



Myerson Brexit

Litigating after the
transition period

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Welcome

We understand the complexities of modern life and the importance of taking care of your business interests. So it's a deep source of satisfaction that so many businesses choose Myerson as their trusted adviser.

Why Myerson?

We are proud to be ranked as 'Top Tier' in the prestigious international directory **The Legal 500**, and commended by The Times '**Best Law Firms 2019**'. Therefore, you can rest assured you will receive a high quality and truly personal service.

With change comes opportunity. Remaining informed of the impact of Brexit and how it affects the economy may give rise to opportunities - we can advise you and your business on how you may take advantage of such opportunities to your commercial and personal benefit.

How we work.

Every client is different, and we are here to support you every step of the way.

Personal, partner-led service. Our most experienced solicitors get to know you and your business inside out. We strive to become your trusted advisers, providing added value and most of all, a genuinely personal service.

The highest level of expertise. Combining commerciality, practicality and legal expertise enables us to deliver every time. Our solicitors have a wealth of knowledge gained from advising clients of all shapes and sizes.

A team you can trust. You're in safe hands. We have a team of specialist lawyers from across our employment, litigation, corporate & commercial departments who have in-depth knowledge of the economic changes following the impact of Brexit. Our departments work together to ensure that the best outcome for our clients - our expert team knows its stuff!

Litigating After The Transition Period

This guide seeks to outline the impact of Brexit for business who were already involved in litigation at the end of the transition period or are contemplating issuing proceedings against an opponent in an EU member state after 31 December 2020. This guide considers the impact of Brexit on:

- the law that will apply to determine the dispute
- the court in which the claim will be determined
- the procedure for serving a claim on an opponent in an EU member state
- the ease and cost of enforcement of an English judgment in an EU member state
- rules relating to mediation and arbitration

The rules before Brexit.

Prior to Brexit, the UK was a party to a framework of EU rules. Those rules governed the issues identified above and gave a clear guide for English claimants as to where and how their dispute would be decided, and how their judgment would be enforced.

The rules after Brexit.

Following the UK's withdrawal from the EU, the UK is no longer a party to the European framework of rules. The Trade and Cooperation Agreement, which took effect on 1 January 2021, contains no provision for cross border cooperation in matters of civil justice, so we are effectively in a "no deal" situation as far as jurisdiction and enforcement of judgments is concerned.

Whilst the UK has taken some steps to limit the impact of the changes, there will be an impact on all litigants with cross border claims issued after the end of the transition period.

Claims instigated before the end of the transition period.

Claims issued prior to the 31 December 2020 are largely unimpacted by the new framework because they remain subject to the pre-Brexit rules. Judgments of the English court in such claims will continue to be recognised and enforced by EU member states.

Retained EU law.

The law in the UK is a mixture of domestic legislation and legislation which has originated from Europe. Domestic legislation is unaffected by Brexit.

Legislation which originated from Europe (which we refer to as EU law) and which applied to the UK at the end of the transition period has been incorporated as a new body of law known as 'retained EU law'.


Retained EU Law will in due course be amended to introduce new UK policies or implement international agreements.

English case law and the Court of Justice of the European Union.

English case law is unaffected by Brexit. However, the UK is no longer bound to follow decisions of the Court of Justice of the European Union.

Governing law after Brexit.

The rules which applied before Brexit to determine which law would apply to contractual and non-contractual obligations remain unchanged. Consequently, the post Brexit framework creates no change to the rules on applicable law. Member states will continue to respect choice of law clauses, and parties who have chosen English law to govern their contract will continue to see that choice of law upheld.



The English courts will continue to apply Rome I (which applies to contracts entered into from 17 December 2009), the Rome Convention (which applies to contracts entered into between 1 April 1991 and 16 December 2009), and Rome II (which governs the law relating to non-contractual obligations) when determining questions of governing law.

Jurisdiction after Brexit.

Jurisdiction involves determining which court which will be the appropriate court to hear a dispute. The court with jurisdiction to hear a dispute can be different to the law which governs the contract.

The rules which determined jurisdiction prior to Brexit were the Brussels Recast Regulation and the Lugano Convention. Those rules ceased to apply at the end of the transition period.

EU member states are no longer required by the rules to recognise or uphold all choice of jurisdiction laws. This creates uncertainty and risk for litigants with cross-border disputes.

Contracts containing an exclusive choice of jurisdiction clause.

Protection is afforded to parties whose contracts contain an exclusive jurisdiction clause – that is a clause within a contract whereby the parties have elected a particular court to determine any dispute. Such contracts are afforded the protection of the 2005 Hague Convention on Choice of Court Agreements (Hague Convention) provided the chosen court is a court of a contracting state.

The Hague Convention requires any contracting state to recognise and uphold the court specified by the parties in an exclusive jurisdiction clause. However, there is uncertainty as to whether the Hague Convention will apply to exclusive jurisdiction clauses entered into between 1 October 2015 and 31 December 2020. Parties should consider re-agreeing such clauses to ensure they are afforded the protection of the Hague Convention in the event of a dispute.

Contracts which do not contain an exclusive jurisdiction clause.

The Hague Convention is limited in its application and only applies to contracts where there is an exclusive jurisdiction clause.

For contracts which do not contain an exclusive jurisdiction clause, there are no rules for allocating jurisdiction when a claim is issued. In this situation the English common law rules will apply.

There is possibility the English courts could exercise their discretion and reject jurisdiction - although this discretion is exercised very infrequently.

There is also the risk of what are known as parallel proceedings, which is where two sets of proceedings concerning the same dispute are issued in different jurisdictions.

Enforcement of judgments in the EU.

Before Brexit, the framework of EU rules (the Recast Brussels Regulation and the Lugano Convention), meant that mutual co-operation existed between member states which made enforcement in another member state a relatively straightforward process. Those rules ceased to apply at the end of the transition period.

For cross border claims issued after Brexit, there is no mutual recognition of judgments by EU member states. Enforcement of an English judgment in an EU member state will be governed by the national law of the state where the judgment is being enforced, except where a contract contains an exclusive jurisdiction clause which is afforded the protection of the Hague Convention.

Where the Hague Convention applies, a judgment given by an English court will be recognised and enforced in the EU in accordance with the provisions of the Hague Convention. However, the Hague Convention does not provide for reciprocal recognition and enforcement of interim measures of protection, such as freezing orders and injunctions.

Where the Hague Convention does not apply, enforcement will present procedural hurdles, will be more time-consuming and costly. Local law advice from the country in which the judgment is being enforced will need to be obtained.

There may be grounds on which the opponent can resist enforcement which would not previously been available under the European regime.

There are some EU member states which already have laws which provide for the reciprocal recognition and enforcement of English judgments, but others do not. There may also be some protection offered by old bilateral treaties between the UK and EU member states. This would need to be considered on a country-by-country basis.

The Lugano Convention.

The Lugano Convention also deals with jurisdiction and enforcement of judgments, but prior to Brexit it was not hugely important as other rules took precedence.

The Lugano ceased to apply to the UK at the end of the transition period.

The UK has applied to join the Lugano Convention in its own right, but the unanimous consent of all contracting states is required. The EU's position remains uncertain.

If the UK is given permission to join the Lugano Convention, there will be little change to the Pre-Brexit regime on jurisdiction and enforcement of judgments. All judgments of the English courts would then be recognised in the EU. That would give certainty and ease of enforcement for all judgments of the English Courts in the EU.



Service of proceedings after Brexit.

The permission of the English court is now required in the majority of cases where proceedings need to be served outside of the jurisdiction. Even if permission is not required, the process is likely to be less efficient and more costly. However, a new rule will come into force on 6 April 2021 which means that that permission of the court to serve the claim form will no longer be required in cross border civil and commercial cases where an applicant is seeking to rely upon the 'Choice of Court Agreements'.

Mediating after Brexit.

There is no direct impact caused by Brexit on the powers of the English courts in relation to mediation. Parties can continue to mediate in the same way as before Brexit.

Arbitration after Brexit.

The recognition and enforcement of arbitration awards is governed by the New York Convention (which the UK signed in its own right and not as an EU member state). Arbitration and the enforcement of arbitral awards is therefore not affected by Brexit. For this reason, it parties should consider the inclusion of an arbitration clause in future contracts as a means of providing certainty.



You're in safe hands!

If you would like further information about how we can help you, or if you have any questions, please don't hesitate to contact a member of our Commercial Litigation Team today.

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black and
white.



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