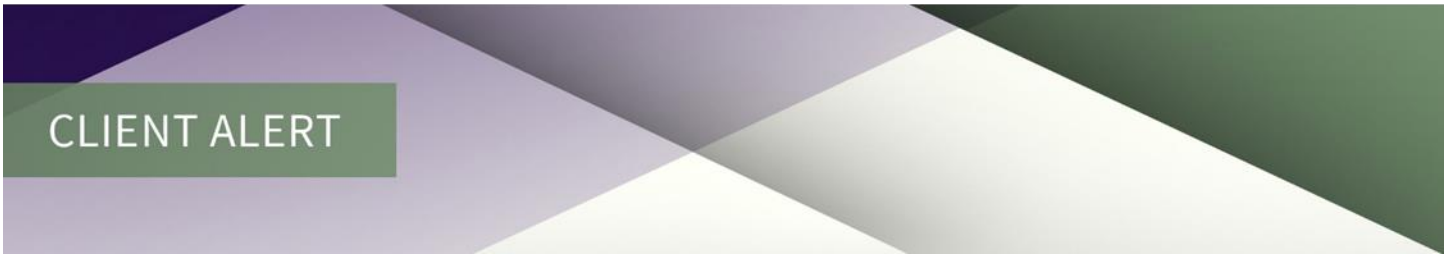


# With No Lugano Convention, What is the Future of Civil Jurisdiction?

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Last week Wednesday, the UK's application to accede to the Lugano Convention was not approved by the existing signatories within the one year deadline. The result: considerable uncertainty relating to cross-border disputes and the recognition and enforcement of judgements given by the Courts of England and Wales within the European Union (EU) and European Free Trade Association, and vice versa.

In this client alert we ask, with no Lugano, what is the law in this area and what does this mean for your governing law and jurisdiction clauses?

Background

Prior to Brexit, the position in this area with respect to choice of law and choice of jurisdiction was encapsulated by four main agreements.

**Choice of law**: the UK was bound by rules for choice of law set out in Rome I Regulation and Rome II Regulations (Rome I and II), which provide common rules on the identification of applicable law in both contractual and non-contractual obligation.

**Choice of jurisdiction:** the UK was bound by rules set out in the Brussels I Recast Regulation (Brussels I) and the Lugano Convention (Lugano). Taken together, these provide for parties' contractual choice of jurisdiction and judgments from the courts of member states to be recognised and enforceable across the EU.

Post-Brexit

With regards to identifying applicable law, Brexit has had minimal impact and the position is straightforward. In 2019, the UK parliament approved the Law Applicable to Contract Obligations and Non-Contractual Obligations, which effectively applies into domestic law the rules set out in Rome I and II. It is expected that English law with continue to mirror those provisions and in any case, the position is not far from that which would otherwise apply under English common law with respect to choice of law.

In contract, the position is far from satisfactory with regard to choice of jurisdiction. Following Brexit, Brussels I and Lugano ceased to apply casting doubt on the effectiveness of clauses giving jurisdiction to a UK or EU court and the recognition and enforcement of judgments in civil and commercial matters. Against this background, the EU-UK Trade Cooperation Agreement agreed was disappointing to many for its notable silence on provision for civil justice matters to replace Brussels I and Lugano. To address these issues, the UK acceded to the Hague Convention on Choice of Court Agreements 2005 (Hague Convention) on 1 January 2021 and made an application to join Lugano in April 2020. The deadline for the existing signatories unanimous approval of this application was 14 April 20211. At the time of writing, we understand that the decision to approve the UK's accession to Lugano is subject to further review over the coming weeks.

So where are we now?

Where proceedings before the EU and UK courts were instituted before 1 January 2021, the old law will continue to apply under article 67(1) of the Withdrawal Agreement. In other words, the rules on which country's courts have jurisdiction over a dispute and the enforcement of judgments will continue to be determined by the Brussels I and Lugano.

In the post-Brexit era with Brussels I and Lugano out, it will be a matter of domestic law of each EU Member State to determine whether or not they will give effect to a clause giving jurisdiction to a UK Court and whether they will enforce UK judgements. In the UK, matters of jurisdiction and enforcement will be determined by common law, supplemented by the Hague Convention. Amongst other things (but importantly for the issues at hand), the Hague Convention (to which the EU is a member) prescribes:

- the court chosen by parties in an exclusive choice of court clause must hear the case;
- courts in other states are prohibited from hearing the case where a valid choice of court has been identified; and
- any judgment rendered by the chosen court must be recognised and enforced in courts of all other contracting parties.

Clearly, the Hague Convention provides some protections but it has shortcomings. It contains no default rules for determining jurisdiction in the absence of any exclusive jurisdiction clauses and no provisions for asymmetric clauses (where one party is limited to bringing proceedings in one court, but the other is not).

What should you be doing?

1. You may want to review you standard dispute resolution clauses and whether they accommodate the change in position and whether they will age well, especially if these include non-exclusive clauses or asymmetric jurisdiction clauses. You may also want to consider amending any contracts to include exclusive jurisdiction clauses, so as to be caught by the Hague Convention protections.

2. You may want to consider alternative dispute resolution provision in your contracts involving EU counterparties, i.e. mediation or arbitration.

3. Finally, consider whether any claims are likely to arise. With the default being domestic Member State law, the litigation process is likely to be more complicated and, at times, more costly. For example, if a UK judgment is obtain against a corporation with assets in a number of EU countries, individual application for enforcement for each Member state may be required. Preparation and planning is key.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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