk.

The UK's paper does not indicate what jurisdictional rules UK courts will apply after withdrawal and, in particular, it does not say whether the rules in the Brussels I Regulation (recast) will be translated into UK domestic law. The jurisdictional rules in Brussels I could be applied unilaterally by the UK; all courts have jurisdictional rules, which may or may not be the same as those applied in other states.

The enforcement of judgments is, to some extent at least, often viewed on a reciprocal basis. After withdrawal, the UK could choose to enforce judgments given by courts in EU member states in accordance with the rules in the

Brussels I Regulation even if EU member states will not enforce UK judgments on the same basis. However, the European Union (Withdrawal) Bill suggests that the UK will not do so. Clause 7(2)(e) of the Bill cites as a "deficiency" in retained EU law that will need to be addressed that it "makes provision for... any reciprocal or other arrangements". Another Government paper adds that "[i]n some cases EU law is based on reciprocal arrangements, with all member states treating certain situations in the same way. If such reciprocal arrangements are not secured as a part of our new relationship with the EU, it may not be in the national interest, or workable, to continue to operate those arrangements alone" (*Legislating for the United Kingdom's withdrawal from the European Union*, paragraph 3.3).

The UK and EU member states have rules that allow foreign judgments to be enforced even if there is no agreement providing for reciprocity. For example, there is no agreement on the mutual enforcement of judgments between the UK and the US, but a US judgment can be enforced in England under common law rules, though these rules are rather stricter than in, for example, the Brussels I Regulation and the procedures are not as streamlined. Whatever approach the UK takes, the mutual enforcement of judgments will commonly still be possible, though it will not be as quick and easy.

The UK paper also indicates that the UK will join the Hague Convention on choice of court agreements after it has left the EU. This is undoubtedly the right thing to do - preferably on the day after withdrawal. The EU is already a party to the Convention, which requires participating courts to give effect to exclusive choice of court agreements and to enforce the judgment given by the chosen court. It will, however, probably only apply to agreements made after the UK accedes to the Convention in its own right.

The UK paper adds that the "UK will seek to continue to participate in the Lugano Convention". The Lugano Convention, to which the EU, Switzerland, Norway and Iceland are parties, replicates largely the EU's regime on jurisdiction and judgments, though without the generally helpful amendments made to the EU's regime by the Brussels I Regulation (recast) (EU/1215/2012). If the UK were able to participate in the Lugano Convention, it would largely reproduce the pre-withdrawal arrangements with the EU (though without the CJEU).

The Lugano Convention is open to accession by states that become members of EFTA as of right and also by other states. Other states wishing to accede can only do so with the unanimous agreement of the existing parties (article 72(3)). The existing parties are obliged to "endeavour to give their consent at the latest within one year" of being informed of the accession request. Even assuming that consent is forthcoming, there will inevitably be a gap between the UK's withdrawal from the EU and any accession to the Lugano Convention.

Conclusion

Whether or not there is a withdrawal or a long-term agreement between the UK and the EU, the rules on applicable law will remain substantially the same as now and, in particular, will respect the parties' choice of governing law. Applicable law raises few issues in practice.

The position on jurisdiction and the enforcement of judgments is not so aligned, at the moment at least. Even on withdrawal, there are temporal differences, though these may be capable of being bridged - subject to the politically-charged issue of the jurisdiction, direct or otherwise, of the CJEU.

"The UK and EU member states have rules that allow foreign judgments to be enforced even if there is no agreement providing for reciprocity."

As for longer term arrangements, the EU has offered no clue as to its plans but the UK appears to be looking largely to replicate existing arrangements through a combination of the Hague Convention, the Lugano Convention and/or a new deal with the EU. In taking this approach, the Government has listened to the consistent view expressed by the legal profession.

For parties contracting now, the issue they need to address is whether the ability to enforce quickly and easily a UK judgment across EU member states or a judgment given in an EU member state in the UK is a key aspect in the decision as to what court should have jurisdiction. If it is not (eg because a party has adequate security, because the counterparty's standing is such that enforcement risk is not a major issue or because a party's prime concern is to avoid being sued in unacceptable courts), then nothing need change. If rapid enforcement across the EU is critical, then the differences between the EU and the UK positions could lead to some uncertainty, requiring more detailed consideration than jurisdiction provisions might usually receive. But if in doubt, stay with the familiar.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street,
London, E14 5JJ

© Clifford Chance 2017

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street,
London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Bangkok • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • Jakarta* • London • Luxembourg • Madrid • Milan • Moscow • Munich • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.

CONTACTS

Simon James
Partner

T +44 20 7006 8405
E simon.james@cliffordchance.com

Chris Bates
Partner

T +44 20 7006 1041
E chris.bates@cliffordchance.com

Kate Gibbons
Partner

T +44 20 7006 2544
E kate.gibbons@cliffordchance.com

Jessica Gladstone
Partner

T +20 44 7006 2953
E jessica.gladstone@cliffordchance.com

Simon Gleeson
Partner

T +44 20 7006 4979
E simon.gleeson@cliffordchance.com

Dan Neidle
Partner

T +20 44 7006 8811
E dan.neidle@cliffordchance.com

Phillip Souta
Head of UK Public Policy

T +44 20 70061097
E Phillip.souta@cliffordchance.com

Malcolm Sweeting
Senior Partner

T +20 44 7006 2028
E Malcolm.sweeting@cliffordchance.com