

Cross-border civil and commercial legal cases after Brexit: guidance for legal professionals

October 2019



Scottish Government
Riaghaltas na h-Alba
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Summary

Guidance for legal professionals on applicable law and on jurisdiction and recognition and enforcement of judgments in cross-EU border civil and commercial legal cases after Brexit.

Detail

This guidance is provided for the information of legal practitioners involved in cross-EU border civil and commercial cases in the event that the UK leaves the EU without a deal. It is not legal advice. It is not a complete statement of the law.

Practitioners should be aware that they may need to consider judgments from both the UK courts and judgments from the Court of Justice of the European Union (CJEU) where relevant, in line with the European Union (Withdrawal) Act 2018. The circumstances of UK exit from the EU are subject to change. The information below on what happens after UK exit is relevant to No Deal UK exit only.

Members of the public and businesses involved in cross-border civil and commercial cases may need to seek local legal advice.

1. Jurisdiction and Recognition and Enforcement of Judgments

1.1 Current law

Currently, the rules governing jurisdiction and the recognition and enforcement of judgments in cross-border civil and commercial disputes involving parties domiciled in EU Member States (including the UK) can be found in the following EU instruments and international agreements:

- [Brussels Ia](#) - which provides rules on jurisdiction, recognition and enforcement for cross-border disputes where the defendant is domiciled in an EU Member State

(Note that Brussels Ia contains special jurisdiction rules for consumer, employment and insurance disputes, as well as exclusive jurisdictions);

- Lugano 2007 - which provides rules on jurisdiction, recognition and enforcement in cross-border disputes involving a party or parties domiciled in an EU Member State or in one or the EFTA states of Norway, Iceland or Switzerland, with certain exceptions;
- EU – Denmark – which extends the Brussels Ia rules to Denmark.

1.2 After Brexit if the UK leaves the EU without a deal

The legislation which comes into force in the event of “no deal”, dealing with civil and commercial rules for jurisdiction and the recognition and enforcement of judgments is contained in the following statutory instrument:

- The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019. Other than providing savings for cases ongoing at Exit day, this instrument revokes the Brussels Ia Regulation and its predecessors as they apply in the UK, and extinguishes the legal effect of the Lugano Convention and EU-Denmark Agreement in the UK.

Cases ongoing in Scotland on exit day

Jurisdiction

Post exit, regulation 92 of The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 provides that courts in Scotland will continue to apply the existing jurisdiction rules (e.g. those of Brussels Ia) to cases where the proceedings were commenced, but not concluded, before exit day.

Enforcement of orders

Post exit, regulation 92 of The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 provides that courts in the UK will continue to apply the existing recognition and enforcement of judgments rules to judgments obtained in proceedings commenced before exit day in an EU Member State or a Lugano State. Regulation 92 also provides that the UK courts will continue to apply the existing recognition and enforcement rules (e.g. those of Brussels Ia) where the parties have come to a court settlement, or registered an “authentic instrument”, before exit day and one party wishes to obtain recognition and enforcement after that date in a part of the UK.

New cases starting in Scotland after exit day

Jurisdiction

Post-exit the rules governing jurisdiction in all cross-border disputes regardless of domicile of the defendant will be governed by the law of each UK jurisdiction. In Scotland, the rules are found in Part III and Schedules 8 and 9 of the Civil Jurisdiction and Judgments Act 1982.

- For consumer and employment claims – some specific provision on jurisdiction is made in sections 15B to 15E of the Civil Jurisdiction and Judgments Act 1982.
- For cases involving a choice of court agreements, the Hague Convention of 30 June 2005 on Choice of Court Agreements may be relevant depending on the country in which the chosen court is established.

Recognition and enforcement of orders

Post-exit, the rules governing recognition and enforcement of foreign judgments in cross-border disputes are generally contained in the common law. However, for certain countries, one of the following statutes provides a route for recognition and enforcement of certain judgments:

- Part II of the Administration of Justice Act 1920; or
- the Foreign Judgments (Reciprocal Enforcement) Act 1933.

1.3 Cases in an EU Member State

The European Commission has issued guidance on how EU private international law rules will apply to pending cases when the UK leaves the EU. Practitioners are encouraged to read this guidance and reflect on what it means for individual cases.

Cases pending on exit day – jurisdiction

The Commission guidance states that where proceedings pending before a court of one of the EU-27 on or after the withdrawal date involve a defendant domiciled in the United Kingdom, the EU rules on jurisdiction will continue to apply.

Cases instituted after exit day – jurisdiction

The Commission guidance states that EU jurisdictional rules will not apply to such cases in the EU-27 except to the extent that the EU instruments govern rules of jurisdiction relating to third countries (i.e. non-EU Member States).

Recognition and enforcement

The Commission guidance states that judgments of a UK court which have been exequatored but not yet enforced in the EU-27 before the withdrawal date can still be enforced in the EU-27. EU rules will not otherwise apply and enforcement will be a matter for the national rules of the relevant EU Member State in which enforcement is sought.

2. Applicable law

2.1 Current law

The current rules governing applicable law in civil and commercial cases in EU Member States can be found in the following EU instruments and agreements:

- for contractual obligations, the Rome I Regulation (EC) No 593/2009 (The Rome I Regulation applies to contracts entered into from 17 December 2009. The 1980 Rome Convention on the law applicable to contractual obligations applies to contracts entered into between 1 April 1991 and 16 December 2009);
- for non-contractual obligations, the Rome II Regulation (EC) No 864/2007.

2.2 After Brexit if the UK leaves without a deal

Legislation dealing with the “Rome” rules on applicable law is contained in the following statutory instrument:

- The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019. This instrument amends the Rome I and Rome II Regulations as retained by the EU Withdrawal Act 2018 so that they will operate effectively as domestic law post-exit.

This statutory instrument also preserves and amends the Rome Convention Rules, which are set out in the Contracts (Applicable Law) Act 1990 so that they will continue to apply to contracts entered into between 1 April 1991 and 16 December 2009.

Cases ongoing in Scotland on exit day

Post exit, courts in the UK will apply the retained Rome I and Rome II Regulations as amended to determine applicable law in relation to contractual (for contracts entered into between 1 April 1991 and 16 December 2009) or non-contractual obligations arising before exit.

New cases in Scotland after exit day

Post exit, the Rome I Regulation and Rome II Regulation will continue to apply as domestic law as amended by The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019.

Cases in an EU Member State

The EU Commission has not issued advice on applicable law rules, but the Rome Rules will continue to apply in EU Member States and their courts post exit.

Practitioners should note, however, that both the Rome I and Rome II Regulations apply whether or not the applicable law is a law of an EU Member State or a third country (see Article 2 of Rome I and Article 3 of Rome II).

3. Hague Convention of 30 June 2005 on Choice of Court Agreements

Since 1 October 2015 the UK has participated in the 2005 Hague Convention by virtue of our EU Membership. UK participation in Hague 2005 will cease upon EU exit.

3.1 Current law

At present, the 2005 Hague Convention is largely inapplicable between EU Member States and only takes priority in exclusive choice of court agreement arrangements involving the UK and non-EU member state contracting parties – at present Singapore, Montenegro and Mexico. The Brussels Ia Regulation takes priority over Hague 2005 in terms of jurisdiction and the recognition and enforcement of judgments in cases involving exclusive choice of court agreements. There are separate arrangements in place for Denmark. This ensures that the rules of the 2005 Hague Convention do not conflict with the EU's internal CJC framework in this area.

3.2 After Brexit if the UK leaves the EU without a deal

The UK Government has lodged its instrument of accession to Hague 2005 with the Hague Depositary. Hague 2005 will enter into force in the UK on exit from the EU. Hague 2005 will apply with full effect to choice of court agreements concluded on or after that date.

4. Choice of Court Agreements concluded before Exit day

Notwithstanding the UK's exit from the EU, UK courts will continue to apply the Hague 2005 rules on jurisdiction and the recognition and enforcement of judgments to exclusive choice of court agreements to which the Convention would have applied where these were concluded between the original entry into force of the Convention in the UK on 1 October 2015 and the entry into force of the Convention when the UK joins Hague 2005 as an independent Contracting State – see the [Civil Jurisdiction and Judgments \(Hague Convention on Choice of Court Agreements 2005\) \(EU Exit\) Regulations 2018](#). This approach will not apply to choices of European Union Member State courts concluded between 1 October 2015 and Exit day, but Hague 2005 rules will be applied to such choices concluded from Exit day onwards.

The Scottish Government cannot give guidance on the approach which will be followed in Member States or other non-EU Member State contracting parties to the Hague 2005 regarding choices of UK courts concluded between 1 October 2015 and the entry into force of the Convention for the UK in its own right.



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This publication is available at www.gov.scot

Any enquiries regarding this publication should be sent to us at
The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-78781-739-5 (web only)

Published by The Scottish Government, October 2019

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS572430 (10/19)

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