



# Myerson Preparing for 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 are 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. The decision to issue proceedings may be impacted by various factors. They include:

- the law that will apply to the parties' contractual and non-contractual obligations
- 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 a member state
- the ease and cost of enforcement of any judgment which is obtained
- rules relating to mediation and arbitration

These factors are considered below.

## 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 any potential litigant as to where and how their dispute would be decided.

The UK was also a party to various different types of international agreements which contain rules relating to legal proceedings.

## The rules during the transition period.

During the transition period the UK is to be treated as if it were still an EU member state for most purposes, so there has been very little impact on civil claims. Most of the EU rules, including those which determine the applicable law and jurisdiction, continue to apply to the UK during the transition period.

During the transition period the UK also continues to be treated as a member state for the purposes of international agreements to which it is a party by virtue of its EU membership.

## The rules after the transition period.

Following the UK's withdrawal from the EU, the UK will no longer be a party to the European framework of rules, and this will have an impact on litigants with cross border claims.

The various international agreements to which the UK is a party will need to be considered on an individual basis for their effect after the transition period has ended. Some international agreements will continue to apply to the UK in the absence of any action by the UK government, but others will not.

The future position remains uncertain in some areas and will only be clarified once the terms of any agreement reached between the UK and the EU are known. A more significant impact on future cooperation between the UK and EU members states is likely if no agreement is reached between the UK and the EU by 31 December 2020.

## How will UK law be affected by Brexit?

The law in the UK is a mixture of domestic legislation and legislation which has originated from Europe. Domestic legislation will be unaffected by Brexit; it is only legislation which has originated from Europe which will be affected. Under the European Union (Withdrawal Agreement) Act 2020, a new body of law known as 'retained EU law' will be created.

This means that EU law which applied to the UK at the end of the transition period will be adopted as UK domestic legislation. This will provide legal certainty and continuity until decisions are made about policy change.

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

# Will English case law be affected?

English case law will be unaffected by Brexit. However, whilst the UK was a member state, it was bound to follow decisions of the Court of Justice of the European Union (CJEU). During the transition period the UK must continue to comply with rulings of the CJEU.

After the end of the transition period the CJEU will have far less of an influence over decisions of the UK courts, although its jurisdiction will not end entirely. Its impact on UK decisions will ultimately depend on whether an agreement is reached with the EU and on what terms.

## How will the law, applicable to my contractual obligations, be affected after 31 December 2020?

The rules which currently apply to determine which law will apply to contractual and non-contractual obligations will largely remain the same. Those are 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).

## I have an express choice of law clause in my contract, will that remain enforceable?

An express choice of law clause is a clause within a contract whereby the parties have elected a particular law to determine any dispute.

Express choice of law clauses are likely to remain enforceable within the EU after 31 December 2020.



# My contract contains an express jurisdiction clause, will that remain enforceable?

An express jurisdiction clause is a clause within a contract whereby the parties have elected a particular court to determine any dispute.

An exclusive choice of court agreement in English contracts which chooses the court of an EU contracting state will continue to be enforceable during the transition period.

Where a claim is issued before 31 December 2020, the relevant EU rules will continue to apply and an express choice of jurisdiction within a contract will continue to be enforceable after the transition period.

For proceedings issued after the end of the transition period the position on exclusive choice of court agreements remains uncertain in the absence of an agreement with the EU.

# There is no express jurisdiction clause in my contract. Which rules will determine which court hears my claim?

The EU framework of rules determined which court would determine a dispute where there was no express jurisdiction clause.

The relevant EU rules continue to apply to proceedings initiated before the end of the transition period. The rules for determining jurisdiction therefore remain unchanged until 31 December 2020.

For a business considering issuing a claim after the transition period has ended, the position on jurisdiction is uncertain. The relevant EU instruments will cease to apply.



The UK intends to try and reach an agreement with the EU which closely reflects the principles of co-operation under the current EU framework on a reciprocal basis. However, until such time as an agreement (if any) is reached by the UK with the EU, the position on jurisdiction remains uncertain for proceedings issued after 31 December 2020.

## Will the way proceedings are served on an EU opponent, change after 31 December 2020?

Service of proceedings outside of England and Wales is governed by the EU Service Regulation and the common law rules.

The EU rules continue to apply during the transition period, and proceedings can generally be served on a defendant in another member state without the permission of the court if the English court has jurisdiction under the framework of EU rules.

The EU rules will cease to apply after the transition period. The procedure for serving documents out of the jurisdiction will become less efficient and will result in service being more expensive than before.

## How will enforcement of judgments be affected?

Under the current EU rules (the Recast Brussels Regulation and the Lugano Convention), mutual co-operation exists between member states which made enforcement in another member state a relatively straightforward process. A judgment of a member state is enforceable in another member state without any declaration of enforceability being required.

For claims issued before the end of the transition period, those rules will continue to apply, and the recognition and enforcement of judgments in other member states will remain unchanged.

For claims brought after the transition period, the position on enforcement of judgments remains uncertain in the absence of an agreement between the UK and the EU. The relevant EU instruments will cease to apply. The enforcement of a UK judgment in an EU member state in proceedings will be determined by the national law of the state where the judgment is being enforcement.

This is likely to involve additional time and costs. There may also 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.

## Will the rules on mediation change?

Whilst certain EU rules relating to mediation will no longer apply after the transition period, there should be no direct impact on the powers of the English courts in relation to mediation due to the UK's existing national provisions for mediation.

## Will arbitration clauses be affected?

Brexit is unlikely to affect arbitration agreements substantially, or at all. 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) and therefore is not affected by the UK's withdrawal from the EU. For this reason, it may be worth considering the inclusion of an arbitration clause in future contracts which should provide certainty for the parties.



# 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.

**Call: 0161 941 4000**

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 SCAN ME

Because  
life is rarely  
**black** and  
**white.**



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