

Select 2020

A Tale of Four Cities: The impact of Brexit on cross-border litigation

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4 March 2020

A Tale of Two Cities

- It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way – in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only.
- **A metaphor for Brexit?**

The three key takeaways

1. There are three separate questions that it is important to separate in your mind:
 1. What law will govern my dispute? (Rome)
 2. What court will hear my dispute? (Brussels, Lugano, Hague)
 3. Can I enforce a judgment of the English Court elsewhere and *vice versa* (Brussels, Lugano, Hague)
2. It will still be possible to enforce an English judgment in the EU27 after Brexit. There may however be more procedural hurdles
3. The majority of the benefits of English law and the English Legal System are unaffected by Brexit

Agenda

1. **Brexit overview**
2. **Enforcement:** The main question we are getting from clients.
3. **Jurisdiction:** Make sure you are in the right place.
4. **Governing law:** Not heavily impacted by Brexit.
5. **Practical implications:** Do I need to do anything now?



Brexit

Brexit overview

31 January 2020

Brexit day

March 2020

UK-EU trade
negotiations begin

30 June 2020

Option to extend
transition period
expires

**31 December
2020**

Transition period ends
(unless extended)

Post-transition

Increased potential for
divergence between UK
and EU

EU law applies to and in the UK during the transition period

UK-EU trade negotiations commence in early March 2020

UK trade negotiations with rest of the world can commence from Brexit day





Enforcement

Enforcement

- Why does it matter?
- When should you consider it?
- Has the position changed?

Enforcement - Now

Enforcement – Now – English judgment in EU27 and *vice versa*



Substance: Governed by Recast Brussels Regulation:

A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required.

Relies on reciprocity

Process: I get a certificate from the judgment-giving-court and can take my judgment and that certificate to another country and get it enforced

Enforcement – Now – English judgment in EFTA State and vice versa



Substance: Governed by Lugano Convention:

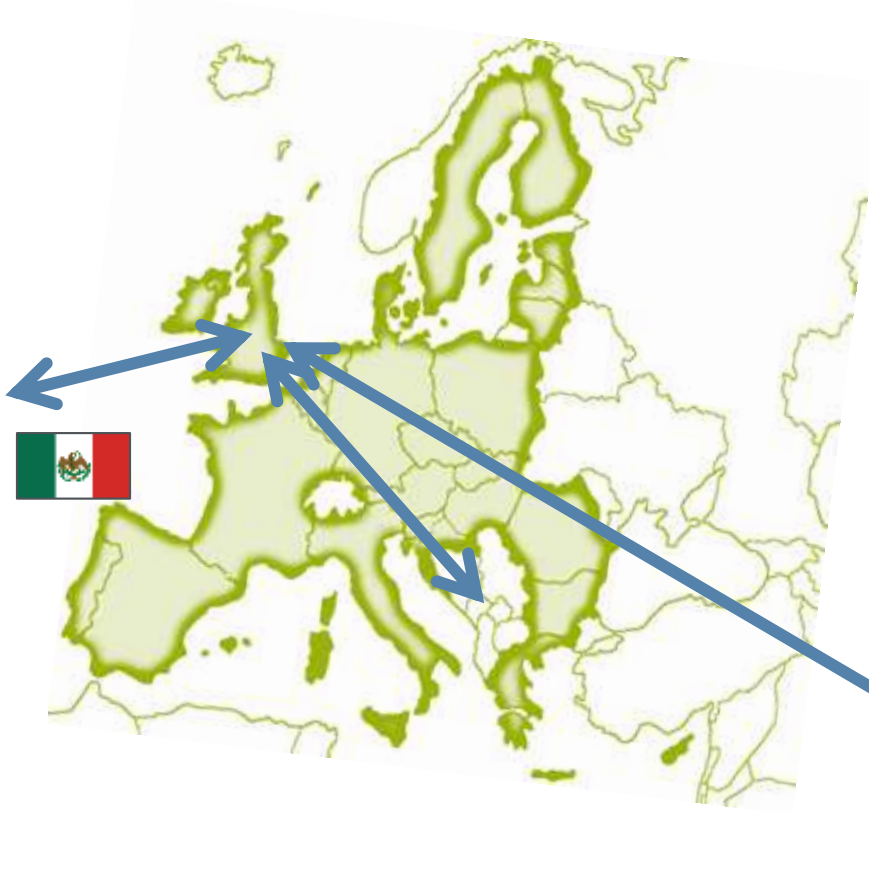
A judgment given in a State bound by this Convention and enforceable in that State shall be enforced in another State bound by this Convention when, on the application of any interested party, it has been declared enforceable there.

Relies on reciprocity

Process: I get a certificate from the judgment-giving-court and can take my judgment and that certificate to another country and get it enforced

Question: Will EFTA States apply Lugano during transition?

Enforcement – Now – English judgment in Hague Convention State and *vice versa*



Substance: Governed by Hague Convention – Article 8:

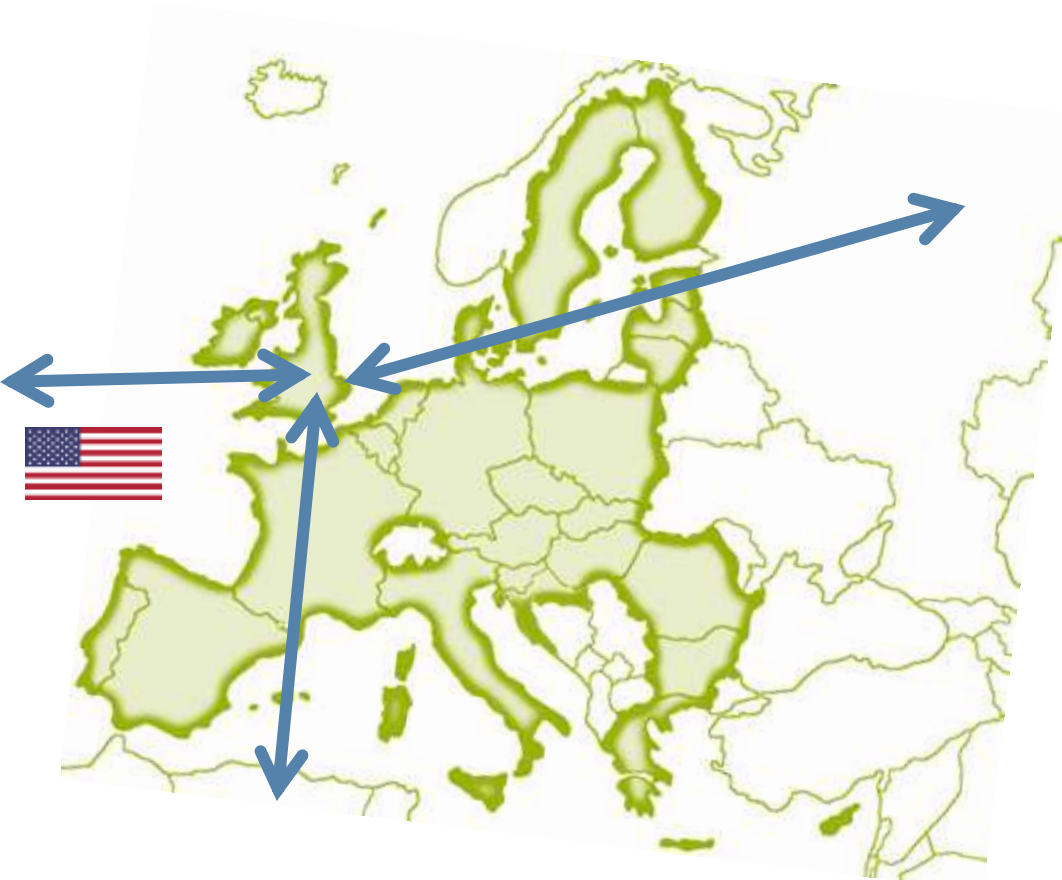
A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter.

Relies on reciprocity, though limits.

Process: Domestic enforcement:

The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.

Enforcement – Now – English judgment in Rest of World and vice versa



Substance: Governed by domestic law of each country

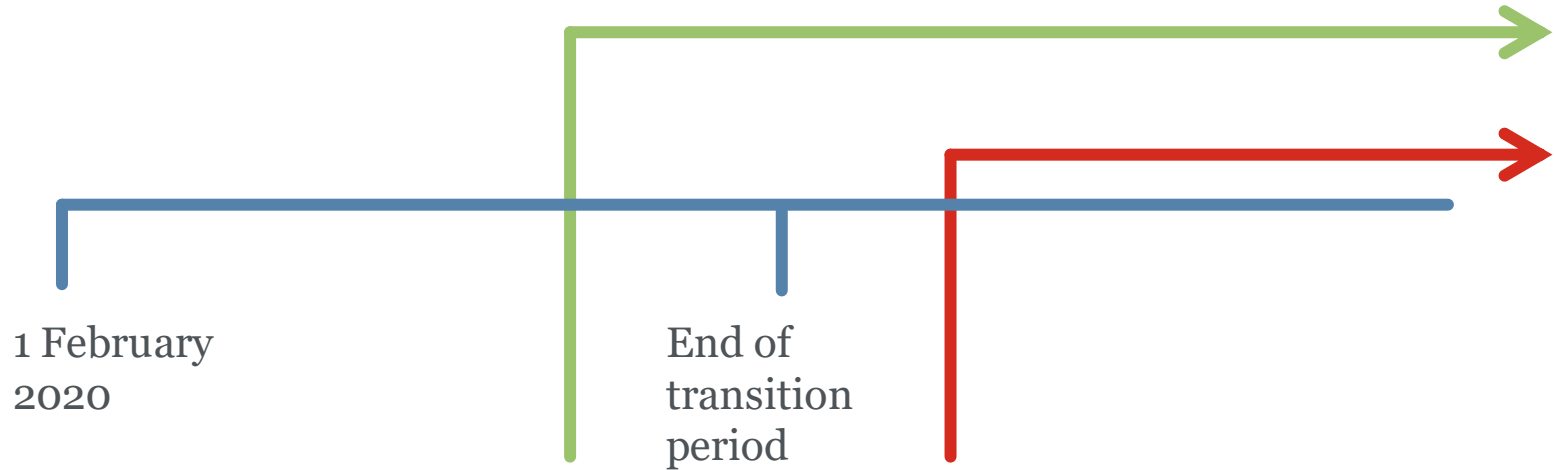
Process: Governed by domestic law of each country

Example: Enforcing a New York judgment in the English Court:

- Institute fresh proceedings (debt claim)
- Judgment evidence of that debt

Enforcement – After end of transition period

Grandfather Provisions



If proceedings instituted prior to end of transition period – RBR/Lugano continue to apply so as above

If proceedings instituted after end of transition period – RBR/Lugano do not apply (no reciprocity!)

Enforcement – After TP – English judgment in EU27 and *vice versa*



Substance: RBR no longer applies
(more detail coming!)

Process: Domestic processes of each
state (which in many cases are well
developed) – Local law advice
required

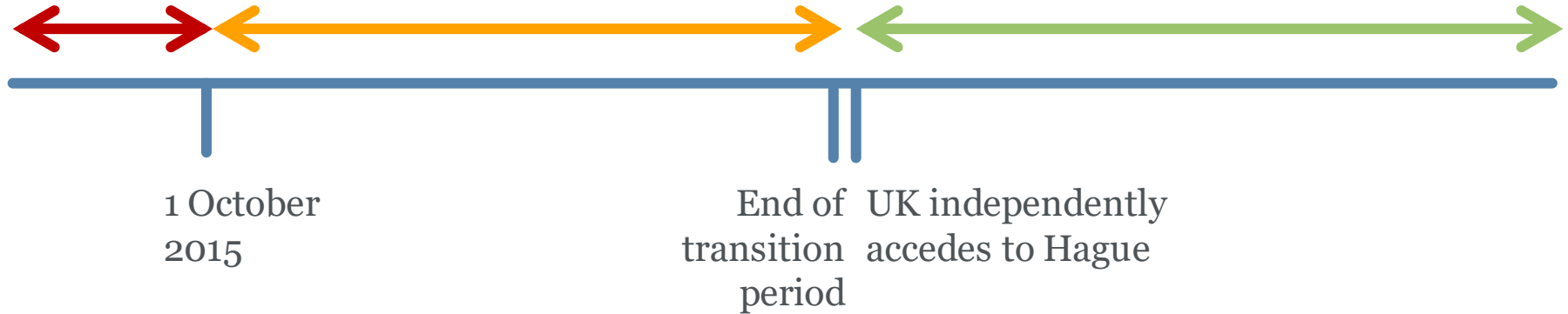
Enforcement – After TP – English judgment in EU27 and *vice versa*

- Three tiers:
 - Recast Brussels Regulation/Lugano
 - Hague Convention
 - Domestic Law
- First tier no longer there (though note UK's intention to join Lugano)
- So greater reliance on the Hague Convention
- But Hague Convention not always the answer:
 - Requires an underlying EJA (not tort)
 - When was EJA entered into
 - Money judgment / interim measures
 - Excluded matters
- If Hague does not apply then domestic law of each state

Enforcement – Hague Convention not always the answer – Timing

When was EJA entered into?

"This Convention shall apply to exclusive choice of court agreements concluded after its entry into force for the State of the chosen court"



HC came into force in UK (as a MS) on 1 October 2015 so if EJA entered into before then HC does not apply

If between 1 Oct 2015 – End of TP – Uncertainty – Commission said it does not apply!

If after UK's independent accession, then Hague definitely applies

Enforcement – After TP – English judgment in EFTA State and *vice versa*



Substance:

- Lugano Convention no longer applies.
- UK intends to join Lugano.
- No EFTA State party to Hague Convention
- So Domestic law

Process: Domestic law processes

Enforcement – After TP – English judgment in Hague Convention State and *vice versa*

No change – Just more reliance

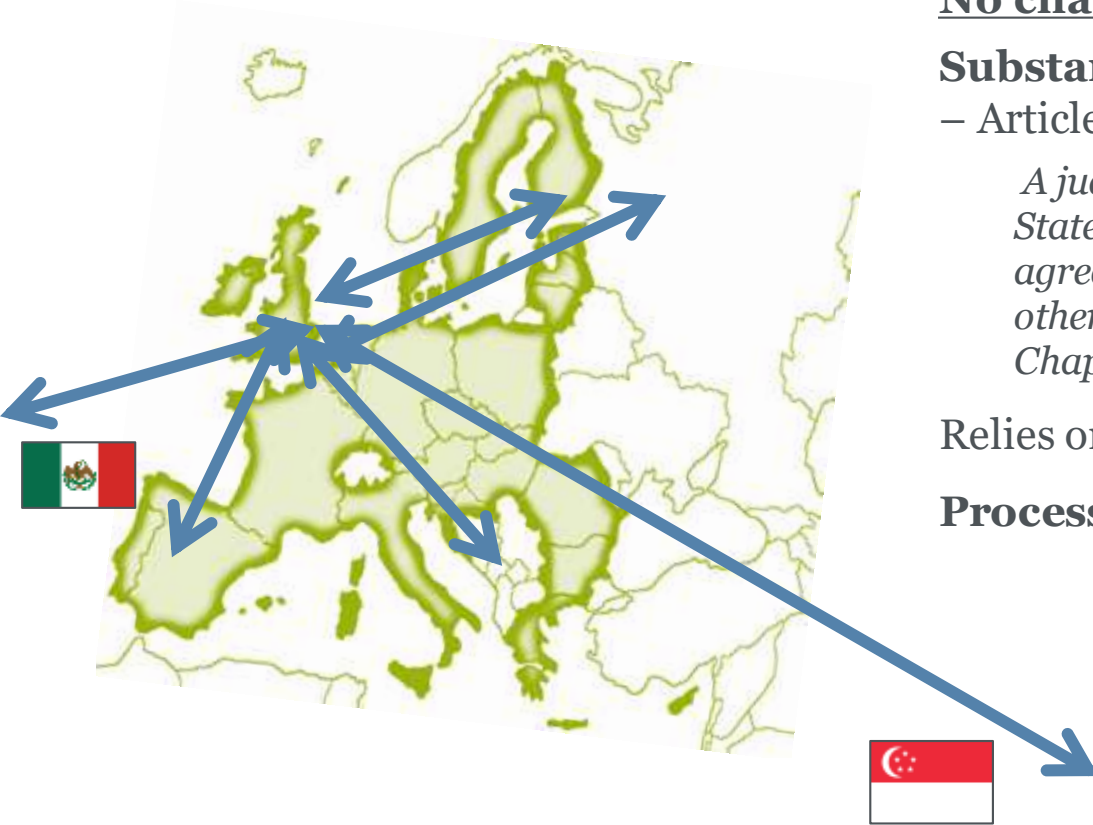
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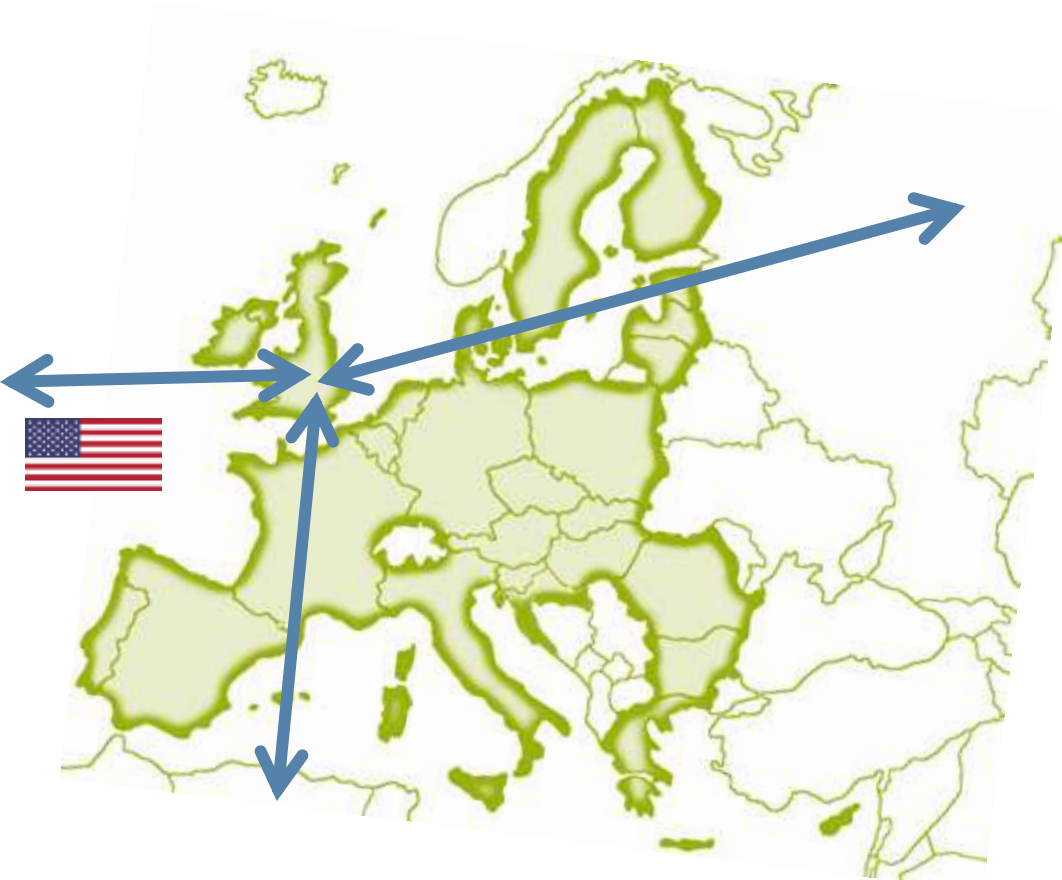
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Enforcement – After TP – English judgment in Rest of World and *vice versa*



No change – Just more reliance

Substance: Governed by domestic law of each country

Process: Governed by domestic law of each country

E.g., Enforcing a New York judgment in the English Court:

- Institute fresh proceedings (debt claim)
- Judgment evidence of that debt

Enforcement – Summary

Enforcement – Summary

Enforcing an English judgment:	EU27	EFTA	Hague	RoW
During Transition Period	RBR applies	Lugano applies	Hague applies (if applicable)	Domestic law applies
Grandfather provisions apply	RBR applies	Lugano applies	Hague applies (if applicable)	Domestic law applies
After Transition Period	Hague applies (if applicable) if not domestic law*	Domestic law*	Hague applies (if applicable)	Domestic law applies

* Note that the UK has expressed intention to join Lugano

Takeaway: It will still be possible to enforce an English judgment in the EU27 after Brexit. There may however be more procedural hurdles.

A bronze statue of Lady Justice, the personification of the law, is shown from the chest up. She has a blindfold and holds a pair of scales of justice in her right hand, which is raised. The background is a bright, hazy sky with the sun visible, creating a lens flare effect. In the top right corner, there is a blue triangular graphic containing the word "Jurisdiction" in white text.

Jurisdiction

Jurisdiction

- What does it mean?
- Why does it matter?
- When to consider it?

Jurisdiction – Now

Jurisdiction – Now – English courts/EU27 courts



Substance: Governed by Recast Brussels Regulation

If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction

If no jurisdiction agreement then specific rules under RBR.

RBR continues to apply.

Jurisdiction – Now – English courts/EFTA courts



Substance: Governed by Lugano Convention

If the parties, one or more of whom is domiciled in a State bound by this Convention, have agreed that a court or the courts of a State bound by this Convention are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction.

If no jurisdiction agreement then specific rules under Lugano.

Lugano continues to apply.

Jurisdiction – Now – English courts/ Hague Convention State courts



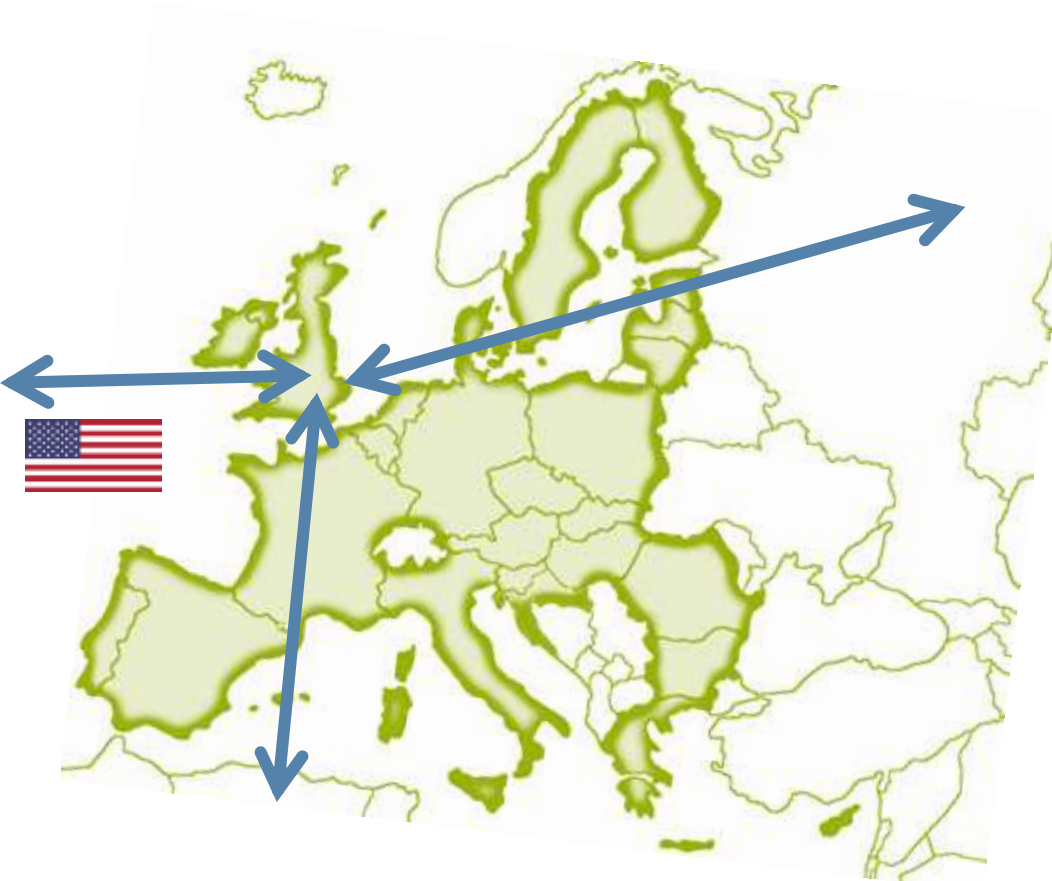
Substance: Governed by Hague Convention:

The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.

Requires EJA



Jurisdiction – Now – English courts/ RoW courts



Substance: Domestic law.

In UK:

Jurisdiction is based on either:

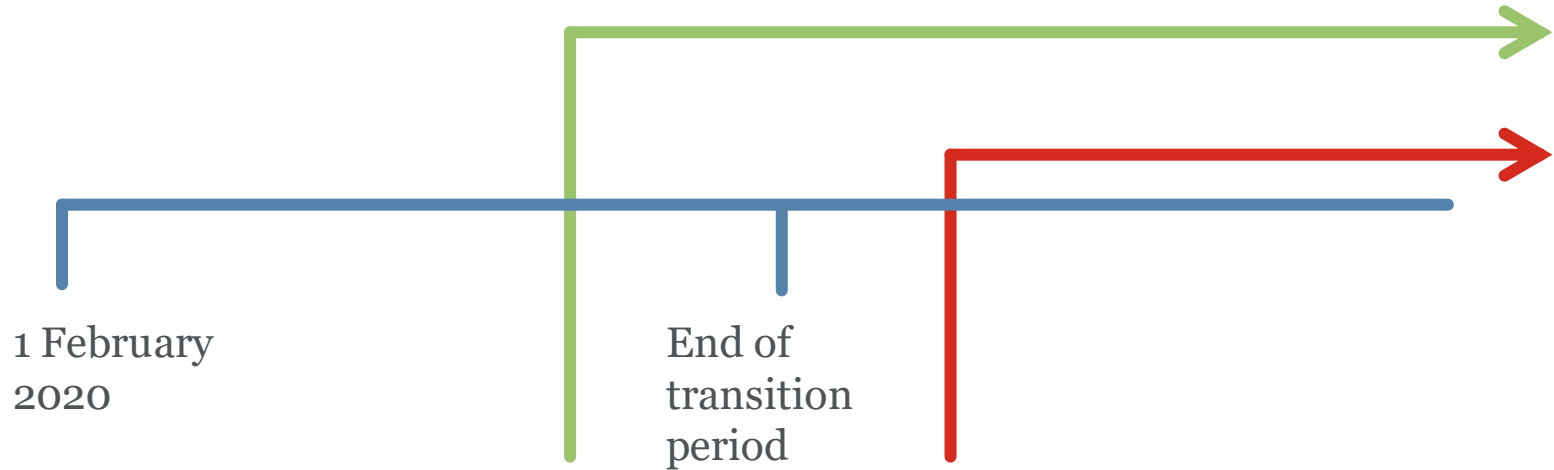
- Service of proceedings (within or outside the jurisdiction); or
- Submission to the jurisdiction

Grounds for challenging jurisdiction:

- Service was defective and/or permission to serve out should not have been given
- England is not the most appropriate forum (*forum non conveniens*)
- Parties have agreed to refer disputes to another country's courts/to arbitration
- Dispute is not justiciable before the English courts

Jurisdiction – After end of transition period

Grandfather Provisions



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Jurisdiction – After TP – English courts/EU27 courts



Substance:

- RBR no longer applies
- Reliance on Hague Convention
- If not domestic law

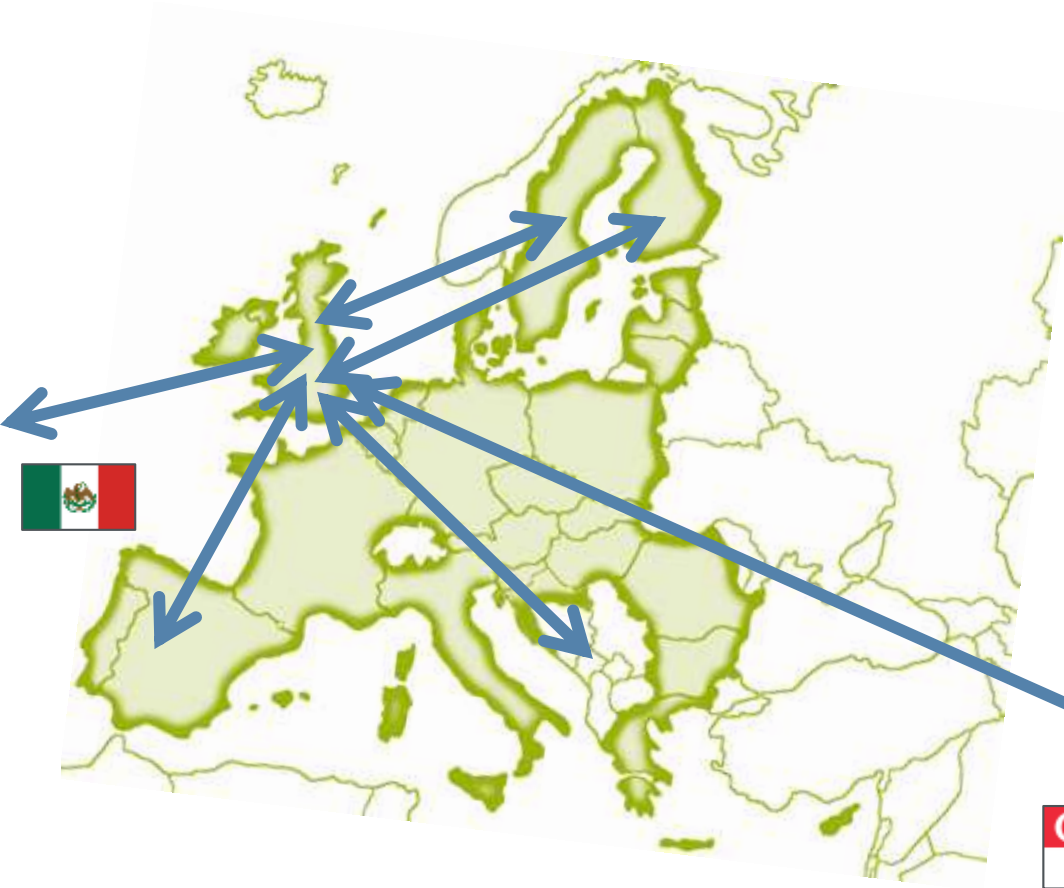
Jurisdiction – After TP – English courts/EFTA courts



Substance:

- Lugano Convention no longer applies.
- UK intends to join Lugano.
- No EFTA State party to Hague Convention
- So Domestic law

Jurisdiction – After TP– English courts/ Hague Convention State courts

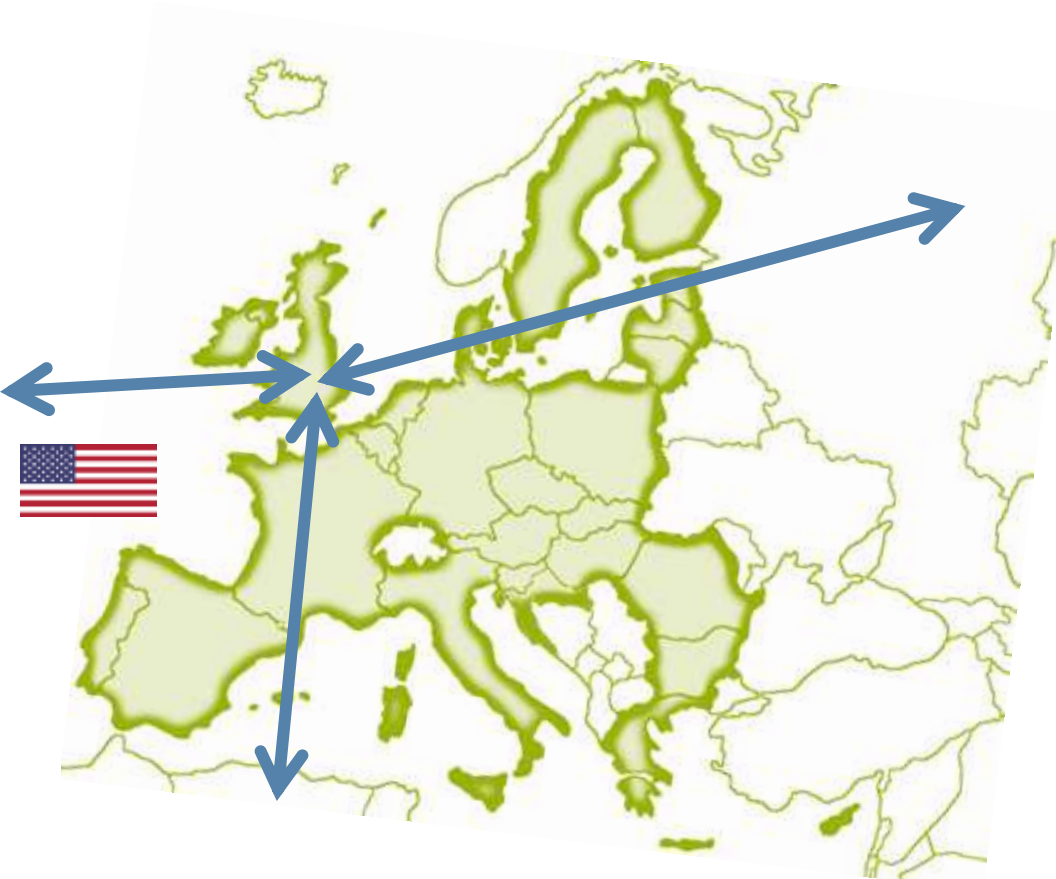


No change – Just more reliance

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Enforcement – After TP – English judgment in Rest of World and vice versa



No change – Just more reliance

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Governing law

Governing law

- Clearly very important. English law, for example, may allow a bank to enforce its security over assets, in circumstances where French law would not.
- The Governing law is determined by the Rome I (contractual obligations) and Rome II (non-contractual/tortious obligations) Regulations.
- Two step process:
 - Is there a governing law clause? (applies to both contractual and non-contractual obligations)
 - If not:
 - Rome I: (Contractual obligations) The governing law is that of the country **where the person with characteristic performance of the contract has his residence.**
 - Rome II: (Non-contractual obligations) The governing law is that of the country **where the damage occurs**

Governing law – Brexit

- **During transition period:** Rome Regulations continue to apply
- **After transition period:** Rome Regulations become part of retained EU law and continue to apply as amended by The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019

Governing law/jurisdiction/enforcement - Summary

Three Questions

- **Takeaway:** In relation to every dispute, there are three key questions that you need to ask:
 - What governing law will govern the dispute? (Governing Law)
 - Rome Regulations
 - Which court will hear my dispute? (Jurisdiction)
 - Recast Brussels Regulation, Lugano Convention, Hague Convention
 - Will I be able to enforce any judgment obtained in another jurisdiction? (Enforcement)
 - Recast Brussels Regulation, Lugano Convention, Hague Convention

A photograph of a large flock of birds, possibly terns, flying in a loose V-formation across a dramatic sky at sunset. The sky is filled with large, dark clouds that are illuminated from below by the setting sun, creating a warm orange and yellow glow. The birds are silhouetted against the bright sky. In the bottom right corner, there is a blue trapezoidal shape containing the text "Practical Implications".

Practical Implications

Practical implications

- Impact on governing law clause
 - Should I continue to choose English law?
- Impact on jurisdiction clause
 - What type of jurisdiction agreement shall I go for?
 - Should I continue to choose English courts?
- **Takeaway:** Many of the benefits of English law and the English courts are unaffected by Brexit



Benefits of English law

- Business friendly:
 - Security
 - Implied terms
 - Oral modification
 - Freedom of contract
- Certainty – Precedent
- Adaptable and commercial
- English is language of international business



Different options for Jurisdiction Agreements

- Exclusive
- Asymmetric
- Non-exclusive
- Let's-change-it-if-we-have-to clause

Benefits of English courts

- Efficient case management
- Speedy resolution of disputes (summary judgment/strike-out)
- Loser pays costs
- London is largest international legal centre in world
- Mediation
- Quality
- Disclosure
- Privilege

The three key takeaways

1. There are three separate questions that it is important to separate in your mind:
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How will Brexit affect you?

When law, policy and politics converge, you need advisors who do not see Brexit through a narrow lens. You need advisors who see the big picture but don't miss the details.

[How we can help you](#)

Brexit countdown

Now counting down to 31 December 2020, the default end of the "transition period"

308
days

5
hours

11
minutes

52
seconds

Insights >



31 January 2020 - Macro

Brexit Day – 31 January 2020



24 January 2020

Brexit FAQs: Entering the transition period – 31 January 2020



7 January 2020 - Macro

Brexit webinar series 2020



13 December 2019

Global Britain 2020 and a new UK Trade policy

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