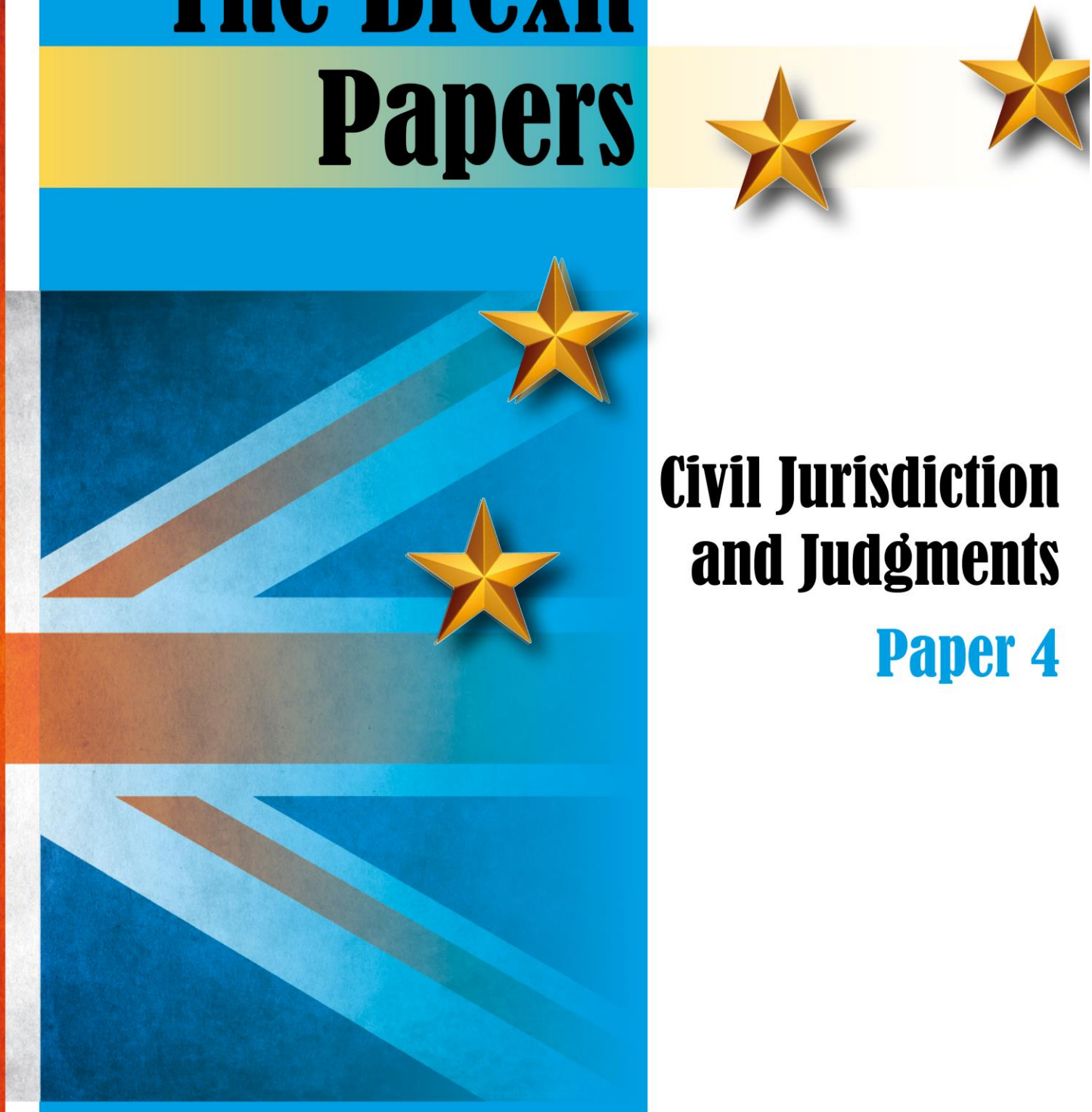
The Brexit Papers



Civil Jurisdiction and Judgments

Paper 4

Bar Council Brexit
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THIRD EDITION

Brexit Paper 4: Civil Jurisdiction and the Enforcement of Judgments

Summary

The ability to enforce judgments of the courts from one state in another is of vital importance for the functioning of society and for retaining the position of England and Wales as the leading dispute resolution centre in the world, with the important economic benefits that follow from this.

Commercial parties require continuity and certainty. The Recast Brussels Regulation ((EU) No 1215/2012) confers important advantages both in terms of recognition and enforcement, which would be lost unless equivalent arrangements are entered into.

- We urge the Government to enter into an agreement based on the Denmark-EU Jurisdiction Agreement and also to sign and ratify the Lugano II Convention and the 2005 Hague Convention on the Choice of Court Agreements, and
- We also urge Government to replace Service Regulations with an agreement based on the EU-Denmark Service Agreement. For choice of law, the Rome I and II Regulations can be adopted into domestic law by Act of Parliament.

Civil Jurisdiction and the Enforcement of Judgments

1. The effective enforcement of judgments is fundamental to the functioning of society. Without it, the rule of law does not exist. If a contract cannot ultimately be enforced by a judgment, it becomes a meaningless piece of paper. If a person who has been injured by the negligence of another cannot be compensated through a judgment of the courts, that person must either be compensated by government or left to suffer the consequences of injustice.

2. In a globalised world, therefore, it is crucial that the judgments of one state are enforced by the courts of another. The current EU regime on enforcement of judgments is effective in ensuring this is the case amongst Member States, and the UK is unique in currently having reciprocal arrangements not only with the EU but also with former commonwealth countries. It is of the utmost importance that UK citizens, businesses, institutions and the UK government retain the right to have judgments which they have obtained in the UK courts efficiently enforced, and to have the jurisdiction of the UK courts recognised, throughout the EU. Such an ability is also of the utmost importance in retaining the position of England and Wales as the leading dispute resolution centre in the world, with the important economic benefits that this brings.

3. EU Member States have a similar interest in relation to their citizens/businesses trading with the UK, to the activities of UK citizens within their territory, and in relation to enforcement over assets in the UK to satisfy EU judgments.

The current position

4. The current position is governed by the Regulation (EU) No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ('the Recast Brussels Regulation'), in force since January 2015. This applies to "civil and commercial matters" and provides that:

4.1. Judgments of the courts of EU Member States are to be enforced throughout the EU as if they were judgments of a court of the Member State in which enforcement is sought. This includes "protective measures" such as injunctions freezing assets.

4.2. The courts of one Member State may apply "protective measures" to assist with proceedings in another Member State.

4.3. Subject to a number of notable exceptions, persons domiciled in an EU Member State should be sued in that Member State and where this is not what has happened courts are required to decline jurisdiction.

4.4. Where the parties have specified in their contract that disputes should be heard in a particular jurisdiction (an exclusive jurisdiction clause), the courts of other Member States are required to abide by the terms of that jurisdiction clause and to decline jurisdiction.

4.5. Where a person is one of a number of Defendants, he may be joined to proceedings which are commenced in another Member State where he is not

domiciled if those proceedings are "so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments".

4.6. Where proceedings have already been commenced in one Member State, the courts of other Member States are required to stay any subsequent proceedings dealing with the same subject matter until jurisdiction has been decided by the court first seized of the matter (the *lis alibi pedens* principle).

4.7. Clarifies the scope of the exclusion of arbitral proceedings from the jurisdiction rules.

5. Another vital element of legal process is the service of claims by claimants on defendants. Without proper service, as a general rule, a claimant cannot bring a claim against a defendant. The position as to service has also been regularised within the EU. The current position with regards to service is governed by the Service Regulation[1], which has applied in the UK since 13 November 2008. It creates a 'European judicial area' for the free movement of judicial and extra-judicial documents.

6. These are achievements for which the UK has lobbied hard and effectively in Brussels over many years. They are vital for the healthy functioning of the UK economy in general and the UK legal sector in particular.

The importance of an effective jurisdiction and judgments regime – for the UK as a whole

7. As already mentioned, it is of the utmost importance that English[2] judgments are enforced and the jurisdiction of the English courts is recognised in as efficient a manner as possible throughout the EU. If a company obtains a judgment in the English courts against an EU party, it is vital that it can be enforced against that EU party's assets abroad. International trade would be fundamentally undermined if this became too cumbersome or expensive. If a child is injured through the negligent driving of a national of another EU state, it is important that that child is able to obtain the compensation he or she has been awarded by an English court. If the UK Government brings proceedings against an EU polluter and obtains judgment in its favour, that judgment should be capable of easy enforcement throughout the EU.

The importance of an effective jurisdiction and judgments regime – for the legal sector in England and Wales

8. England and Wales is the leading centre for dispute resolution worldwide. The English legal sector generated £3.3 billion of revenue in 2015.

[1] Council Regulation (EC) No.1393/2007.

[2] The term "English" is used here and elsewhere in this paper as a substitute for "England and Wales". England and Wales as a jurisdiction is the focus of this paper, but most of the points made in relation to England and Wales are likely to pertain for Northern Ireland and Scotland too.

9. The reputation of England and Wales as the pre-eminent destination for international dispute resolution will be damaged if appropriate steps are not taken to ensure that the position as to the jurisdiction of the English courts and the enforcement of English judgments are protected. Much of the international dispute resolution work carried out by English lawyers comes to them because the parties to a dispute (either before or after the dispute has arisen) have chosen to have their dispute resolved in the English courts. If jurisdiction clauses designating the English courts are not effectively respected in the EU, this will make English jurisdiction clauses considerably less popular. Further, if the EU *lis alibi pedens* rules do not apply to proceedings in English courts such that subsequent proceedings in EU Member States' courts will not automatically be stayed, this will deter parties from including English jurisdiction clauses in their agreements.

10. Similarly, if the judgments of the English courts are more difficult to enforce in the EU, then jurisdiction clauses naming England and Wales will become a great deal less attractive. The same point applies to "protective measures", like interim injunctions. If it is more difficult to enforce the "protective measures" of the English court in EU Member States, or if EU Member States decline to make use of their own "protective measures" in support of English proceedings, English jurisdiction clauses will become a great deal less popular.

11. That fact that England and Wales is such a significant hub for international dispute resolution has important knock-on advantages for the UK as a whole. There is, of course, the fee income and tax revenues which flow from the sector. However, there are other advantages too. Given the widespread acceptance of English law as an effective law for governing commercial relationships, and the choice of the English courts as a corollary of this, UK parties can often negotiate that English law be the law which governs their commercial relationships with international parties and that their disputes will be resolved in the English courts. This gives those UK parties the "home advantage" of being able to use a law and courts with which they are familiar, even though they are trading internationally.

12. Finally, a great deal of the attractiveness of the UK in general, and London in particular, as a hub for business (particularly financial services) derives from the attractiveness of the English legal sector. As discussed immediately above, this attractiveness will be considerably diminished if steps are not taken to ensure an adequate legal framework is put in place to ensure that English judgments and jurisdiction clauses are effectively and efficiently enforced.

The position if nothing is done

Jurisdiction and Judgments

13. Commercial parties value continuity and certainty. The Recast Regulation confers important advantages both in terms of recognition and enforcement, which would be lost unless equivalent arrangements are entered into. If the UK becomes a "third state" for the purposes of the Recast Regulation, the Lugano II Convention and the 2005 Hague Convention, the status of English jurisdiction clause and judgments in other Member State courts will become more open to question. It is likely that, if parties consider that the answer to the questions of "Will my jurisdiction clause be respected?" and "Will my judgment be enforced?" will involve adding time and expense as well as uncertainty to any transaction,

then this may encourage them to amend their contractual clause in favour of resolving disputes before other Member State courts.

14. There is an increased risk that commercial parties' negotiated and contractually agreed English jurisdiction clauses will not be respected by the courts in Member States and that the parties are more likely to become embroiled in proceedings in a court other than the court that they have chosen. This is demonstrated by the survey conducted by members of Simmons & Simmons' offices in Germany, France, Italy, Spain and the Netherlands as to their courts' approach to English jurisdiction clauses post-Brexit which revealed that over 50% of clients were considering moving away from English choice of law or jurisdiction clauses (see the Simmons & Simmons' survey at Appendix 1 (the "Survey").

15. Competitor jurisdictions are likely to take advantage of such uncertainty but would be reassured if there was good reason to believe that continuity was likely. The Survey showed that 88% of clients thought the UK Government should make a public and early statement.

16. Further, it is likely that even where the English courts continue to respect jurisdiction clauses in favour of Members State courts under common law rules, applying the principle of *forum conveniens*, there may be increased uncertainty as to the approach of the English courts on jurisdictional issues generally.

17. There are some areas where Brexit may have a particular impact. For example, some market participants might consider moving away from English law as the governing law of asset purchase and sale arrangements in securitisation. Similarly, post-Brexit, formerly 'safe harbours' will no longer be available in the context of the insolvency or reorganisation commenced in another Member State.

18. Anecdotally, the Bar Council has heard of a number of cases where parties are being advised not to choose English jurisdiction clauses in their contracts, where previously this would have been an almost automatic choice, because of the uncertainty surrounding the jurisdiction and judgments regime. Similarly, anecdotal evidence in September 2016 suggests that cases are already being commenced in other EU jurisdictions which would otherwise have been commenced in England due to the uncertainty over the ultimate enforceability of an English judgment. Large-scale litigation would frequently take longer than two years. Therefore, it is of vital importance that interim measures are put in place.

Service

19. The Service Regulation will cease to have effect upon Brexit. At this point the residual service framework will revive which includes the methods of service permitted by the common law and the Hague Service Convention[3]. If the UK does not enter into an

[3] Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters.

agreement akin to the Denmark-EU Service Agreement[4], services of process will become more difficult and expensive as permission to serve out of the jurisdiction may be required and the permitted methods of service will be more cumbersome.

Recommendations

Longterm:

20. The UK Government should:

- Enter into an agreement based on the Denmark-EU Jurisdiction Agreement, both with the EU and with Denmark albeit with a clause providing not for interpretative jurisdiction of the CJEU but for 'due account' to be taken of the decisions of the courts of all 'Contracting Parties'
- Sign and ratify the Lugano II Convention, to preserve the present regime vis-à-vis Norway, Iceland and Switzerland
- Sign and ratify the 2005 Hague Convention on Choice of Court Agreements[5]
- Enter into an agreement based on the Denmark-EU Service Agreement, both with the EU and with Denmark
- Adopt the Rome I and II Regulations (which deal with choice of law) in domestic law by way of an Act of Parliament, and
- Adopt specific transitional arrangements to clarify the date on which various features of the above agreements will come into force.

21. Further, the UK Government needs to:

- Make a decision that these will be its aims as soon as possible and that is publicly stated, and
- Ensure that these arrangements take effect immediately upon Brexit so that there is a seamless transition between the existing and new regimes.

Transitional arrangements:

22. The UK Government should expressly provide for transitional arrangements in any agreement that it concludes with the EU in order to prevent uncertainty. The following transitional arrangements are suggested, which should be adopted in parallel:

22.1. As to the agreement based on the Denmark-EU Jurisdiction Agreement:

- The Agreement shall apply only to proceedings instituted after its entry into force, and

[4] Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2005] OJ L/299/62, 16 November 2005

[5] As its name suggests, this Convention is concerned with one aspect of jurisdiction and enforcement: the effect of choice of court agreements. This is not a substitute for the Brussels-Lugano regime.

- If proceedings in the state of origin were commenced before the entry into force of the Agreement, judgments given after that date shall be recognised and enforced in accordance with the Agreement.

22.2. As to the Lugano II Convention and the 2005 Hague Convention, the UK is limited by the fact that those treaties are already concluded, meaning that specific transitional regimes are less likely to be agreed. However, the UK might consider issuing a declaration upon ratification of those Conventions to provide for their seamless operation.

22.3. As to the agreement based on the Denmark-EU Service Agreement, no specific transitional arrangements are likely to be required, other than to specify the date of the entry into force of the Agreement.

Brexit Working Group

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Appendix 1

Survey of likely responses to English jurisdiction clauses in EU Member States (conducted by Simmons & Simmons)

Once the UK has left the EU, how will civil courts in Member States approach the following scenarios, assuming that:

- the UK is not a signatory to any relevant conventions, and
- the agreement between the parties contained a jurisdiction clause in favour of the English courts?

If the clause were an exclusive jurisdiction clause, would the court enforce it and decline jurisdiction?

Under their domestic provisions, courts in Member States would be likely to recognise an exclusive jurisdiction clause in favour of the courts of a non-Member State.

Exceptions include disputes involving rights granted by EU law, such as those relating to consumers, employment contracts, and compensation for commercial agents on termination of a relationship.

If the clause were a non-exclusive jurisdiction clause, would the court decline jurisdiction if proceedings had already commenced in England?

Courts of Member States would have a discretion not to decline jurisdiction in these circumstances. Objections could be raised in the Member State court on the basis of *lis pendens* by the party who had commenced proceedings in the court first seised.

In all jurisdictions we surveyed, the court would accept jurisdiction regardless of the parallel proceedings if a judgment of the court first seised would be unenforceable in its jurisdiction.

Other factors that might be considered include whether there is a significant link between the dispute and the state where the court is first seised, public policy considerations and whether there will be a fair hearing.

Would it make any difference if neither party were resident in the UK?

If the defendant were domiciled in a Member State, the Recast Regulation would apply, but would not alter the position from domestic rules. In France, the domicile of the parties would have no effect on the situation where an exclusive jurisdiction clause was present, but might affect it where a non-exclusive jurisdiction clause had been used, as the French court would then consider whether a substantial link to the UK had been established.

Would the Brussels Convention, or any bilateral convention that pre-dated it, still be considered applicable to the choice of jurisdiction?

In at least Italy and Germany, the Brussels Convention would still be considered binding.

If the UK had ratified the 2005 Hague Convention, would the court decline jurisdiction over a dispute where neither party was resident in the UK, but they had agreed to the exclusive jurisdiction of the English courts?

Yes, as long as one of the parties is resident in a contracting state that is not a Member State and the dispute is within the scope of the Convention. This requires it to be an international dispute, so the parties would need to be from different domiciles.