

FAQ: Litigation post Brexit

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This FAQ is intended to present a very short outline of the main issues relating to cross-border litigation post Brexit with a particular focus on civil and commercial matters. It is therefore not comprehensive.



Q: What is the current legal framework for cross-border litigation?

A: Currently, there is a significant body of EU Regulations governing jurisdiction, recognition and enforcement of judgments in civil and commercial matters (Brussels I Recast Regulation 1215/2012); the applicable law to contractual and non-contractual obligations (Rome I Regulation 593/2008; Rome II Regulation 864/2007); as well as the cross-border service of documents and taking of evidence (Service Regulation 1393/2007; Evidence Regulation 1206/2001). In addition, there are Regulations on jurisdiction, recognition and enforcement in the area of cross-border divorces and matters of parental responsibility (Brussels IIbis Regulation 2201/2003); on maintenance (Regulation 4/2009) and on cross-border insolvencies (Regulation 1346/2000, replaced by Regulation 2015/848 (recast) – not dealt with here).

Through its EU Membership, the UK is furthermore party to international conventions in the area of civil justice, notably to the 2005 Hague Convention on Choice of Court Agreements (which secures the efficiency of exclusive forum selection clauses and the recognition and enforcement of judgments based on such clauses in the signatory states - EU, Mexico and Singapore) and to the 2007 Lugano Convention which is modelled along the lines of the 2001 Brussels I Regulation and binds the EU, Norway, Iceland and Switzerland. It is not (yet) equivalent to the revised Brussels I (Recast) Regulation as it still requires exequatur proceedings and does not grant priority to exclusive choice of court agreements.

Q: What are the advantages of the current system ?

A: The current system works well in practice. The EU Regulations ensure legal certainty and predictability for litigants and decisional harmony across the EU. The Brussels I Recast, Rome I and Rome II Regulations create a coherent system. EU jurisdictions selected in choice of court agreements are given priority, weaker parties are protected. A judgment given by the English courts can be enforced across the EU without the need for exequatur proceedings, it is treated as if it was given in the Member State of enforcement.

This is not only beneficial to commercial litigants but secures simplified access to justice for consumers and other weaker parties, from online shoppers to victims of traffic accidents abroad. For instance, a London based consumer who has bought a product online from a company in France can sue the seller in England. A British tourist involved in a car accident while on vacation in Greece can sue the Greek insurer in the UK. In both cases, the ensuing judgments must be enforced by France and Greece and all other EU Member States.

In the area of family law, binational couples in divorce proceedings or in litigation about parental responsibility can rely on single set of jurisdictional rules, avoiding conflicting judgments from different courts. Children can sue for maintenance at the place of their habitual residence and have the judgment enforced in their parent's country.

Q: What happens after Brexit?

A: Brexit will leave a large gap in the area of civil justice and judicial cooperation. EU Regulations covering this area will no longer apply. This has a considerable impact on individuals and businesses bringing or defending cross-border claims. The current regime cannot, in its entirety, be maintained unilaterally via a Great Repeal Bill, as the Brussels I Recast and II bis Regulations require reciprocity. This means that even if the UK would continue to enforce Member State judgments without any formalities, EU Member States would not be obliged to do the same.

Also, there is uncertainty whether any earlier regimes such as the superseded 1968 Brussels Convention or earlier bilateral enforcement treaties might revive once the EU Regulations cease being applied. This creates a legal patchwork for the cross-border enforcement of judgments which falls well behind the swift and efficient mechanisms currently provided.

The UK will also cease being a Member of the 2005 Hague Convention and the 2007 Lugano Convention. These have been signed by the EU on behalf of the Member States and the UK is bound by them only through its current EU Membership. Leaving the EU will also terminate the UK's status as member of the conventions.

It is yet unclear how these considerable gaps will be filled.

Q: Are parties less likely to litigate in the UK due to Brexit?

A: Possibly. The UK litigation market needs legal certainty. Uncertainty about the future legislative framework already started impacting the decision making process of international litigants who have to consider whether they bring proceedings in the UK, despite potential enforcement difficulties when Brexit becomes effective. There is growing competition from other litigation centres that offer proceedings in English language/under English law.

Although there are other elements that advocate in favour of litigating in the UK (quality of the courts and legal services sector, speed of proceedings, suitability of English law for commercial disputes, English language) the uncertainty surrounding Brexit can discourage litigants if the current regime is not replaced by an effective and workable framework.

Q: Is there any precedent for a bespoke deal on civil justice measures?

A: Yes. Denmark opted-out from civil justice measures under the Amsterdam Treaty. Unlike the UK, it had no possibility of opting into any Regulation in that area. Denmark therefore tried to reach parallel agreements with the EU on the application of several civil justice measures. However, agreement could only be reached on the Brussels I Regulation, as Denmark was a party to its predecessor, the 1968 Brussels Convention. In addition, Denmark has to accept the Regulation's revisions, ie the Brussels I Recast as well as future amendments. Failure to do so would result in the termination of the agreement.

Whether a similar UK-EU agreement could be achieved remains to be seen. On the one hand, the odds are rather favourable because the UK, unlike Denmark, has been applying most EU civil justice measures. On the other hand, Denmark is a Member State, while post-Brexit Britain will be a third State. Also, the EU-Denmark Agreement acknowledges the role of the CJEU both for the interpretation of the Brussels I Regulation as for the interpretation of the EU-Denmark Agreement itself.

Q: What regime should be adopted post Brexit?

A: (1) The UK should (re)join the **2005 Hague Convention**, which is an open access convention, to secure that choice of court agreements in favour of the English courts in commercial cases are respected and judgments given on their basis are enforced. However, the convention is limited in scope and does not extend to B2C scenarios or tort cases. It only fills part of the gap.

(2) The UK should also (re)join the **2007 Lugano Convention**. This requires meeting the accession criteria (EFTA Membership or unanimous agreement amongst all Contracting Parties) as the convention is not open access. Signing it also entails adherence to its Protocols, in particular Protocol No 2 which requires signatory states to "pay due account to" CJEU rulings on the interpretation of the Convention. Whether this is likely in light of the UK's current perception of the CJEU is questionable. Being outside the Lugano Regime would cause major problems for disputes not covered by the 2005 Hague Convention and would be a huge step back for access to justice.

(3) Ideally, the UK should seek a bespoke deal on the application of the **Brussels I Recast Regulation**, similar to the EU-Denmark Agreement. Such deal could include the Evidence and Service Regulations. This would simplify cross-border proceedings and secure the exportability of judgments from UK based courts. Again, this option is not available without giving a role to the CJEU in safeguarding the uniform interpretation of the Regulation's rules. It could potentially be envisaged to negotiate a bespoke agreement on Brussels I in combination with a Lugano Protocol 2, but this requires both the goodwill of the EU and a compromise from the UK on the role of the CJEU.

(4) If a bespoke deal seems feasible, it should be extended to litigation in cross-border family matters (**Brussels IIbis and Maintenance Regulations**).

(5) The UK should copy the **Rome I and II Regulations** into national law. They do not require reciprocity and have *erga omnes* effect. This means that Member State courts would apply them after Brexit to cases with a connection to the UK. It makes sense for the UK to do the same in order to avoid forum shopping and the possibility of different national laws being applied to the same set of facts. Copying the Rome I and II Regulations would ensure continued uniformity in the area of conflict of laws.

Q: Will the options for a future regime for dispute resolution depend on whether or not the UK is part of the single market?

A: Likely, although judicial cooperation in civil and commercial matters is an area which should be considered separately from the UK's membership in the single market. As the TFEU itself shows, judicial cooperation is a distinct pillar of the EU framework and developing a workable system for access to justice in cross-border cases should be in the interest of both the UK and EU. Whether or not the UK is in the single market, there will be cross-border disputes that need to be solved and there have been systems in place that worked well for many years. There is, however, no guarantee that this area will be negotiated separately and the opinion that access to the single market should be a general precondition for joining civil justice measures is rather widespread.

Q: Why is a compromise on the CJEU a precondition for a good deal?

A: European rules harmonising the legal framework for cross-border litigation must be applied by Member State courts in a way that responds to the need for uniformity and consistency. In case of doubt, the CJEU is the instance that assists national courts in providing an authoritative, autonomous and EU-wide interpretation of the rules. Conferring this task to a single European body is very useful as it prevents Member State courts from adopting diverging interpretations of the harmonised rules, which could jeopardise the whole idea of harmonisation. Being part of a harmonised system only makes sense if there is the willingness, at least to some degree, to accept a uniform interpretation of the rules. Under the Brussels I Regulation, Member States are bound by the CJEU's judgments. Under the Lugano Convention they have to "pay due account" to the CJEU's decisions. In the latter case, there is some degree of flexibility and the possibility to deviate from CJEU case law, should a contracting state think a decision is incorrect. At least the latter commitment would be required from the UK. A UK-EU agreement on a workable solution without accepting any role of the CJEU is very unlikely.