

The Thursday Morning Webinar

Cross Border Litigation after **BREXIT**

The webinar will start shortly

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28 January 2021

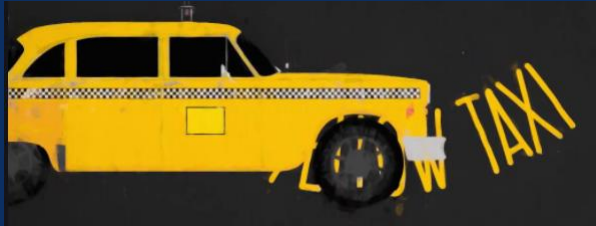
End of Transition

At 23:00 on 31 December 2020, the Transition Period came to an end. The Brexit process was complete.

The Trade and Cooperation Agreement (“TCA”) between the UK and the EU contains no provisions on Civil Justice Cooperation.

The result: it is **NO DEAL** for now for CJC. We fall back on a Smörgåsbord of mini-deals for enforcement of judgments and secondary legislation / common law rules for jurisdiction.

Don't it always seem to go...



The outgoing regime

Jurisdiction and Enforcement of Judgments:
Recast Brussels Regulation (EU) 1215/2012.

Applicable Law

Rome (I) Regulation (EC) No 593/2008 - contracts

Rome (II) Regulation (EC) No 864/2007 - torts

Auf weider sehen, not goodbye

Winding Down provisions in the WA

Art. 67(1) of the Withdrawal Agreement provides that the 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...*”

Art 66(a) provides that Rome I applies to contracts “*concluded before the end of the transition period*”

Art 66(b) provides that Rome II applies to events giving rise to damage “*where such events occurred before the end of the transition period*”

Jurisdiction: Is my case caught by the WA?

How should we interpret the word ‘instituted’ in Art. 67?

Art. 4(4) WA - *“The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period”*

Union Law: *Siegfried Zelger v Sebastiano Salinitri (129/83):*

“Article 21 of [the 1968 Brussels Convention] must be interpreted as meaning that the court ‘first seised’ is the one before which the requirements for proceedings to become definitely pending are first fulfilled, such requirements to be determined in accordance with the national law of each of the courts concerned.”

Jurisdiction: Is my case caught by the WA? (cont)

How should we interpret the word ‘instituted’ in Art. 67?

A matter of UK law.

Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019. s.95(2): a court is seised of proceedings “*when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps the applicant was required to take to have service effected on the respondent.*”

See also CPR PD7A Para. 5.1: “*5.1 Proceedings are started when the court issues a claim form at the request of the claimant (see rule 7.2) but where the claim form as issued was received in the court office on a date earlier than the date on which it was issued by the court, the claim is ‘brought’ for the purposes of the Limitation Act 1980 and any other relevant statute on that earlier date.*”

Jurisdiction: Is my case caught by the WA? (cont)

The upshot: where a claim form has been *lodged with the court* prior to 31st December, even if served after the transition period, the court has jurisdiction over it.

Service of proceedings must be done in accordance with the methods set out in CPR Part 6. Pursuant to CPR 6.33(3) proceedings may be served outside the jurisdiction where the Defendant is not within the jurisdiction *or* the facts giving rise to the claim did not occur within the jurisdiction, IF it has the power to determine the claim (for example under the transition provisions).

It is no longer possible to serve on UK handling agents.

Enforcement: Is my case caught by the WA?

Art. 67(2)(a):

The Brussels (recast) provisions on 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”*.

A relatively long tail.

So a judgment from a foreign court will be enforceable for some time to come, and vice versa.

The New Order - Applicable Law

For Applicable Law: le plus ça change...

Rome I and II as they existed on 31 December 2020 have been incorporated into UK domestic law in 'snapshot' by virtue of the EU (Withdrawal) Act 2018 with 'deficiencies' corrected by the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019.

UK can and does apply these rules unilaterally as this does not require cooperation between states at international level.

In EU courts, cases where English law would be the applicable law under the Rome Regulations will continue as such, as the Rome rules apply to the non-EU Third Countries.

The New Order - Applicable Law

Applicable law - direct right against insurers?

It follows, therefore, that the changes do not affect claims made against insurers arising out of road traffic accidents under the European Communities (Rights against Insurers) Regulations 2002 (because they apply to vehicles normally based in the UK).

In relation to accidents occurring in England and Wales but involving foreign insurers, Article 18 of Rome II applies - if either the law of the tort or the law of the insurance contract allows such a claim to be made, a direct claim can be made (subject to jurisdiction considerations).

The New Order - Hague Conventions

Hague Convention 2005 - Choice of Court - contract only

- Provides rules for enforcement of judgments and jurisdiction where contracts contain 'choice of court' clauses.
- Came into force on 1 October 2015, with EU being a party on behalf of all its Member States.
- During the transition period, the UK has maintained an odd status of being covered by the 2005 Convention without being in the EU.
- The UK joined the Convention in its own right from 1 January 2021, although with some ambiguity as to its retrospective effect on choice of court clauses before that date – EU and UK position differ.
- Implemented in UK domestic law by the Private International Law (Implementation of Agreements) Act 2020.
- Personal injury claims, consumer contracts and employment contracts are excluded from the scope

The New Order - Jurisdiction

Good news for consumers:

UK domiciled consumers will still be able to sue here in respect of consumer contracts

New s15B(2)(b) of Civil Jurisdiction and Judgments Act 1982, provides a consumer may sue a Defendant: *“in the courts for the place where the consumer is domiciled (regardless of the domicile of the other party to the consumer contract).”*

CPR Rule 6.33 has been amended such that permission of the court is not required for service out.

The New Order: Jurisdiction

Otherwise it's Common Law

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

- Torts: damage has been, or will be, sustained within the jurisdiction.
- Contracts: formed within the jurisdiction, is governed by English law, or contains a jurisdiction clause in favour of England and Wales.
- Anchor Defendants: a 'necessary or proper party to the claim'.

The New Order: Jurisdiction

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.

The New Order - Recognition/Enforcement

In some cases we will fall back on international agreements as regards the recognition and enforcement of judgments.

See for instance the UK-Norway Agreement of 1961 on CJC, updated in 2020.

It will be necessary to take advice on enforcement from foreign agents - it will be a matter of foreign law in the jurisdiction concerned.

The New Order - Hague Conventions

Hague Judgments Convention 2019

- Trying to replicate the New York regime for enforcement of arbitral awards in context of judgments.
- Will cover personal injury.
- Neither the UK nor the EU has yet signed up to the Convention – will likely be years down the line..

Where do we go from here?

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).

Lugano

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.

Lugano (cont)

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.

In the meantime...



Next week: Fundamental Dishonesty in
Clinical Negligence Claims

Thursday 11th February at noon
David Thomson and Ella Davis

Sarah Prager

sprager@1chancerylane.com

Thomas Yarrow

tyarrow@1chancerylane.com