



Finance ADVISORY ■

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Brexit and Its Potential Impact on Cross-Border Litigation Throughout Europe

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Over the past few months, it is safe to say that COVID-19 has totally dominated the media and our topics of conversation, whether professional or social. Before then, it was all about Brexit. Despite the pandemic and its media coverage, Brexit rumbles on.

Notwithstanding that Brexit talks between the UK and EU have been severely disrupted by the coronavirus pandemic, the UK government appears to be proceeding on the basis that Britain's post-Brexit transition period will end on 31 December 2020, as planned, with any request for an extension looking increasingly unlikely. Amongst other things, any prolongation of the transition period would no doubt result in Britain having to make financial contributions to the EU budget, money which would, of course, be much better spent on the National Health Service.

With the end of the transition period steadily approaching, an important issue to consider is the subsequent effect on cross-border litigation and judicial cooperation between the UK and EU.

On 8 April 2020, the UK formally applied to become an independent contracting party to the Lugano Convention 2007, which currently applies to the EU (including the UK, during the transition period) and the European Free Trade Association (EFTA) countries Iceland, Norway, and Switzerland. In general terms, the Convention provides certainty of which country's courts may hear a civil or commercial cross-border dispute and ensures that the resulting judgment will be recognised and enforced across borders of the contracting states. Hence, it helps prevent multiple court cases taking place on the same subject matter in different countries and significantly reduces the costs and expenses for the parties involved. This is therefore an important convention for UK businesses and the legal services sector.

If the UK's application is accepted, ultimately there would be little change from the current regime in jurisdiction and enforcement, and English judgments would continue to be readily enforceable throughout the EU and in EFTA countries. That said, under Protocol No 2 to the Convention, the courts of non-EU Member States (which, post-Brexit, would include the UK) are only required to "pay due account" to European Court of

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Justice (ECJ) case law on the Brussels Regulation, meaning that those non-EU signatories to the Convention arguably have a greater degree of flexibility than the EU signatories. As a result, it could be said that while the UK courts would still be expected to consider ECJ case law post-Brexit, they would not be bound by it under Protocol No 2.

The UK's accession to the Convention requires agreement from the EU, Denmark (which has an "opt-out" right), and the EFTA countries. On 29 January 2020, the government announced that the UK had received statements of support from Iceland, Norway, and Switzerland. It has since been reported that, following the UK's formal request to join, the European Commission has advised the bloc's Member States that a quick decision was "not in the EU's interest."

Even though the application of Protocol No 2 and lack of ECJ jurisdiction will perhaps go against the EU's desire to maintain a uniform approach, it is still the case that this is already the position for the existing non-EU signatories to the Convention. Furthermore, if the UK were to revert to applying the common-law rules on jurisdiction at the end of the transition period, this would be a far less synchronised approach as it would be between the EU Member States and the UK under the Convention.

If the UK's application to accede to the Convention is not accepted, London's standing as a favoured global centre for commercial disputes may be adversely affected, particularly if companies choose to litigate elsewhere or have the ability to contravene its rulings outside the UK.

The Convention provides that application requests should usually be dealt with within a year. We are hopeful that, in order to avoid any further disruption for businesses (in addition to that caused by the coronavirus pandemic) the EU Commission will advise the EU Member States to accept the UK's application to accede to the Convention before the end of the transition period.

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