

# Civil Jurisdiction and Judgments in England and Wales after Brexit

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serle court



## Overview: regime in the UK prior to 1 January 2021

- ❑ Recast Judgments Regulation (EU) No. 1215/2012 contains harmonised rules of jurisdiction and recognition and enforcement of judgments in civil and commercial matters (“**Brussels I Recast**”).
- ❑ Lugano Convention 2007 applies in EU (including Denmark separately), along with Iceland, Norway, and Switzerland (“**Lugano**”).
- ❑ UK was a party to the Hague Choice of Court Convention 2005 by virtue of EU ratification; along with Denmark (separately), Mexico, Montenegro and Singapore (“**Hague Choice of Court Convention**”). It has since also entered into force in Ukraine (on 1 August 2023).
- ❑ Common law applied residually (principally to defendants domiciled outside the EU).
- ❑ The transition period ended at 11pm GMT on 31 December 2020.



## Overview: regime in the UK from 1 January 2021

- ❑ Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (as amended):
  - ❑ s.82(1)(b)(iv) – revokes Lugano;
  - ❑ s.89 – revokes Brussels I Recast;
  - ❑ UK has acceded in its own right to Hague Choice of Court Convention 2005.
- ❑ The provisions relating to consumer and employment contracts in Brussels I Recast have largely been re-enacted for consumers and employees domiciled in the United Kingdom by the Civil Jurisdiction and Judgments Act 1982, ss.15A-E (see reg.26 of the 2019 Regulations).
- ❑ Certain older bilateral treaties between the UK and individual Member States on recognition and enforcement of judgments may revive (e.g. with Austria, Belgium, France, Germany, Italy, and the Netherlands). Bilateral agreement with Norway revised and reaffirmed by further agreement concluded in November 2020.
- ❑ **Otherwise, jurisdiction and enforcement of foreign judgments are governed by the English common law rules, whether the defendant is domiciled in an EU Member State or Lugano Convention State or not.**

## Transitional arrangements: Brussels I Recast

- The *lis pendens* rules in Brussels I Recast continue to apply where proceedings were instituted in the court first seised prior to the end of the transition period, even if related proceedings are instituted subsequently.
- So too, if proceedings were instituted before the end of the transition period, the resulting judgment is enforceable under the Brussels I Recast regime, even if delivered, or sought to be enforced, after the end of that period.

### **Withdrawal Agreement Article 67: Jurisdiction, recognition and enforcement of judicial decisions, and related cooperation between central authorities**

*“1. In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, in respect of legal proceedings instituted before the end of the transition period and in respect of proceedings or actions that are related to such legal proceedings pursuant to Articles 29, 30 and 31 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council (73), Article 19 of Regulation (EC) No 2201/2003 or Articles 12 and 13 of Council Regulation (EC) No 4/2009 (74), the following acts or provisions shall apply:*

*(a) the provisions regarding jurisdiction of Regulation (EU) No 1215/2012; ...*

*2. In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, the following acts or provisions shall apply as follows in respect of the recognition and enforcement of judgments, decisions, authentic instruments, court settlements and agreements:*

*(a) Regulation (EU) No 1215/2012 shall apply to the recognition and enforcement of judgments given in legal proceedings instituted before the end of the transition period...”*



## Transitional arrangements: Lugano Convention

- ❑ The transitional position is less clear for the Lugano Convention, which is not covered by the Withdrawal Agreement. There is no international agreement on the transitional effects of Lugano.
- ❑ The UK has implemented a unilateral transitional provision dealing with *lis pendens* in section 93(2) of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019:
  - ❑ *“Where before IP completion day [i.e. the end of the transition implementation period] a court in any part of the United Kingdom (the UK court) was seised of proceedings to which a relevant instrument applies, and a court in a State bound by that relevant instrument is subsequently seised of proceedings involving the same cause of action and between the same parties, the UK court may after IP completion day, decline jurisdiction if, and only if, it considers that it would be unjust not to do so.”*

## Transitional arrangements: Lugano Convention

- ❑ The UK has also made unilateral provision to apply the jurisdiction and judgment rules in Lugano wherever proceedings were commenced before 1 January 2021: see section 92 of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019.
- ❑ Hence, e.g. if the courts of Switzerland gave a judgment in proceedings commenced prior to that date, the UK courts would enforce it as if it were a Lugano judgment even after 1 January 2021.
- ❑ Of course, there is no international agreement on the transitional effects of the Lugano Convention, so other Lugano Convention States may take a different view as to the basis and criteria for enforcement of English judgments where proceedings were commenced in England before 1 January 2021 and sought to be enforced after that date.



# Hague Choice of Court Convention 2005

- ❑ UK has acceded in its own right to Hague Convention on Choice of Court Agreements, with effect from 1 January 2021.
- ❑ The Private International Law (Implementation of Agreements) Act 2020 amends s.4 of the Civil Jurisdiction and Judgments 1982 and inserts a Schedule 3F into the 1982 Act containing text of the Convention.
- ❑ The Hague Choice of Court Convention originally came into force in the UK on 1 October 2015 (by virtue of the EU's ratification on behalf of Member States).
- ❑ By Article 3 of the Hague Choice of Court Convention, only exclusive jurisdiction clauses fall within its scope.
- ❑ Clause must be in writing; or by any other means of communication which renders information accessible so as to be usable for subsequent reference
- ❑ There are also subject matter exclusions contained in Article 2 e.g. consumer contracts and carriage of goods. The UK (like the EU) has also largely excluded insurance (but not reinsurance) contracts.

## Hague Choice of Court Convention 2005

- ❑ By Article 16, the Convention only applies to choice of court agreements in favour of Contracting States concluded after its entry into force for that chosen State's courts. There is a question mark over which date will apply to the UK - 1 October 2015 (when the UK was first bound via its membership of the EU) or 1 January 2021 (when it re-acceded as a separate Contracting State).
  
- ❑ The UK has **unilaterally** taken a position (see Sch.5, para 7 of Private International Law (Implementation of Agreements) Act 2020):
  - ❑ *"For the purposes of Article 16 of the 2005 Hague Convention, as it has the force of law in the United Kingdom by virtue of section 3D(1) of the Civil Jurisdiction and Judgments Act 1982 (as inserted by section 1(2) of this Act), the date on which the 2005 Hague Convention entered into force for the United Kingdom is 1 October 2015, and accordingly references in the Convention to a Contracting State are to be read as including, without interruption from that date, the United Kingdom."*
  
- ❑ But it is less clear whether the other Contracting States would agree (although on the HCCH official website, the UK's date of accession is given as 1 October 2015: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> ).





# Hague Choice of Court Convention 2005

## Duty of designated court to assert jurisdiction- Article 5:

*“(1) The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.*

*(2) A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State...”*

## Duty of courts of other Contracting States to decline jurisdiction- Article 6:

*“A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless -*

*a) the agreement is null and void under the law of the State of the chosen court;*

*b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;*

*c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;*

*d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or*

*e) the chosen court has decided not to hear the case.”*

## Duty of courts of other Contracting States to recognise and enforce judgment given by a court of a Contracting State designated in an exclusive choice of court agreement is set out in Article 8.

### Limited grounds for refusal of recognition and enforcement set out in Article 9.

# Recognition and enforcement of foreign judgments at common law

- ❑ Most judgments from EU Member States will now be recognised and enforced under the English common law rules.
- ❑ *Dicey, Morris and Collins, The Conflict of Laws* (16<sup>th</sup> edition, 2022) sets out the principal Rule for recognition of foreign judgments at common law, which is much more restrictive than the recast Brussels I Recast and Lugano Convention regimes:
  - ❑ ***“RULE 47—... a foreign country outside the United Kingdom has jurisdiction to give a judgment in personam capable of enforcement or recognition as against the person against whom it was given in the following cases:***
  - ❑ ***First Case—If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country. For a natural person this requires physical presence in the territory, and for a legal person it requires a fixed place of business in the territory.***
  - ❑ ***Second Case—If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.***
  - ❑ ***Third Case—If the person against whom the judgment was given, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.***
  - ❑ ***Fourth Case—...if the person against whom the judgment was given, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country.”***
- ❑ There are other important differences. For example, unlike under Brussels I Recast, it is a defence at common law under s.32 Civil Jurisdiction and Judgments Act 1982 that a judgment was obtained in breach of a jurisdiction clause:  
***“a judgment given by a court of an overseas country in any proceedings shall not be recognized or enforced in the United Kingdom if the bringing of those proceedings was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country...”***



## Other material changes to English law

### *Lis pendens and forum non conveniens*

- No longer any rule of *lis pendens* compelling the English court to decline jurisdiction where courts in an EU Member State are first seised.
- It is but one factor to consider in applying the doctrine of *forum non conveniens*.
- Proceedings may be stayed in favour of courts of Member States on basis of *forum non conveniens* (Case C-281/02 *Owusu v Jackson* no longer applicable).

### Anti-suit injunctions

- Under Brussels I Recast: Case C-159/02 *Turner v Grovit*, CJEU held that an English court could not restrain the pursuit of proceedings in the courts of another Member State. No such restriction now exists.



## English jurisdiction clauses: abolition of requirement for permission to serve claim form out of the jurisdiction

- After the end of the transition period, Civil Procedure Rules, para 6.33(2B) (as amended) abolished the requirement for permission to serve out of the jurisdiction where there is an English jurisdiction clause (even in cases falling outside the ambit of the Hague Choice of Court Convention 2005):
  - *“The claimant may serve the claim form on a defendant outside the United Kingdom where, for each claim made against the defendant to be served and included in the claim form—*
    - *(a) the court has power to determine that claim under the 2005 Hague Convention and the defendant is a party to an exclusive choice of court agreement conferring jurisdiction on that court within the meaning of Article 3 of the 2005 Hague Convention;*
    - *(b) a contract contains a term to the effect that the court shall have jurisdiction to determine that claim; or*
    - *(c) the claim is in respect of a contract falling within sub-paragraph (b).”*



## Revised gateways for permission to serve out of the jurisdiction

- ❑ Important amendments and extensions to the jurisdictional gateways for permission to serve out of the jurisdiction came into effect on 1 October 2022. These include the following provisions of Civil Procedure Rules, Practice Direction 6B, para 3.1:
  - ❑ General grounds
  - ❑ *“(1) A claim is made for a remedy against a person domiciled within the jurisdiction within the meaning of sections 41 and 42 of the Civil Jurisdiction and Judgments Act 1982.”*
    - ❑ [i.e. the definition of domicile in the UK for individuals is that formally used under the recast Brussels I Recast and its predecessors.]
  - ❑ *(1A) A claim is made against a person in respect of a dispute arising out of the operations of a branch, agency or other establishment of that person within the jurisdiction, but only if proceedings cannot be served on the branch, agency or establishment...*
  - ❑ *(4A) A claim is made against the defendant which—*
    - ❑ *(a) was served on the defendant within the jurisdiction without the need for the defendant’s agreement to accept such service;*
    - ❑ *(b) falls within CPR rule 6.33; or*
    - ❑ *(c) falls within one or more of paragraphs (1A), (2), (6) to (16A) or (19) to (23), and a further claim is made against the same defendant which arises out of the same or closely connected facts.”*



## Revised gateways for permission to serve out of the jurisdiction

- ❑ Claims in relation to contracts
  
- ❑ “(6) A claim is made in respect of a contract where the contract –
  - ❑ (a) was (i) made within the jurisdiction or (ii) concluded by the acceptance of an offer, which offer was received within the jurisdiction;
  - ❑ (b) was made by or through an agent trading or residing within the jurisdiction or
  - ❑ (c) is governed by the law of England and Wales.
  
- ❑ (7) A claim is made in respect of a breach of contract committed, or likely to be committed within the jurisdiction.
  
- ❑ (8) A claim is made for a declaration that no contract exists where, if the contract was found to exist, it would comply with the conditions set out in paragraph (6).
  
- ❑ (8A) A claim for unlawfully causing or assisting in:
  - ❑ (a) a breach of a contract where the contract falls within one of paragraphs (6)(a) to (6)(c) above or within Rule 6.33(2B); or
  - ❑ (b) a breach of contract falling within paragraph (7) above.”



## Revised gateways for permission to serve out of the jurisdiction

### Claims in tort

#### “(9) A claim is made in tort where –

(a) damage was sustained, or will be sustained, within the jurisdiction;

(b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction; or

(c) the claim is governed by the law of England and Wales.”

In *FS Cairo (Nile Plaza) LLC v Christine Brownlie* (‘Brownlie 2’) [2021] UKSC 45, the Supreme Court determined (Lord Leggatt dissenting on this issue) that “damage” under the tort gateway includes both direct and indirect harm.

Paras (12A)-(15D) extend and add new gateways relating to trusts, fiduciary duties and liability of accessories.



## Revised gateways for permission to serve out of the jurisdiction

- ❑ Declarations of non-liability
  
- ❑ “(16A) A claim is made for a declaration that the claimant is not liable where, if a claim were brought against the claimant seeking to establish that liability, that claim would fall within another paragraph of this Practice Direction (excluding paragraphs (1) to (5), (8), (12D), (15D), (17), (22) and (24) to (25)).”
  
- ❑ Gateways (21)-(23) extend and add new gateways relating to obligations of confidence, right to privacy and accessory liability.
  
- ❑ Information orders against non-parties
  
- ❑ “(25) A claim or application is made for disclosure in order to obtain information— (a) regarding: (i) the true identity of a defendant or a potential defendant; and/or (ii) what has become of the property of a claimant or applicant; and (b) the claim or application is made for the purpose of proceedings already commenced or which, subject to the content of the information received, are intended to be commenced either by service in England and Wales or pursuant to CPR rule 6.32, 6.33 or 6.36.”





## Other requirements for permission to serve out of the jurisdiction

- ❑ In order to obtain permission to serve out of the jurisdiction, a claimant must still satisfy the Court as to three conditions.
  
- ❑ Firstly, the claimant must show that there is a **serious issue to be tried on the merits of the claim** (*Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438). That means a substantial question of fact, or law, or both, and is the same test as for summary judgment (*AK Investments v Kyrgyz Mobil Tel* [2011] UKPC 7; [2012] 1 WLR 1804 per Lord Collins at [71])
  
- ❑ Secondly, the claimant must establish that there is a **good arguable case that the claim falls within a gateway**. The test for this was explained by Lord Sumption *Brownlie v Four Seasons Holdings Inc (Brownlie 1)* [2017] UKSC 80 and in *Kaefer Aislamientos SA de CV -v- AMS Drilling Mexico SA & Ors* [2019] EWCA Civ 10 as comprising three ‘limbs’:
  - ❑ Limb 1: claimant must show a plausible evidential basis for the application of the jurisdictional gateway
  - ❑ Limb 2: if there is an issue of fact about it, or reason for doubting whether the gateway applies, the court must take a view on the material available if it can reliably do so; but
  - ❑ Limb 3: the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.
  
- ❑ Thirdly, the claimant will also have to establish that **England is the natural forum**.
  - ❑ **The expansion in the scope of the service out gateways (and correspondingly fewer cases where there will not be a gateway) may lead to more weight being placed on this discretionary element.**

# Retained EU Law (Revocation and Reform) Act 2023

- ❑ Retained EU Law (Revocation and Reform) Act 2023 amends the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal) Act 2020. The 2023 Act:
- ❑ Revokes at the end of 2023 a list of subordinate UK legislation and retained direct EU legislation (which is now to be called “*assimilated law*”). The Rome I and II Regulations are not in this list and so not revoked at this stage.
- ❑ Repeals retained EU rights, powers and liabilities under section 4 of the 2018 Act
- ❑ Abolishes the supremacy of EU law and of general principles of EU law.
- ❑ Makes changes to interpretation and effect of retained EU law. In particular, the Court of Appeal and Supreme Court have an enhanced ability to depart from European Court of Justice case law, including where “*retained EU case law restricts the proper development of domestic law.*” (section 6(5) of the 2023 Act, amending section 6 of the 2018 Act).
- ❑ Includes the power by regulation to restate assimilated law, to reproduce the effect of sunsetted retained EU rights, powers, liabilities etc., or to revoke or replace retained EU law or assimilated law (apart from primary legislation).
- ❑ Still not certain if the Rome I or Rome II Regulations will, in due course, be restated or replaced under the 2023 Act.



# Hague Judgments Convention 2019

- ❑ The Convention entered into force between the EU countries (other than Denmark) and Ukraine on 1 September 2023. It will enter into force in Uruguay on 1 October 2024.
  
- ❑ The UK Ministry of Justice has formally consulted on whether the UK should accede to the Convention. The consultation closed on 9 February 2023.
  
- ❑ If UK were to accede, this would provide a broad basis for mutual recognition of judgments between the United Kingdom and EU Member States.
  - ❑ Contain more exclusions and more grounds for refusal of recognition and enforcement than the Lugano Convention.
  
  - ❑ Unlike Lugano, it does not contain harmonised rules of jurisdiction.
  
  - ❑ Excludes interim protection measures (Art 1(b)).
  
  - ❑ Only applies to proceedings commenced after Convention enters into force for both state of origin and state where enforcement sought (Art.16).
  
- ❑ Hague Conference is currently working on project for a proposed Convention on jurisdiction, with a focus on *lis pendens*. Uncertain if UK would accede to any such future instrument.

## Re-accession to Lugano Convention?

- ❑ The UK applied to rejoin the Lugano Convention as a separate Contracting State on 8 April 2020.
- ❑ Iceland, Norway and Switzerland indicated that they were supportive of the UK's membership.
- ❑ On 4 May 2021, however, the EU Commission indicated that it would not be recommending that the UK be permitted to join Lugano: COM(2021) 222 Final. This was mainly on the basis that it was not a Member State or in the European Free Trade Association.
- ❑ Commission communicated to Swiss Federal Council (as Depository of the Convention) on 28 June 2021 that it was: *"not in a position to give its consent to invite the United Kingdom to accede to the Lugano Convention."*
- ❑ Any new attempt by the UK to rejoin the Lugano Convention would require careful evaluation of the legal, political and commercial considerations.
- ❑ Although its application is still formally pending, it seems doubtful if the UK will continue actively to seek (at least openly) re-accession at present; not least because prospects for UK accession in foreseeable future appear slim and because it seems more likely that attention will be focused on UK accession to the Hague Judgments Convention 2019.