

The Thursday Morning Webinar

Brexit: What to Do and When to Do It

The webinar will start shortly

Next week: the festive caselaw roundup!
TUESDAY at 11am

The Thursday Morning Webinar



10th December 2020

31/12/2020 @ 11pm

At the stroke of the midnight hour (Central European Time) the Transition Period comes to an end.

Any deal agreed by then will not include a continuation of the current EU civil law regime for jurisdiction, applicable law, and enforcement and recognition of judgments.

WHAT DOES THIS MEAN... and

WHAT CAN WE DO ABOUT IT?

Jurisdiction: recast Brussels

Currently governed by the recast Brussels Regulation (EU) 1215/2012.

Recast Brussels is intended to strike a balance between harmonisation, certainty and consumer protection.

It is not possible to defeat the purpose of the Regulation by reference to arguments of forum non conveniens - *Owusu*, Case C-281/02.

Jurisdiction: recast Brussels

Currently governed by the recast Brussels Regulation (EU) 1215/2012.

General rule: Defendants must be sued in the courts of their domicile (Article 4(1)).

Jurisdiction: recast Brussels

Important exceptions:

Article 7: tortious and contractual claims, among others.

Article 8: multiple Defendants...

Jurisdiction: recast Brussels

Important exceptions:

Section 3: Insurers...

This section gives rise to jurisdiction in *Odenbreit* claims - enabling personal injury claims against road traffic and public liability insurers.

The CJEU, in *Spedition*, Case C-495/17, confirmed that service may be effected on UK handling agents.

Jurisdiction: recast Brussels

Section 4 relates to consumer contracts; this section gives rise to jurisdiction in some cosmetic surgery and accommodation claims.

Jurisdiction: recast Brussels

Section 5 relates to employment contracts.

Section 7 relates to jurisdiction clauses - these are generally enforceable.

Section 9 relates to lis pendens and irreconcilable judgments - these provide a good degree of certainty and were altered in recast Brussels so as to avoid the so-called 'Italian Torpedo' issue.

Recognition/ enforcement: recast Brussels

Sections 1 and 2 of Chapter 3 of Brussels Recast deal with recognition and enforcement of UK judgments in other member states.

Art. 36(1): A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

Art. 39: A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required.

31/12/2020 @ 11pm - Jurisdiction

WHAT DOES THIS MEAN?

Brussels Recast rules will no longer apply after the end of the transition period - meaning jurisdiction, recognition and enforcement will become more difficult...

31/12/2020 @ 11pm - Jurisdiction

WHAT CAN YOU DO ABOUT IT?

Art. 67(1) of the Withdrawal Agreement provides that the jurisdiction provisions of Brussels Recast apply to “*legal proceedings instituted before the end of the transition period* and in respect of proceedings or actions that are related to such legal proceedings...”

31/12/2020 @ 11pm - Enforcement

WHAT CAN YOU DO ABOUT IT?

Art. 67(2) of the W.A. provides that Brussels Recast provisions on recognition and enforcement “shall apply to the recognition and enforcement of judgments given in legal proceedings instituted before the end of the transition period, and to authentic instruments formally drawn up or registered and court settlements approved or concluded before the end of the transition period”

31/12/2020 @ 11pm - Jurisdiction /
Enforcement

WHAT CAN YOU DO ABOUT IT?

Issue proceedings *before the end of the transition period* to be able to benefit from Brussels Recast rules on jurisdiction, recognition and enforcement.

31/12/2020 @ 11pm - Jurisdiction /
Enforcement

WHAT CAN YOU DO ABOUT IT?

But is it necessary to serve proceedings within the transition period?

The answer may be found in the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019. s.95(2): a court is seised of proceedings *when lodged with the court, unless the Claimant has failed to take such subsequent steps to serve as are necessary*. In some jurisdictions date of issue is deemed to be date of service.

Jurisdiction: recast Brussels

It is therefore prudent to issue *and serve* prior to the deadline in order to avoid any issue being taken with the validity of either issue or service.

Jurisdiction: after Brexit

After 31st December 2020 recast Brussels will fall away.

The UK has applied to join the Lugano Convention 2007. It is supported by the EFTA states - Iceland, Norway and Switzerland - but not currently by the EU (which seems to be waiting to see what the wider future relationship is).

Jurisdiction: after Brexit

Accession is a four stage process:

Requesting accession (8th April 2020);

Unanimous approval by the contracting parties;

Depositing the instrument of accession;

A three month objection period before the Convention enters into force - a contracting state that previously approved accession may object at this stage, with the effect that the Convention does not enter into force between the UK and that state.

Jurisdiction: after Brexit

The provisions of the Lugano Convention are similar to those of recast Brussels - but not identical.

The courts of non EU contracting states are not bound by the CJEU - but merely take 'due account' of its decisions.

There is no mechanism by which the UK could be penalised for failure to comply with the Convention.

Exclusive jurisdiction clauses do not carry the same weight in an 'Italian Torpedo' context.

Jurisdiction: after Brexit

If the UK does not accede to the Lugano Convention, will we revert to the pre-EU position?

Consumers:

UK domiciled consumers will still be able to sue here in respect of consumer contracts (new S 15B of Civil Jurisdiction and Judgments Act 1982).

Jurisdiction: after Brexit

If the UK does not accede to the Lugano Convention, will we revert to the pre-EU position?

Otherwise: Jurisdiction will be based on common law rules.

The Claimant must bring him or herself within one of the tort gateways in CPR Part 6, PD6B:

- Damage has been, or will be, sustained within the jurisdiction.
- Anchor Defendants: a ‘necessary or proper party to the claim’.

Jurisdiction: after Brexit

The Claimant must also satisfy the court that England and Wales is the proper forum in which to bring the claim: forum conveniens.

It must be possible to serve the proposed Defendant, either outside or within the jurisdiction.

Jurisdiction: after Brexit

Might the Hague Choice of Court Convention provide an answer?

The Hague Conventions will be implemented by the Public International Law (Implementation of Agreements) Bill 2020 which has passed and is awaiting Royal Assent.

The Hague suite of Conventions is not a complete answer - personal injury claims, consumer contracts and employment contracts are excluded from their scope.

There is also an issue between the UK and EU regarding commencement in relation to the UK.

Enforcement: after Brexit

When recast Brussels is no longer applicable, we will fall back on international agreements as regards the recognition and enforcement of judgments.

Public policy arguments may be strengthened.

For claims issued after that, it will be necessary to take advice on enforcement from foreign agents - it will be a matter of foreign law in the jurisdiction concerned.

In summary....

If it is possible to issue and serve prior to 31st December 2020, this is the most prudent course.

If this is not possible, it is most prudent to issue and then to serve foreign entities by way of the Foreign Process Section (but be mindful of the necessity to apply for extensions of time for service).

If a claim cannot be issued before 31st December 2020, it may be better to wait for some months until the position is clearer before issuing it.

If this is not possible, it will be necessary to take the advice of a foreign agent as to service and enforcement.

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