

Impact of Brexit on the UK's cross-border litigation rules

What will be the immediate and future impact of the UK vote to leave the EU on cross-border litigation within Europe?

This short document aims to provide **answers to your immediate key questions**, and to highlight some points to be resolved in the future.

Although there is a degree of future uncertainty about the detail (including because much may depend upon trade negotiations), the short point is that the UK's decision to leave will not have an immediate effect on cross-border litigation, and any future impact is unlikely to be considerable.

Q1: WE ARE CURRENTLY INVOLVED IN LITIGATION WITH AN ENTITY IN ANOTHER EU MEMBER STATE. WHAT HAPPENS NOW?

There should be no immediate change. The UK's exit from the EU will not take place immediately. The procedure for a Member State's withdrawal from the EU is set out in Article 50 of the Treaty on European Union. It provides for the UK to negotiate a withdrawal agreement with the EU and for the Treaties to cease to apply to the withdrawing State after two years, unless there is unanimous agreement to extend that period.

Q2: WE ARE CURRENTLY IN DISPUTE WITH AN ENTITY IN ANOTHER EU MEMBER STATE. WE ARE EXPECTING PROCEEDINGS TO BE ISSUED WITHIN A YEAR. WHAT HAPPENS NOW?

Please see answer to Question 1 above. As we would normally do, we will advise you on issues such as the law governing your dispute, in which country/jurisdiction the litigation should be heard. If litigation is commenced under the existing rules, the likelihood is that it will be allowed to continue under them: when new legislation is introduced which makes changes to litigation procedure, transitional provisions in the new legislation usually stipulate that the new rules apply only to proceedings commenced on or after a date in the future.

Q3: WHAT ARE THE RULES IN RELATION TO CROSS-BORDER LITIGATION LIKELY TO LOOK LIKE AFTER THE UK'S WITHDRAWAL FROM THE EU?

It is unclear from the terms of Article 50 (summarised at Question 1 above) how far the arrangements for the UK's future relationship with the EU would be included in the Article 50 withdrawal agreement. One of the decisions to be made will be the extent to which existing EU legislation should continue to form part of UK law. Many commentators believe that most of the existing EU Regulations governing cross-border litigation would be transposed into UK law (albeit that some would also require continued compliance by the current EU Member States, to the extent that the rules envisage interaction and/or reciprocity). Some of those Regulations are listed in the box below.

- Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations ("**Rome I**")
- Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations ("**Rome II**")
- Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("**the Recast Brussels Regulation**")
- Regulation (EC) No 805/2004 of the European Parliament and of the Council creating a European Enforcement Order for uncontested claims ("**the European Enforcement Order Regulation**")

- Regulation (EC) No 1896/2006 of the European Parliament and of the Council creating a European order for payment procedure (“**the European Order for Payment Regulation**”)
- Regulation (EU) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extra-judicial documents in civil or commercial matters (“**the Service Regulation**”)
- Council Regulation (EU) 1206/2001 on co-operation between the courts of the Member States in the taking of evidence in civil and commercial matters (“**the Evidence Regulation**”)

Q4: WHAT MIGHT THE CROSS-BORDER LITIGATION FRAMEWORK BE IF THE EXISTING EU REGULATIONS LISTED ABOVE ARE NOT TRANSPOSED INTO UK LAW?

- **Rules on which law will govern contractual obligations**

One option is for the English Courts to revert to the rules which were in force before Rome I. The regime pursuant to the Rome Convention on the law applicable to contractual obligations 1980 is similar to that set out in Rome I, although there are some differences.

- **Rules on which law will govern non-contractual obligations**

One option is for the English Courts to revert to the rules which were in force before Rome II, in this case the Private International Law (Miscellaneous Provisions) Act 1995. This regime is not the same as Rome II. One particular difference is that, unlike Rome II, it does not give the parties an express right to choose the law applicable to non-contractual relationships between them. It seems unlikely that a backward step would be taken however.

- **Rules concerning which country’s courts would have jurisdiction to resolve disputes with a UK and EU connection, and rules about what happens when there are parallel proceedings in the UK and an EU Member State**

One option is for the UK to be bound by the Lugano Convention. The Lugano regime is similar to that under the Recast Brussels Regulation, although it does not yet include the greater benefits and clarity for parties which were recently incorporated in to the Recast Regulation. (It is unclear whether the UK, as a former EU Member State, would in fact already be bound by Lugano or would have to accede to it separately.)

- **Rules on enforcement of English court judgments in EU Member State courts and judgments from the courts of EU Member States in England & Wales**

The Lugano Convention mentioned above contains a similar (albeit less streamlined) regime for the enforcement of judgments within the EU to the Recast Brussels Regulation. There is, however, currently no non-EU equivalent to the European Enforcement Order Regulation, nor to the European Order for Payment Regulation.

- **Rules relating to service of English proceedings abroad and service of foreign proceedings in the UK**

At present, there is no requirement to apply for court permission to serve English proceedings out of the jurisdiction if the English courts have jurisdiction under the Recast Brussels Regulation. A similar exemption from having to apply for permission to serve out of the jurisdiction applies to parties to the Lugano Convention.

Service of UK proceedings (and proceedings in a Member State) can currently be effected within the EU using methods pursuant to the Service Regulation. If that Regulation were to cease to apply, the UK is a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (1965). As at 24 June 2016, there were 71 Contracting States including most, but not all, of the current EU Member States (and, in respect of the others, service could still be effected using methods which accorded with a bilateral treaty or local law).

- **Rules on obtaining evidence in EU Member States for UK proceedings or in the UK for proceedings in a Member State**

Such evidence can currently be obtained pursuant to the Evidence Regulation. If that Regulation were to cease to apply, the UK is a party to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (1970) which provides for the taking of evidence by means of letters of request and by diplomatic or consular agents and commissioners. As at 24 June 2016, there were 59 Contracting States, including most, but not all, of the current EU Member States (and, in respect of the others, such evidence might still be obtained via a bilateral treaty or local law).

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