



LITTLETON

# Choice of law, choice of forum and the enforcement of judgments post-Brexit

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## Timetable

- European Union (Withdrawal) Act 2018 (EUWA) passes into law on 26 June 2018
- New Withdrawal Agreement agreed on 17 October 2019
- European Union (Withdrawal Agreement) Act 2020 (WAA) passes into law on 23 January 2020
- Withdrawal Agreement comes into force at 11.00pm UK time on 31 January 2020 (Exit Day)
- Transition period ends 11pm on 31 December 2020 (Implementation Period (IP) Completion Date)

## Applicable law and choice of law clauses

(pre-IP Completion Date / end of Transition Period)

### ARTICLE 66 of the Withdrawal Agreement

*Applicable law in contractual and non-contractual matters*

In the United Kingdom, the following acts shall apply as follows:

- (a) Regulation (EC) No 593/2008 [**Rome I**] of the European Parliament and of the Council shall apply in respect of contracts concluded before the end of the transition period;
- (b) Regulation (EC) No 864/2007 [**Rome II**] of the European Parliament and of the Council shall apply in respect of events giving rise to damage, where such events occurred before the end of the transition period.

## Jurisdiction and enforcement of judgments

(pre-IP Completion Date / end of Transition Period)

### ARTICLE 67 of the Withdrawal Agreement

*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 ... the following acts or provisions shall apply:

(a) the provisions regarding jurisdiction of Regulation (EU) No 1215/2012 [Judgments Regulation];

## Jurisdiction and enforcement of judgments

(pre-IP Completion Date / end of Transition Period)

### **ARTICLE 67 of the Withdrawal Agreement** *Jurisdiction, recognition and enforcement etc.*

2. In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, ....:

(a) Regulation (EU) No 1215/2012 [**Judgments Regulation**] 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;

## Jurisdiction Clauses

(pre-IP Completion Date / end of Transition Period)

- **Article 25 Judgments Regulation**
  - Jurisdiction exclusive unless parties have agreed otherwise
  - Chosen court must be that of a Member State
  - Parties do not need to be domiciled in a Member State
- **Article 23 Lugano Convention**
  - Jurisdiction exclusive unless parties have agreed otherwise
  - Chosen court must be that of a Convention State
  - At least one of the parties must be domiciled in the EU, Iceland, Norway, Switzerland or Liechtenstein
- **2005 Hague Convention on Choice of Court Agreements**

At present inapplicable as between UK and EU / EFTA states. Thus takes priority only for UK, Singapore, Montenegro and Mexico.

## After 11pm on 31 December 2020

- Nothing yet agreed between UK and EU
- Statements of support for the UK's intention to accede to the 2007 Lugano Convention from Iceland, Norway and Switzerland (28.1.20)
- "*The Future Relationship with the EU*". UK intends to work with the EU through multilateral precedents set by the Hague Conference on Private International Law and through its accession as an independent contracting party to the 2007 Lugano Convention (27.2.20) (UK not bound to follow CJEU case-law)
- Possibility of revival of old bilateral conventions (Eg. UK/Italy ("*Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters*" – Convention 7.2.64 / amending Protocol 14.7.70)

## Applicable law and choice of law clauses

(after 11pm on 31 December 2020)

- Rome I and Rome II become part of UK law
- The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (No. 834 of 2019)

# Jurisdiction and enforcement of judgments

(after 11pm on 31 December 2020)

- Transition provisions do not apply to legal proceedings commenced after 11pm on 31 December 2020
- Judgments Regulation and 2007 Lugano Convention revoked as a matter of UK law: Regs. 89 and 82(1) of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (No. 479 of 2019)
- But two provisos:
  - UK court is already seised of a jurisdiction question before 31 December 2020 and has not yet reached a decision. (Reg. 92)
  - UK court may decline jurisdiction, although first seised, if EU/EFTA court becomes second seised of dispute involving the same cause of action and between the same parties, but only if it considers that it would be unjust not to do so (Reg. 93)

## Jurisdiction and enforcement of judgments

(after 11pm on 31 December 2020)

### Consumer contracts (new s. 15B Civil Jurisdiction & Judgments Act 1982)

The consumer may bring proceedings against the other party to the consumer contract —

- (a) where the other party to the consumer contract is domiciled in the United Kingdom, in the courts of the part of the United Kingdom in which the other party to the consumer contract is domiciled, or
- (b) in the courts for the place where the consumer is domiciled (regardless of the domicile of the other party to the consumer contract).

*But* proceedings may be brought against the consumer by the other party to the consumer contract only in the courts of the part of the United Kingdom in which the consumer is domiciled.

# Jurisdiction and enforcement of judgments

(after 11pm on 31 December 2020)

Individual contracts of employment (new s. 15C Civil Jurisdiction & Judgments Act 1982)

The employer may be sued by the employee —

- (a) where the employer is domiciled in the United Kingdom, in the courts for the part of the United Kingdom in which the employer is domiciled,
- (b) in the courts for the place in the United Kingdom where or from where the employee habitually carries out the employee's work or last did so (regardless of the domicile of the employer), or
- (c) if the employee does not or did not habitually carry out the employee's work in any one part of the United Kingdom, in the courts for the place in the United Kingdom where the business which engaged the employee is situated (regardless of the domicile of the employer).

**But** if the employee is domiciled in the United Kingdom, the employer may only sue the employee in the part of the United Kingdom in which the employee is domiciled (regardless of the domicile of the employer).

# Jurisdiction and enforcement of judgments (after 11pm on 31 December 2020)

## Permission to serve out of England & Wales

1. There is a serious issue to be tried on the merits.
2. There is a good arguable case that each claim falls within one or more classes of case in which permission to serve out may be given. (*Civil Procedure Rules Part 6, Practice Direction 6B*)
3. In all the circumstances England & Wales is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

# Jurisdiction and enforcement of judgments

(after 11pm on 31 December 2020)

## Enforcement of foreign judgments at common law

A foreign judgment *in personam* given by the court of a foreign country with jurisdiction to give that judgment in accordance with various well-established principles\*, and which is not impeachable, may be enforced by a claim or counterclaim for the amount due under it if the judgment is:

- (a) for a debt, or definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty); and
- (b) final and conclusive, but not otherwise.

\* See generally Dicey, Morris & Collins on the Conflict of Laws, 15<sup>th</sup> ed., Rule 42 ff.

## Jurisdiction clauses

(after 11pm on 31 December 2020)

- 2005 Hague Convention on Choice of Court Agreements (HCCCA)
- Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018 (SI 2018/1124) – addresses choice of court agreements in three scenarios:
  - concluded before 31 December 2020;
  - concluded on or after 31 December 2020, but before the HCCCA again enters into force for the UK; and,
  - concluded after the HCCCA again enters into force for the United Kingdom

## Jurisdiction clauses

(after 11pm on 31 December 2020)

HCCCA does not apply:

- To contracts entered into before 1 October 2015.
- To contracts for the carriage of goods.
- If one of the parties is domiciled in a state which has not acceded to the HCCCA (eg. the EFTA countries).
- If the choice of court agreement is not exclusive.
- If the jurisdiction agreement is asymmetric.
- If one of the parties is a natural person, including acting as a consumer (unless he/she is operating a business in their own name)
- If the contract in question is a contract of employment.
- To tort claims for damage to tangible property that do not arise from a contractual relationship.



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