Disputes

The UK formally left the EU on 31 January 2020 and the transition period established under the Withdrawal Agreement (called the “implementation period” in UK legislation) is due to end on 31 December 2020. This note considers the position both during and after transition in relation to: private disputes; public and administrative law disputes; investor state claims; and state to state disputes.

Private disputes

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

Judgments – transition period

Under the terms of the Withdrawal Agreement, EU law will generally continue to apply to and in the UK during the transition period. This includes the international agreements to which the EU is party and the EU has bound itself under Article 129 of the Withdrawal Agreement to notify the other parties to these agreements that the UK is to be treated as an EU Member State for the purposes of these agreements during the transition period.

Accordingly, very little should change between now and 31 December 2020. The UK courts will continue to apply EU law and to interpret it in accordance with case law of the Court of Justice of the European Union (“CJEU”).

Current rules on jurisdiction and enforcement of judgments under the Recast Brussels Regulation (EU 1215/2012) will continue to apply as between the UK and the EU, as will current provisions relating to service and the taking of evidence under the EU Service Regulation (EC 1393/2007) and Taking of Evidence Regulation (EC 1206/2001). The UK will also continue to comply with obligations under the 2007 Lugano Convention (which applies between EU Member States and most EFTA countries – Iceland, Norway and Switzerland, but not Liechtenstein) and the 2005 Hague Convention on Choice of Court Agreements (which applies between EU Member States and Mexico, Singapore and Montenegro) and, assuming none of the contracting states object, it is expected that the UK will continue to be treated as an EU Member State for the purposes of those conventions up to 31 December 2020.

The section is part of our Brexit Legal Guide.

Deal/transition period

• Now it has been approved by the UK and EU Parliaments, the Withdrawal Agreement sets out arrangements for the UK’s withdrawal from the EU with effect from 11 pm on 31 January 2020 – when the UK ceased to be an EU Member State.

• The UK is now in a transition period following its exit from the EU until the end of 2020. UK legislation calls this the “implementation period”.

• During transition, EU law continues to apply in and to the UK and the UK courts will continue to interpret it in accordance with case law of the CJEU. The relevant law includes:
  - directly applicable EU legislation, such as the recast Brussels Regulation (EU 1215/2012) on jurisdiction and enforcement of judgments and Rome I and Rome II Regulations (EC 593/2008 and EC 864/2007) on the law applicable to contractual and non-contractual obligations,
Judgments – after transition period

The Withdrawal Agreement contains transitional provisions which will continue to have effect after the end of transition, most significantly:

- Current rules on both jurisdiction and enforcement of judgments under the recast Brussels Regulation will apply where proceedings are commenced before the end of the transition period.
- Current provisions under the EU Service international conventions to enforce money judgments given in other countries, subject to limited exceptions.

Once that happens, judgments will be enforced between the UK and other contracting states 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.

There is, however, some potential uncertainty over the application of Hague where an exclusive English jurisdiction clause was agreed before 1 January 2021. Hague applies only to exclusive jurisdiction clauses agreed after it came into force for the chosen state.

The question therefore is whether other Hague contracting states (including the EU binding all its Member States (except Denmark) as a Regional Economic Integration Organisation recognised as competent under Hague Conference rules and Denmark as a separate adherent) would treat the Convention as having been in force for the UK since 1 October 2015, when it came into force for the EU generally, or only from when the UK re-joins on 1 January 2021. 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 opposite view, although this is not of course binding on the courts that will decide this question in future. Where a clause is agreed during the transition period, there is the additional point that it is unclear whether, under Hague rules, the UK will be regarded as party to Hague during that period.

If no international agreement or convention applies to a particular contract, 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 the 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

In those circumstances, a key question will be whether there is an exclusive jurisdiction clause which falls within the 2005 Hague Convention. The UK intends to accede to Hague in its own right with effect from the end of transition, ie 1 January 2021.

Once the transitional provisions under the EFTA countries Iceland, Norway, and Switzerland, but it is likely that the UK will continue to apply the current rules under the Lugano Convention in relation to questions of jurisdiction and enforcement where proceedings were commenced in an EFTA country before the end of transition. It is not certain, however, whether the EFTA countries will reciprocate and the opportunity to clarify this in the UK-EEA EFTA Separation Agreement appears to have been missed, although it deals with a wide range of issues arising from the UK leaving the EU and the EEA in so far as they affect EFTA countries party to the EEA agreement. This separation agreement does not apply to Switzerland and the corresponding agreement between the UK and that country is limited to the subject of citizens’ rights. See accompanying section: Migration.

Once the transitional provisions under the Withdrawal Agreement have ceased to apply, matters are more complicated and, to some extent, uncertain. The precise position will depend on whether any further arrangements are agreed between the UK and the EU (and/or the EFTA countries) between now and the end of transition and on the content of any further UK legislation put in place before the end of transition. In particular, if the UK joins the Lugano Convention, then little will change in relation to jurisdiction and enforcement as between the UK and both the EU and EFTA countries. The UK has received statements of support from Iceland, Norway and Switzerland for its intention to accede, but also requires agreement from the EU and from Denmark (which has an “opt-out” of justice and home affairs matters under relevant EU treaties).

Once the transitional provisions under the Withdrawal Agreement cease to apply, the recast Brussels Regulation will no longer be relevant to questions of jurisdiction and enforcement as between the UK and the EU.

- international conventions to which the EU is a party, such as the 2007 Lugano Convention and the 2005 Hague Convention on Choice of Court Agreements.

At the end of transition

- At the end of the transition period, if the new trading relationship is not in place, there could be a no-deal situation, except as regard arrangements specifically covered in the Withdrawal Agreement. It is more likely that this will be modified by the introduction of agreed elements of the future relationship or some other temporary set of rules, even though the UK Government has ruled out extending the transition period. Both sides have set out their respective negotiating positions. However, there will be no clarity as to what will happen until towards the end of 2020 and the adage “plan for the worst, hope for the best” continues to apply. See the accompanying section: Leaving the EU: The process and preparations.

- The body of EU law in force at the end of 2020 will be imported into UK law (with necessary amendments) under the European Union (Withdrawal) Act 2018 and UK legislation made to implement EU law will be retained, with suitable amendments – this will be called “retained EU law”.

- A lot of the secondary legislation to make amendments consequent on the UK’s departure from the EU has already been made, such as legislation amending the civil procedure rules, but further adjustments may be required.

- The recast Brussels Regulation will continue to apply to proceedings commenced before the end of transition. The UK will likely also apply the 2007 Lugano Convention to proceedings commenced before the end of transition, but it is unclear whether
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.

Arbitration

Arbitration with a seat in London is unaffected during the transition period of the Withdrawal Agreement. This remains the case post-transition, regardless of whether a future relationship is agreed between the UK and the EU. Arbitration is not regulated by EU law. The UK 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. The UK and all EU Member States are party to the New York Convention 1958, meaning that enforcement of UK-seated arbitral awards in those states and EU-Member-State-seated arbitral awards in the UK will be unaffected.

Volume and nature of disputes arising from Brexit

So far as the number of disputes is concerned, the fact that there may be uncertainty as to the content of English law after no deal at the end of the transition period could lead to disputes, as parties seek to test the position.

Contractual disputes

There is more room for uncertainty where an agreement that refers to the EU or to EU law continues to have effect during and/or after transition. Does a reference to the EU continue to include the UK? Should a reference to EU law (specific or general) be read as a reference to retained EU law in the UK or as a reference to EU law as applied in the continuing EU? Does the UK leaving the EU amount to such a change of circumstances that a party may rely on a provision of the agreement such as a force majeure or the doctrine of frustration to terminate an agreement. See accompanying section: Contract and other obligations.

Most of these disputes lie in the future, but the English Courts have been robust in rejecting the arguments of the European Medicines Agency that its lease had been frustrated when it was required to relocate from the UK as a result of Brexit: Canary Wharf (BP4) T1 Ltd & Ors v European Medicines Agency (2019) EWHC 335 (Ch).

Retained EU law

Existing EU law as at the end of the transition period will continue to apply in the UK as retained EU law, pending any decision to amend or repeal it. In interpreting this retained EU law, the European Union (Withdrawal) Act 2018, (the “Withdrawal Act”) as originally enacted, provided that lower courts rather than the Supreme Court would apply EU case law that pre-dated the withdrawal; the Supreme Court would not be bound, but would have to apply the same test as it would in deciding to depart from its own case law.

However, the European Union (Withdrawal Agreement) Act 2020 (the “Withdrawal Agreement Act”) amends the Withdrawal Act to introduce a new power for Ministers, by regulations made before the end of the transition period, to specify the extent to which, or circumstances in which, courts or tribunals are not to be bound by case law pre-dating 31 December 2020 and the test they must apply in deciding whether to depart from it. Accordingly, the circumstances in which the English courts will be able to depart from CJEU case law may become broader, which would increase the prospect of the UK courts relitigating points settled in pre-existing EU case law.

Post-transition, the UK courts will no longer be able to refer questions to the CJEU for a preliminary ruling (except for some limited purposes provided for in the Withdrawal Agreement), but rulings made after transition in cases already before the CJEU as a result of a reference from a UK court will have the same binding force as rulings made by the CJEU before transition.

For more details on how EU law will continue to influence UK law see the accompanying section: The UK’s new legal order post Brexit: A new class of UK law.

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 where relevant). 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.

As a result of the UK implementation of the Withdrawal Agreement, this similarly remains the case in the UK during the transition period (which is expected to end on 31 December 2020).

The Withdrawal Act (as amended), however, aims to ensure that the UK Parliament and domestic UK courts, rather than EU institutions, decide on the content and other contracting states will reciprocate.

• The UK will join the 2005 Hague Convention on Choice of Court Agreements on 1 January 2021, but there is some uncertainty as to whether it will be applied to English exclusive jurisdiction clauses entered into before that date. The UK will also seek to join the 2007 Lugano Convention as an independent state.

• 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.

Arbitration

• 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
meaning of the law after the end of transition. Therefore, the supremacy of EU law will not apply to any enactment or rule of law passed or made on or after the end of the transition period. A UK court or tribunal will not, as a general rule, be bound by any principles laid down, or any decisions made, by the CJEU after the end of the transition period. There are a series of further restrictions (with some limited savings – see Withdrawal Act Schedule 8, Part 1 and Schedule 8, para 39) on the application of EU law to cases in the UK started after the end of the transition period. These include a prohibition on the use of a general principle of EU law as the basis for a claim and the abolition of the right to damages under the rule in Francovich. These changes will limit the exposure of the UK Government in particular to the consequences of any breach of EU law and retained EU law in administrative law proceedings.

However, EU law and CJEU judgments will remain relevant after the end of the transition period because:

- Retained EU law will continue to have priority over some domestic law in certain circumstances.
- CJEU judgments handed down prior to the end of the transition period are expected to be binding precedents as to the validity and interpretation of EU law in most UK courts and may affect the interpretation of retained EU law (see discussion above under “Retained EU law”).

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.

**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 enforce directly 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 that a future relationship is not agreed between the UK and the EU. 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**

**With third countries**

It is possible that third countries will invoke claims against the EU and/or the UK where the value of their treaty relations with the EU are adversely affected by Brexit. In the context of trade, it may be that claims (either under relevant bilateral treaty dispute resolution processes or WTO rules) will be brought, for example where quotas for tariff-free entry of goods to the EU have been split between the continuing EU and the UK in ways that an affected third country considers to be disadvantageous. The scope for these claims will be reduced to the extent that the UK is able to agree new trade arrangements with the aggrieved countries.

**With the EU during the transition period**

Articles 167 to 181 in Part Six of the Withdrawal Agreement address state to state dispute settlement. The 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 Withdrawal Agreement sets out a process for the parties to select an arbitral tribunal of five 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 Withdrawal Agreement and the rules of conduct for the arbitral tribunal within Part B of Annex IX. The 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 of 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 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 which may impose a penalty on the non-complying party.

**With the EU after transition: depends on whether this is settled in a new relationship**

The non-binding Political Declaration provides an indication of the state to state dispute settlement process that may be adopted in the event that a future relationship is agreed. Set out in paragraphs 129-132, the process looks very similar to that contained within the Withdrawal Agreement, although with the addition of a flexible mediation mechanism for “expedient problem solving”. Again, we see the use of a Joint Committee to endeavour to resolve disputes by discussion and consultation, an arbitration process with a binding outcome and non-compliance measures. At paragraph 131, the Political Declaration also continues to envisage a reference to the CJEU for the “interpretation of provisions or concepts of Union law”.

If no future relationship agreement is agreed for the end of the transition period, the Withdrawal Agreement’s dispute settlement provisions would continue to apply to any pending or ongoing cases that arose before the end of the transition period. They would also apply to the limited number of obligations which would continue beyond the end of the transition period that could be enforced at a state to state level, such as citizens’ rights, the Irish border and the financial settlement. For other disputes going forward, without a new agreement there would be no formal framework for resolving disputes between the UK and the EU. Trade disputes would likely be resolved according to the WTO dispute settlement mechanism. There could also be disputes which arise between the UK, the EU or its Member States that fall outside the WTO framework and also outside the provisions of the Withdrawal Agreement. Such disputes may rest on complex issues, including the application of the Vienna Convention on the Law of Treaties and how such disputes would be resolved is by no means clear cut.