



CORPORATE AND COMMERCIAL

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# Civil Justice and Private International Law: New Guidance from the European Commission for post-Brexit Disputes

by **Richard Curran**

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Notice to stakeholders: Withdrawal of the United Kingdom and EU rules in the field of civil justice and private international law.

On 27 August 2020, the European Commission published a 'Notice to Stakeholders' setting out how EU laws in the areas of civil justice and private international law will apply when the Brexit transition period ends on the 31 December 2020.

This Notice replaces an earlier notice published in January 2019 and a document with questions and answers published in April 2019.

Although the UK's Internal Market Bill has been attracting headlines, the European Commission's Notice merits attention as it lays out the future relationship between the courts of the UK and the courts of EU member states, if no agreement for a new partnership between the EU and UK is negotiated before the end of the transition period.

## EU Private International Law

"Private international law" or "conflict of Laws" are terms referring to the process for determining the applicable law and jurisdiction in multi-jurisdictional transactions and disputes. Over the past two decades, the EU has adopted a number of regulations in this area. The most notable pieces of legislation include:

- Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation Recast)
- Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation).
- Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual / tortious obligations (Rome II Regulation)
- Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings (Insolvency Regulation Recast)

## The Notice

The Notice deals with these matters in the light of the Withdrawal Agreement entered into between the UK and the EU on 24 January 2020. It examines how the relationship between the UK and the EU in these areas currently operates, and how the legislation listed above will operate after the end of the current transition period on 31 December 2020 ("Transition End Date").

## International Jurisdiction

The Notice sets out the following in relation to jurisdiction:

1. Where proceedings issue prior to the Transition End Date, EU rules on international jurisdiction continue to apply.
2. If proceedings issue after the Transition End Date and those proceedings concern the UK and an EU Member State, the court of that Member State will determine international jurisdiction.
3. If the proceedings concerned fall within the scope of EU instruments in civil and commercial matters and the instrument in question so provides, a court of a Member State may apply its national rules of international jurisdiction.
4. If proceedings fall outside the scope of EU Instruments, international jurisdiction will be governed by the national rules of the Member State in which a court has been seized.

## **Applicable Law**

The Notice sets out that the Rome I Regulation, which concerns the applicable law in contractual matters, will apply to all contracts involving parties based in the UK up until the Transition End Date. Following the Transition End Date, unless a new agreement is reached between the EU and the UK, it is uncertain whether choice of law clauses in commercial contracts would be enforced in the UK and/or recognised in the EU.

The same applies to Rome II Regulation, concerning tortious matters, which is to apply in the UK in respect of events giving rise to damage, where such events occurred before the Transition End Date.

## **Recognition and Enforcement**

The Notice sets out that the Brussels Regime (a series of rules, including the Brussels 1 Regulation Recast regulating rules on jurisdiction, recognition and enforcement within the EU), concerning the recognition and enforcement of EU decisions shall apply in the UK, provided that proceedings relating to the order or decision were initiated before the Transition End Date.

The Brussels Regime shall not apply to any decisions or orders if the proceedings were initiated after the end of the Transition Period.

The recognition and enforcement of UK judgments relating to proceeding initiated after Transition End Date will be governed by the national rules of the relevant Member State.

## **Insolvency**

In relation to insolvency matters, the Notice points out that the Insolvency Regulation will apply to cross-border insolvencies, provided the main proceedings commenced before the Transition End Date. Where, prior to the end of the Transition Period, the main proceedings are commenced in the UK and secondary proceedings are commenced in one or more EU Member States, the courts of the Member States in question will retain international jurisdiction.

After the Transition End Date, the Insolvency Regulation will not be applicable in the UK. Consequently, the UK will not be able to open insolvency proceedings on foot of the Insolvency Regulation. Furthermore, insolvency proceedings issued in the UK after the Transition End Date will not be given recognition in the EU on foot of the Insolvency Regulation.

## **Comment**

The laws developed by the EU in the sphere of private international have generally been favourably received by the business community and legal practitioners. They have enhanced judicial cooperation and brought clarity to the recognition and enforcement of judgments in cross-border commercial disputes involving EU Member States. Moreover, they have provided legal certainty to “choice of law” and “choice of forum” clauses in commercial contracts and thereby deepening the internal market by giving choice to parties in their contractual arrangements.

The UK has been one of the main benefactors from these laws. A large number of commercial contracts favour the UK as a choice of forum and UK law as the governing law. Moreover, the City of London became a hub for large cross-border insolvencies and restructurings in the aftermath of the last financial crisis. However, it is clear from the Notice that the key regulations facilitating these will not apply in the UK once the transition period has ended.

With the 30 December 2020 fast approaching, parties to contracts which contain a choice of forum clauses designating courts in the UK as the competent jurisdiction should be aware that in the event of a dispute with their counterparties this clause may not apply. Equally, choice of law clauses will be rendered uncertain.

In the event that legal proceedings are being contemplated, and if any UK jurisdiction or laws may have an impact in any respect, parties should consider the consequences of allowing the transition period to expire without taking action now.

The Notice can be viewed [here](#).

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