

# Reasons to Issue a Claim Form in UK–EU/EFTA Disputes in 2020, while the Going is Good

With the Brexit transition period set to end on 31 December 2020, this article looks at the implications for jurisdiction and the recognition & enforcement of judgments in cross-border litigation involving parties split between the UK and EU/EFTA member states, with a particular focus on litigation before the courts of England and Wales. It concludes that litigants in such cases may well face increased delays, costs and uncertainty in proceedings issued following the end of the transition period, so there is good reason to issue claim forms in claims against defendants domiciled in the EU/EFTA before the end of the year.

## The relevant EU/EFTA instruments

Regulation 1215/2012 (the “**Judgments Regulation**”) governs the allocation of jurisdiction and the recognition & enforcement of judgments in cross-border litigation in the EU. It applies:

- With direct effect in EU member states (save for Denmark); [1]
- In civil and commercial proceedings, whatever the nature of the court or tribunal, with limited exceptions, notably arbitration and insolvency; [2]
- In proceedings in which the defendant is domiciled in an EU Member State [3] and in limited cases regardless of the defendant’s domicile. [4]

The Lugano Convention 2007 is a treaty on substantially similar terms to the Judgments Regulation, which is signed by the EU, certain European Free Trade Association (EFTA) members, [5] and Denmark. It applies between states bound by the Convention where the Judgments Regulation does not apply. [6]

## EU law in domestic law post-Brexit

Establishing the status of EU and EU-derived rules of law post-Brexit involves navigating a labyrinthine series of statutes and secondary legislation. In very basic summary, as it relates to the Judgments Regulation and Lugano Convention:

- The default position is that direct EU legislation (such as the Judgments Regulation) and EU treaty commitments (such as the Lugano Convention) applicable before exit day (31 January 2020) continue to apply as part of domestic law following exit day; [7]
- Ministers are empowered to make statutory instruments dealing with “deficiencies” in retained EU law, which are subject to parliament’s approval; [8]
- Parliament approved secondary legislation relating to civil jurisdiction and judgments, providing that the Judgments Regulation and Lugano Convention would cease to apply following 31 January 2020, save in very limited circumstances; [9]
- However, the UK and the EU also entered into a treaty, the EU-UK Withdrawal Agreement, which provides for a transition period from 31 January 2020 to 31 December 2020; [10]
- The EU-UK Withdrawal Agreement is given effect in domestic law by the European Union (Withdrawal Agreement) Act 2020, and every other enactment is to be read subject to it; [11]
- The EU-UK Withdrawal Agreement is to be interpreted in accordance with EU law and with regard to decisions of the Court of Justice of the European Union; [12]

- The coming into force of the 2019 Regulations has been delayed to the end of the transition period, [13] and the government has indicated that it will amend the Regulations before then to comply with the terms of the EU-UK Withdrawal Agreement. [14]

#### Jurisdiction and judgments in the transition period

The Judgments Regulation is addressed directly in the EU-UK Withdrawal Agreement. It continues to apply to proceedings instituted before the end of the transition period on 31 December 2020 and to proceedings and actions that are related to them pursuant to Articles 29-31 Judgments Regulation. By Article 67:

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 [the Judgments Regulation], the following acts or provisions shall apply:*

a. *the provisions regarding jurisdiction of [the Judgments Regulation] [...]*

2. [...]

a. *[The Judgments Regulation] shall apply to the recognition and enforcement of judgments given in legal proceedings instituted before the end of the transition period [...]*

(emphasis added)

The UK remains bound by the Lugano Convention during the transition period by virtue of the general arrangements in relation to the EU's external actions, which provide that “*during the transition period, the United Kingdom shall be bound by the obligations stemming from the international agreements concluded by the Union*”. [15]

Although not addressed in terms in the EU-UK Withdrawal Agreement, it would seem a respectable argument that the applicability of the Lugano Convention as part of transition arrangements will be determined by when relevant proceedings were instituted, which is the approach currently anticipated under Regulation 92 of the 2019 Regulations.

#### When are proceedings “instituted”?

In relation to proceedings in England and Wales, it is likely that proceedings will be considered “instituted” for the purposes of the EU-UK Withdrawal Agreement when the relevant claim form is issued by the court, [16] given that in cases under the Judgments Regulation, the Court of Appeal has accepted the claim form as the document “*instituting the proceedings*”. [17]

In relation to Part 20 proceedings against non-parties to the litigation, Article 8(2) Judgments Regulation provides a person domiciled in a Member State may be sued “*as a third party in an action on a warranty or guarantee or in any other third-party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case*”. The reference to the “*original proceedings*” suggests that Part 20 proceedings against non-parties would be considered separate proceedings, instituted upon issuing the Part 20 claim form.

In relation to counterclaims, a person domiciled in a Member State may be sued “*on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending*”. [18] The reference to the “*original claim*” (as opposed to “*proceedings*”) militates, it is suggested, in favour of the proceedings

between the parties being considered to be on foot and so proceedings having been instituted – and the court’s jurisdiction over the parties established – at the time the original claim form was issued.

This also fits with the position under CPR Part 20, where no claim form is required in respect of counterclaims or contribution claims between existing parties, but a claim form is required in respect of claims against non-parties.

Similar language is used in Article 6 Lugano Convention in respect of Convention States.

#### What are “related” proceedings and actions and what does the withdrawal agreement mean for them?

The meaning of “related proceedings” as that term is used in Article 67 of the EU-UK Withdrawal Agreement is a matter of interpretation of that provision within the context of the EU-UK Withdrawal Agreement. However, Article 67 expressly invokes the concept of relationship pursuant to Articles 29-31 of the Judgments Regulation. Those provisions in Section 9 of the Judgments Regulation are concerned with conferring precedence between parallel proceedings pending before the courts in different EU Members States. Article 29 addresses parallel proceedings involving the same cause of action and Article 30 provides that “*actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*”. There is a healthy body of law under both these articles. [19] The question of whether any two sets of proceedings are “related” is likely to turn on the facts of the particular case, given it has been held that whether actions are related requires a “*broad, commonsense*” approach and the risk of irreconcilable judgments is to be read widely. [20]

The rules regarding related proceedings seem likely to apply in the English courts only in limited circumstances, where:

- Proceedings are instituted in a member state before the end of the transition period; and
- Proceedings are instituted before the English courts after the end of the transition period; and
- The English courts take the view that the two sets of proceedings are “related” within the meaning of Articles 29-31 of the Judgments Regulation.

#### After the end of the transition period

Save for proceedings caught by the transition arrangements, the Judgments Regulation and Lugano Convention will cease to apply in the UK from the end of the transition period. [21] Litigants will no longer be able to serve defendants domiciled in the EU out of the jurisdiction without permission in general commercial matters. [22]

Unless replaced with something else, the void created by the absence of the Judgments Regulation and Lugano Convention will be filled in the UK by domestic law. Law, like nature, abhors a vacuum. This is set to be the current domestic position, i.e. the common law and statutory rules currently applicable to defendants based in non-EU/EFTA member states, including CPR Part 6 and Practice Direction 6B, is set to apply to claims against EU/EFTA-based defendants. [23]

The UK has applied to become a signatory to the Lugano Convention in its own right (rather than through the EU), and its application [24] has reportedly been met with support from Switzerland, Norway and Iceland. [25] Accession would provide litigants in the UK with something close to continuity in the law of civil jurisdiction and judgments.

However, in order for the Lugano Convention to apply between the UK and EU, the EU will have to approve the UK’s accession. [26] That approval may be held up by broader political considerations, especially in light of the EU’s all-or-nothing approach to negotiations, the UK’s recent stance in negotiations and the controversy surrounding the Internal Market Bill. Even with approval, the Lugano Convention would not enter into force for 2-3 months following the deposit of the UK’s instrument of accession, [27] meaning there is no longer time for the Lugano Convention to take effect before the end of the transition period, absent some collateral agreement.

At present, it is unlikely that there will be an equivalent regime to the Judgments Regulation or Lugano Convention in place in the UK from the new year, while an extension to the transition period seems politically unlikely given the enthusiasm of the current UK government towards “getting Brexit done”.

### Comment

If the transition period ends before the UK becomes party to the Lugano Convention, claimants in the English courts against EU/EFTA-domiciled defendants may face a slower and more costly process to issue and serve proceedings, and greater uncertainty as to the enforceability of any judgment they obtain. There seems good reason to issue a claim form in claims against defendants domiciled in the EU/EFTA before the end of 2020, while the going remains good.

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[1] Although an EU member state, Denmark has opted out of judicial co-operation in civil matters – see Recital 41 Judgments Regulation. The provisions of the Regulation apply between the EU and Denmark by virtue of a separate agreement – 2019/C OJ 384 I/01.

[2] Article 1.

[3] Articles 4 & 6.

[4] Recital 14.

[5] Switzerland, Norway and Iceland – Liechtenstein is the only EFTA member not to have signed up to the Lugano Convention. For ease of reference, “EFTA member states” is used in the remainder of this article to refer to Switzerland, Norway and Iceland.

[6] In the UK, it applies principally in relation to proceedings against defendants domiciled in Switzerland, Norway or Iceland, or to the recognition and enforcement of judgments made by courts in those countries.

[7] Section 3 European Union Withdrawal Act (2018).

[8] Sections 8 & 22 and Schedule 7 European Union Withdrawal Act (2018).

[9] Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (the “**2019 Regulations**”).

[10] Article 126 EU-UK Withdrawal Agreement.

[11] See section 5 European Union (Withdrawal Agreement) Act 2020.

[12] Article 4 EU-UK Withdrawal Agreement.

[13] Schedule 5, paragraph 1 European Union (Withdrawal Agreement) Act 2020.

[14] See UK Government publication “Cross-border civil and commercial legal cases: guidance for legal professionals from 1 January 2021”, 30 September 2020:

<https://www.gov.uk/government/publications/cross-border-civil-and-commercial-legal-cases-guidance-for-legal-professionals-from-1-january-2021/cross-border-civil-and-commercial-legal-cases-guidance-for-legal-professionals-from-1-january-2021>.

[15] Article 129 EU-UK Withdrawal Agreement.

[16] That seems right as a matter of impression, because English procedural rules stipulate it is the issue of the claim form by the court at the request of the claimant that starts the proceedings. CPR Part 7 is headed: “*How to Start Proceedings – The Claim Form*”.

[17] See *Debt Collect London Ltd and another v SK Slavia Praha-Fotbal AS* [2010] EWCA Civ 1250; [2011] 1 WLR 866, [26] per Mummery LJ.

Under the 2019 Regulations, the Judgments Regulation would be applied only where the English Courts were “seised” before the end of the transition period: Regulation 92(1)(a), 2019 Regulations. The definition of “seised” is imported directly from Article 32 Judgments Regulation and is slightly more limited than the wording of the withdrawal agreement, in that it also requires the party not to have failed to take any step required for the service of the document instituting proceedings.

[18] Article 8(3) Judgments Regulation.

[19] See for example *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* [2013] UKSC 70.

[20] *Sarrio SA v Kuwait Investment Authority* [1999] 1 AC 3.

[21] Regulations 82 and 89, 2019 Regulations.

[22] Regulation 4(16), Civil Procedure Rules 1998 (Amendment) (EU Exit) Regulations 2019 amending CPR 6.33 – there will be limited exceptions for claims by consumers and employees under the new sections 15A-15E Civil Jurisdiction and Judgments Act 1982 to be inserted into CPR 6.33.

[23] See Government Guidance of 30 September 2020.

[24]

[https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/autres-conventions/Lugano2/200414-LUG\\_en.pdf](https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/autres-conventions/Lugano2/200414-LUG_en.pdf).

[25]

<https://ukandeu.ac.uk/farewell-lugano/#:~:text=On%208%20April%202020%2C%20Britain,the%20other%20EU%20member%20states.>

[26] Article 72(3) Lugano Convention.

[27] Article 73(2) Lugano Convention.