

# Brexit: what might change

## Dispute Resolution

### Introduction

On 23 June 2016 the UK population voted for the UK's exit from the European Union (EU). The applicable exit procedure and certain possible legal consequences of Brexit for Dispute Resolution will be discussed below.

In the short term, we do not identify material changes for the legal practice. The European law and regulations will remain in force until the negotiations between the EU and the UK have been completed and the withdrawal procedure has come to an end. To which extent European law and regulations will also apply following the UK's exit from the EU, will largely depend on the outcome of the negotiations. One of the fundamentals of the EU is the internal market, allowing for the free movement of goods, services, workers and capital (Internal Market). In this context we note that in January 2017, Prime Minister May announced that the UK will opt for a "hard Brexit", meaning that the UK will no longer maintain membership of the Internal Market, nor accede to any associated status. Instead, the UK will seek a free-trade deal with the EU outside the Internal Market.

### Brexit – background

Since 2007 (Treaty of Lisbon), the EU Treaty offers a Member State an explicit legal basis to leave the EU (Article 50 TEU). Pursuant to Article 50(2) TEU, the UK can start the exit procedure by giving notice to the European Council. The exit agreement will be concluded on behalf of the EU by the Council<sup>1</sup>, acting upon a qualified majority<sup>2</sup> and after having obtained the consent of the European Parliament. The agreement must set out the arrangements for the UK's exit and take account of the framework for the UK's future relationship with the EU. The UK cannot participate in the relevant discussions or decisions of the European Council or Council.

The EU Treaties cease to apply to the UK from the date of entry into force of the exit agreement or, if there is no such agreement, 2 years after the date of notice under Article 50 TEU, unless the European Council, in agreement with the UK, unanimously decides to extend this period. The exit procedure has never been called for and the way forward is full of uncertainties. Apart from Article 50 TEU, no further provisions or guidelines apply.

<sup>1</sup> The Council consists of a representative of each Member State at ministerial level, who may bind the government of the Member State in question and cast its vote (Article 16 TEU).

<sup>2</sup> The qualified majority shall be defined as at least 72 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States (Article 238(3)(b) TFEU).

## Jurisdiction

### Current Situation

At this moment, the Brussels I Regulation<sup>3</sup> and the Brussels I Regulation Recast (“**Brussels Regulation Recast**”)<sup>4</sup> offer important conflict of laws regimes in the EU member states, including the UK.

### Post-Brexit

In the event of a Brexit, it is likely that the Brussels I Regulation and Brussels Regulation Recast will no longer apply in the UK. That means that courts in the UK and the EU member states will then no longer rely on the same legal instruments in determining questions of judicial jurisdiction. From the point of view of the courts in the EU member states, parties from the UK will from then on, i.e. after a Brexit, no longer be regarded as parties which are domiciled in an EU member state.<sup>5</sup>

Against the background of the non-applicability of the Brussels I Regulation and Brussels I Regulation Recast in the UK post-Brexit, the question arises which legal regime will possibly fill the ‘void’ of these EU regulations in the UK. The answer to this question will depend on the chosen legal relationship between the UK and the EU after a Brexit.

In this regard, the question arises whether the UK may rely on the legal framework established by previous international instruments, and whether the applicability of these international instruments will ‘revive’ after Brexit. These international instruments include e.g. the Brussels Convention of 1968 (a predecessor of the Brussels Recast Regulation) and bilateral agreements concluded between the UK and EU member states prior to the European harmonisation in this field of law. To date, this question continues to raise discussions and leaves room for debate.

## Applicable law

### Current situation

The current legal instruments on the basis of which the law applicable to contractual and non-contractual obligations is to be determined by courts in EU member states is laid down in two EU regulations: the Rome I Regulation (contractual obligations) and the Rome II Regulation (non-contractual obligations). Subject to certain exceptions, both regulations give effect to the parties’ choice of law. In the absence of such choice of law, the regulations provide for a set of rules determining the law applicable to contractual and non-contractual obligations.

<sup>3</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>4</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>5</sup> See for example article 4(1) of the Brussels I Regulation Recast.

### Post-Brexit

In the event the UK would leave the EU, the framework established by the Rome I and the Rome II Regulation will, most probably, no longer apply in the UK. The UK could, however, decide to adopt conflict of law rules identical or similar to those contained in these regulations.

In the absence of any legislative intervention in that sense, the UK courts will have to apply the existing national conflict of law rules, including those originating in international conventions.

The courts of the EU member states will, for their part, continue to apply the Rome I and II Regulation, regardless of whether the law specified by these regulations is the law of an EU or a non-EU member state (and hence also English law).

### Recognition and enforcement of judgments

#### Current position

The Brussels Regulation Recast is the main legal instrument currently in force that governs the cross-border recognition and enforcement of judgments rendered in civil and commercial matters by courts in EU member states in other EU member states.

One of the Brussels Regulation Recast's objectives is to make cross-border recognition and enforcement of judgments from courts in EU member in other EU member states less time-consuming and costly. To that end, the Brussels Regulation Recast establishes a framework that

enables a party to enforce a judgment rendered by the courts of an EU member state against assets located in another EU member state, as if such judgment had been rendered in the EU member state where enforcement is sought. In contrast to the (prior) Brussels I Regulation, a party seeking to enforce a judgment in an EU member state, must therefore no longer firstly apply for a so-called declaration of enforceability before the local courts, but may immediately take enforcement measures.

#### Post-Brexit

Upon the UK leaving the EU, the Brussels I Regulation and the Brussels Regulation Recast will most probably cease to apply in the UK. The UK and the EU could, in theory, agree that these regulations remain applicable in the UK. The UK could also unilaterally codify these regulations in national law. However, given the reciprocal nature of these regulations, this option would only facilitate the enforcement of judgements given by the courts of an EU member state in the UK, and not the other way around.

Alternatively, the UK may wish to accede to the Lugano Convention of 2007. The Lugano Convention 2007 offers a recognition and enforcement regime similar to the regime established by the Brussels I Regulation and is applicable between EU Member States and Iceland, Norway and Switzerland. The Lugano Convention 2007 has, however, not benefited from the changes introduced by the Brussels Regulation Recast, which inter alia further simplifies cross-border enforcement of judgments.



Presently, the UK is only bound to the Lugano Convention of 2007 by virtue of its status of an EU member state. Upon the UK leaving the EU, the UK will thus no longer be a party to this convention. The UK could nevertheless consider becoming a contracting party in its own right in accordance with the accession process set out in this convention. Should the UK wish to accede to this convention as a non-EFTA member state, then this would require the unanimous consent of the contracting parties.

The UK may also decide to accede to the Hague Convention on Choice of Court Agreements of 2005. This convention – which is open for signature by all states – provides for a set of rules regarding the enforcement of judgments in civil and commercial matters with respect to cases where the parties concluded an exclusive choice of court agreement. The scope of the Hague Convention is, however, more limited than that of e.g. the Lugano Convention, as it only applies to judgments given by the courts of a contracting state exclusively designated by the parties to the dispute.

The question arises whether the UK may also rely on the framework established by earlier international instruments and whether the application of these instruments will ‘revive’ after Brexit. These instruments include e.g. the Brussels Convention 1968 (a predecessor of the Brussels Recast Regulation) and bilateral agreements concluded between the UK and EU member states prior to the European harmonisation in this field of law. To date, this question continues to raise discussions and leaves room for debate.

As is clear from the above, different options are available for the UK and one cannot predict with a sufficient degree of certainty which legal instrument(s) will be applicable when it comes to the recognition and enforcement of EU and/or UK judgments in EU member states or the UK post-Brexit. Each of the possibilities outlined above has advantages as well as disadvantages.

### Arbitration

The subject matter of arbitration is, at this moment, not regulated by EU law. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“**New York Convention**”) offers an international legal regime for (*inter alia*) the recognition and enforcement of arbitral awards.

All the EU member states, including the UK, are parties to this convention. The EU is not a party to the New York Convention. Since the New York Convention does not form part of EU law, a possible Brexit will not affect the applicability of the New York Convention in the UK vis-à-vis arbitral awards which have been rendered in EU member states and vice versa.

### Service of documents

Regulation (EC) No 1393/2007 on the service of judicial and extrajudicial documents in civil or commercial matters (**Service Regulation**) regulates and facilitates the service of such documents within the EU.



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In the event a Brexit will result in the Service Regulation no longer being applicable in the UK (for example in case of a 'full Brexit'), litigant parties (established or residing in an EU member state who wish to serve documents in the UK and vice versa) will in principle have to fall back on the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 (Service Convention), to which all EU member states (except Austria) and the UK are a party.

The Service Convention has a different service methodology than the Service Regulation, and it is likely that the service of UK documents in the EU member states and vice versa under the Service Convention will (i) become more complex and (ii) take longer.

(Potential) litigant parties that wish to circumvent possible practical difficulties with the service of documents, can choose to include a so-called 'process agent clause' in their choice of forum agreements. (Court) documents can then be served upon the process agent in a predetermined country. If this predetermined country is an EU member state, instead of the UK, and as a result of a Brexit the UK loses the benefit of the service of documents under the Service Regulation, then this circumstance has no impact on the mechanics for service.

### What next?

Once the UK invokes Article 50 TEU, the UK and the EU will negotiate the terms of Brexit. It will be a highly political process and the outcome is as yet unclear. Therefore it is of the utmost importance to monitor the developments and the potential impact on your company's position closely. We will keep you informed about further developments.

Please contact your trusted adviser at Loyens & Loeff or send an e-mail to [Brexit@loyensloeff.com](mailto:Brexit@loyensloeff.com) if you have any queries.

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