



# Disputes

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At present it is uncertain whether Brexit will take place in the form of a withdrawal arrangement followed by a subsequent future relationship treaty, or whether a no-deal scenario will occur. The UK Government is seeking to renegotiate the draft Withdrawal Agreement released on 14 November 2018 and has said it intends to leave the EU with or without a deal on 31 October. The EU has so far maintained that it will not renegotiate. This note therefore considers the position in the case of a no-deal scenario and under the current draft Withdrawal Agreement and Future Declaration.

## Private disputes

The UK's exit from the EU without a deal will mean that key EU legislation regarding jurisdiction and reciprocal enforcement of judgments (namely the [recast Brussels Regulation](#)) will no longer apply to the UK.

In that event, the UK Government intends to participate in the [Hague Convention on Choice of Court Agreements 2005](#), which it can do without agreement from the EU. The UK is currently a party to the Convention by virtue of its EU membership, but will have to join in its own right to continue to take the benefit of the Convention post-Brexit. At the moment, the Convention applies between the EU and Mexico, Singapore, and Montenegro, but after a no-deal Brexit the UK will join as a separate party. Once the UK is a party to the Convention judgments will be enforced under the Convention where judgment was given

pursuant to an exclusive jurisdiction clause in favour of a UK court or the courts of another contracting state.

The Government's intention is to join the Hague Convention with effect from 1 November 2019, if the UK leaves the EU without a deal on 31 October. The [UK lodged its Instrument of Accession](#) in December 2018 with a view of joining the Convention in its own right on 1 April 2019. It has since lodged declarations suspending its date of accession, most recently to 1 November, in light of the extensions to the date of withdrawal from the EU. There is some uncertainty over whether the UK can suspend its succession in this way, although there seems to be no reason why it should be unable to do so.

There is also some potential uncertainty over whether the EU 27 countries would apply the Convention where an exclusive English

The section is part of our [Brexit Legal Guide](#).

## No Deal

- If the draft [Withdrawal Agreement](#), or some version of it, is not entered into by 31 October 2019 and there is no change to the exit date, the UK will cease to be an EU member state
- The [recast Brussels Regulation](#), the [Lugano Convention](#) and related civil procedure regulations will no longer apply in the UK, subject to transitional provisions. The rule changes required are set out in draft [civil procedure regulations](#) published by the UK Government
- The choice of law rules in [Rome I](#) and [Rome II](#) will be incorporated into English law with appropriate amendments. Rome I and II will continue to apply in EU member states
- The UK has issued [guidance](#) on civil justice in the event of a no-deal Brexit
- The UK [will join](#) the Hague Convention on Choice of Court Agreements on 1 November 2019

jurisdiction clause was agreed before exit day. The Convention applies only to exclusive jurisdiction clauses agreed after the Convention came into force for the chosen state. The question therefore is whether the EU 27 countries would treat the Convention as having been in force for the UK since 1 October 2015, when the Convention came into force for the EU generally, or only from when it re-joins on 1 November. On the face of it it's not easy to see why the Convention should not be treated as having been in force from the earlier date. However, [guidance](#) issued by the European Commission in April 2019 suggests it is taking the view that exclusive English jurisdiction agreements are within the Hague Convention only if they are entered into post-Brexit, although this is not of course binding on domestic courts that will decide this question in future.

If no agreement or convention applies to a particular agreement, then each country will apply its own domestic rules to questions of jurisdiction and enforcement.

When it comes to the English courts, that means in most cases the common law rules and the upshot is that the court will generally respect an exclusive jurisdiction clause in favour of another country and will generally enforce money judgments given in other countries, subject to limited exceptions.

So far as enforcement of English judgments is concerned, most (but not necessarily all) EU countries will enforce foreign judgments even without a specific reciprocal regime, although the type of judgment enforced may be more limited and the procedures involved more time consuming and costly. There may also be some question marks about whether EU member state courts would give effect to an exclusive English jurisdiction clause in these circumstances, particularly where proceedings were started in the EU member state before they were started in England.

If the UK exits the EU with a deal, then the draft Withdrawal Agreement between the UK and the EU contains provisions relating to jurisdiction and enforcement of judgments during the proposed transition period which are likely to apply. Under those provisions current rules on jurisdiction and enforcement of judgments will continue to apply where proceedings were commenced before the end of the transition period (so before the end of 2020).

There is no specific reference in the draft Political Declaration on the relationship between the EU and the UK post-transition to provisions on jurisdiction and enforcement of judgments. The UK Government has said it will seek to reach an agreement with the EU that allows for close and comprehensive cross-border cooperation on a reciprocal basis, so presumably something which broadly mirrors the current arrangements under the recast Brussels Regulation. The Government has also indicated that it will seek to participate in the 2007 Lugano Convention, which would apply as between the UK and Norway, Switzerland, and Iceland (and the EU, if no other agreement is reached). As noted above, it will also be a party in its own right to the Hague Convention, which would apply between the UK and Mexico, Singapore, and Montenegro where there is an exclusive English jurisdiction clause (and the EU 27, if no other agreement, including the UK joining the Lugano Convention, is reached).

Arbitration with a seat in London will not be affected by the exit from the EU, with or without a deal. Arbitration is not regulated by EU law, the UK is a signatory to the New York Convention 1958 and has a well-drafted and clear piece of modern arbitration legislation, an impartial and well-regarded judiciary and a strong track record in supporting arbitration and enforcing arbitral awards. All EU member states are also signatories to the New York Convention meaning that enforcement of UK-seated arbitral awards in those states and EU-member-state-seated arbitral awards in the UK, will be unaffected.

So far as the numbers of disputes are concerned, the fact that there may be uncertainty as to the content of English law after a withdrawal on a no-deal basis (or at the end of an agreed transition period) could lead to disputes, as parties seek to test the position.

The [EU \(Withdrawal\) Act 2018](#) preserves existing EU law pending any decision to amend or repeal it. However, it also creates extensive powers for the Government to amend legislation (not limited to the retained EU law) to make it fit for purpose in a domestic context. And no doubt more significant changes are likely to follow as Parliament makes decisions on the way forward for the UK outside the EU.

Under the Withdrawal Act, in interpreting the retained EU law, lower courts rather than the Supreme Court will apply EU case law that pre-dates the withdrawal. The Supreme Court will not be bound but it must apply the same test as it would in deciding to depart from its own case law. The UK courts will not be required to apply post-Brexit EU case law

- [European guidance](#) and [Q&A note](#) suggest, however, the Hague Convention will only apply to English exclusive jurisdiction clauses entered into from 1 November 2019

### Deal/transition period

- If the Withdrawal Agreement, or some version of it, is entered into by 31 October 2019, there will be a transition period following exit until the end of 2020, possibly the end of 2021 or 2022
- The provisions on ongoing judicial cooperation in civil and commercial matters are set out in Article 66 (applicable law), Article 67 (jurisdiction and enforcement) Article 68 (service and taking of evidence) and Article 69 (other related provisions)
- In particular, the recast Brussels Regulation will continue to apply to proceedings commenced before the end of transition. Rome I will apply to contracts concluded before the end of transition and Rome II will apply in respect of events giving rise to damage where events occurred before the end of transition
- The Political Declaration on the future relationship between the UK and EU does not deal expressly with civil jurisdiction and enforcement of judgments post-transition
- The UK may seek to negotiate a bespoke deal as suggested in the [Government's White Paper](#) of July 2018
- The UK may seek to join the [Lugano Convention 1988](#)
- The UK will join the [Hague Convention 2005](#)
- The Choice of law rules in Rome I and Rome II will be incorporated into English law with appropriate amendments. Rome I and Rome II will continue to apply in EU member states

but they may look at that case law to assist in interpretation.

Overall, so far as disputes are concerned, although there may be some instability and uncertainty, it seems unlikely that Brexit will substantially damage the UK's position as a premier dispute resolution centre.

### Public and administrative law disputes

Rights of UK businesses trading in the EU to bring disputes with regulators and public bodies in the EU (as well as 'horizontal' disputes with private bodies about the application of administrative or public law rules) will continue to be governed by the laws of the relevant EU member state including EU law. In the continuing EU member states, questions on the application and interpretation of EU law will still be able to be taken to the CJEU as the final court.

The Withdrawal Act is aimed at ensuring that the UK Parliament and domestic UK courts, rather than EU institutions, decide on the content and meaning of the law post-Brexit. As such, the supremacy of EU law will not apply to any enactment or rule of law passed or made on or after exit day. Under the Withdrawal Act, a UK court or tribunal is not bound by any principles laid down, or any decisions made, on or after exit day by the CJEU, and cannot refer any matter to the European Court on or after exit day.

However, EU law and CJEU judgments will remain relevant because:

- retained EU law will continue to have priority over some domestic law in certain circumstances
- CJEU judgments handed down prior to the exit date will be binding precedents as to the validity and interpretation of retained EU law in most domestic courts. However, the UK Supreme Court may depart from the CJEU's judgments (applying the same test as it would apply in deciding whether to depart from its own judgments); and
- UK courts or tribunals may have regard to anything done on or after exit day by the CJEU, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal.

In the event a deal is reached, the Withdrawal Agreement sets out a transition period during which the status quo in relation to the application of EU law will be maintained until the end of December 2020 (with a possible extension of up to two years).

### Investor state claims arising from Brexit

The UK is a signatory to a number of treaties that offer certain protections to foreign investments made in the UK. This includes over 90 Bilateral Investment Treaties and other multilateral agreements that are currently in force with countries across the world. Among these are treaties with India, China, the UAE, Russia and South Korea. These treaties enable foreign investors to directly enforce the protections against the UK, usually by investor-state arbitration.

It has been suggested that Brexit could prompt claims by foreign investors against the UK under these treaties, in particular from investors in the sectors most likely to be affected (such as the Financial Services, Insurance, Automotive, Pharmaceuticals and Food and Drink industries). Arguably, such claims are more likely in the event of a 'no-deal'. Each claim would need to be considered on its own merit, including depending on the language of the specific treaty under which the claim is made.

### State to state disputes

#### The no-deal options for state to state disputes

In a 'no-deal' scenario, there will be no formal agreed framework for resolving all disputes between the UK and the EU. Trade disputes would likely be resolved according to WTO dispute settlement mechanism. However, in the event of a 'no-deal', there could well be disputes about how residual, or ongoing, obligations or liabilities between the UK and the EU should be settled. These disputes fall outside the WTO framework. Such disputes may rest on complex issues, including the application of the Vienna Convention on the Law of Treaties.

How such disputes would be resolved is by no means clear cut. The EU treaties would no longer apply to the UK as of 29 March 2019 and, without the agreement of the EU27 and the UK, the CJEU would no longer have any jurisdiction over the UK after that date as it would be a third state. However, the position is less clear-cut with regard to disputes concerning obligations which arose before the UK's exit and there is some speculation as to whether the CJEU could be accessed for the purposes of infringement proceedings. There has also been speculation about whether one or more of the 27 EU member states could bring a claim against the UK before the International Court of Justice for non-payment of the "divorce" bill on exiting without a deal.

### Arbitration

#### Deal/No deal

- In either scenario, arbitration with a seat in London will not be affected, nor will the enforcement of UK-seated arbitral awards in EU member states or EU-seated arbitral awards in the UK

“Overall, it seems unlikely that Brexit would substantially damage the UK's position as a premier dispute resolution centre”

**ADAM JOHNSON**

### In a deal scenario: Under the Withdrawal Agreement or any subsequent relationship agreement(s)

Articles 167 to 181 in Part Six of the draft Withdrawal Agreement released on 14 November 2018 address state-to-state dispute settlement. The draft Withdrawal Agreement proposes that the EU and the UK will first endeavour to resolve any disputes by good faith consultation through a Joint Committee (co-chaired by representatives from each of the UK and EU) in an effort to reach a mutually agreed solution. Any party wishing to start such consultation is required to provide written notice to the Joint Committee.

Either the EU or the UK can refer the matter to arbitration if no solution has been agreed within three months of the date of that written notice. Arbitration is commenced by issuing a request to the International Bureau of the Permanent Court of Arbitration, setting out the dispute in question and the legal arguments in support of that request. The draft Withdrawal Agreement sets out a process for the parties to select an arbitral tribunal of 5 arbitrators from an independent and legally qualified panel to hear a particular dispute. The procedural rules governing any arbitration are contained within Part A of Annex IX to the draft Withdrawal Agreement and the rules of conduct for the arbitral tribunal within Part B of Annex IX. The draft Withdrawal Agreement sets out a time limit of 12 months for a ruling to be given by an arbitral tribunal, with a six month time limit for "urgent" matters. Of particular interest is the requirement at Article 174 that in any dispute raising a question of interpretation of EU law, the arbitral tribunal must make a "request" to the CJEU for a ruling on that question which shall then be binding on the tribunal.

The draft Withdrawal Agreement states that the ruling of the arbitral tribunal shall be binding upon the UK and the EU and that the parties will take the measures necessary to comply with that ruling within a reasonable period of time. A party may refer non-compliance back to the arbitral tribunal who may impose a penalty on the non-complying party.

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