

INTERNATIONAL DISPUTE RESOLUTION NEWS

**Brexit and the Future of
Litigation in Ireland****Paul Convery*****1. Brexit – progress update and next steps**

Notwithstanding the global healthcare crisis, the Brexit deadline of 31 December 2020 approaches. This deadline has been described as the date of the 'economic Brexit'¹ following the 'political Brexit' which occurred earlier this year. There are a number of priorities to be addressed before this deadline. This article considers the progress of Brexit to date and in addition examines the possible consequences for litigation in Ireland, including the increased selection of Ireland as a forum for dispute resolution.

1.1 Brexit negotiations

October 2019 saw the conclusion of two Agreements between the European Union and the United Kingdom. The first of these was the revised Withdrawal Agreement and the second was the revised Political Declaration.

The Withdrawal Agreement entered into force on 1 February 2020. Its stated objective is to set out "... *the arrangements for the withdrawal of the United Kingdom of Great Britain and Northern Ireland ("United Kingdom") from the European Union ("Union") and from the European Atomic Energy Community ("Euratom").*"² It is legally binding with a view to ensuring that the withdrawal will happen in an orderly manner and continues in force until 31 December 2020. Of its three Protocols, the Protocol on Ireland/Northern Ireland is a fundamental issue for Anglo-Irish relations and is designed to avoid the erection of a new border³ on the island of Ireland, to protect the Good Friday Agreement⁴ and to safeguard the integrity of the European Union Single Market.⁵ The overlapping conflicts created by these issues have proven difficult to reconcile.

The transition period, which is scheduled to end on 31 December 2020 (unless extended), envisages the

United Kingdom continuing to function as a European Union Member State until then. From an Irish perspective, this effectively means that there will be no changes for its citizens or businesses until 2021. While an extension to the transition period envisaged by the Withdrawal Agreement is possible, the United Kingdom has prohibited the seeking of an extension by an act of its parliament.⁶ Throughout negotiations with the European Union, the United Kingdom has steadfastly reaffirmed its position that it will not seek an extension.

A report by Copenhagen Economics in January 2020 (commissioned by the Department of Business, Enterprise and Innovation), on the effect of Brexit on potential economic growth in Ireland, predicted a fall of between 3.2% and 3.9% depending upon the ultimate scenario agreed by the European Union and the United Kingdom. If no agreement can be reached, and if the United Kingdom withdraws from the European Union on World Trade Organisation terms,⁷ there is an anticipated reduction in potential Irish economic growth of 7%. Any economic comfort Ireland took from the Political Declaration has effectively been wiped out by the Covid-19 pandemic, and the risk remains of the United Kingdom leaving with no deal on 31 December 2020.

2. Legal Impact**2.1 Potential impact on the UK legal system**

Brexit has created various legal uncertainties for the United Kingdom in respect of the interaction between it and the European Union. One glaring example is the refusal to date of the United Kingdom to accept the jurisdiction of the European Court of Justice in dispute resolution and governance. Some previous treaties agreed with non-European Union countries (such as the EU-Canada Comprehensive and Economic Trade Agreement)⁸ do not include jurisdiction for the European Court of Justice in dispute resolution. However, other treaties of the European Union, such as the agreement with Norway, require a

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mirroring of the decisions of the European Court of Justice.⁹ It remains to be seen whether a "middle ground" can be achieved.

In respect of litigation, and assuming the UK does not leave the European Union without economic agreement on 31 December 2020, the envisaged impacts are as follows:

2.1.1. Choice of Law

- Rome I and Rome II, the EU regulations which attempt to harmonise the rules which apply in determining the law applicable to contractual and non-contractual disputes, will continue to apply until 31 December 2020.
- The UK government currently intends to incorporate the Rome I¹⁰ and Rome II¹¹ Regulations into national legislation post Brexit via [The Law Applicable to Contractual Obligations and Non-Contractual Obligations \(Amendment etc.\) \(EU Exit\) Regulations 2019](#).

2.2.2. Jurisdiction, Recognition and Enforcement

- Until 31 December 2020 Brussels I Regulation Recast¹² will continue to apply. After the transition period, the UK government currently intends to incorporate the Brussels Regime into national legislation post Brexit via [The Civil Jurisdiction and Judgments \(Amendment\) \(EU Exit\) Regulations 2019](#).

2.1.2. Service and Evidence

- On exit day, the EU Service and EU Evidence Regulations will be revoked by draft [Service of Documents and Taking of Evidence in Civil and Commercial Matters \(Revocation and Saving Provisions\) \(EU Exit\) Regulations 2018](#).¹³
- The draft Statutory Instrument contains transitional provisions in relation to requests received before exit day.
- The Hague Conventions on [Service](#)¹⁴ and [Evidence](#)¹⁵ will continue to apply after Brexit and will govern cross-border requests for evidence and service of documents between the UK and member states which are also contracting parties.

2.1.3. Arbitration

- It seems unlikely that there will be a significant impact on arbitration as a result of Brexit. The choice of arbitration as the forum through which to resolve disputes is established by commercial contract. The recognition and enforcement of arbitration awards are governed by the New York Convention 1958 on the Recognition and Enforcement of Foreign Arbitral Awards which, as it is an international convention, will continue to apply notwithstanding Brexit. The United Kingdom signed the Convention on 24 September 1975. Ireland signed the Convention on 12 May 1981.

2.2 Brexit impact on the Irish legal system

The Irish legal system is derived from the English common law system, which operates on the doctrine of precedent. This doctrine means that the Irish Courts are bound to follow decisions of superior courts in Ireland (and decisions of the courts of the European Union where applicable) and are usually slow to depart from decisions of courts of equal rank, save in exceptional circumstances. The doctrine ensures certainty within the law and brings a corresponding high degree of certainty to cases -- which is frequently cited by international litigants as a reason for choosing (a) the law of a common law country to govern its contracts, and (b) its courts to adjudicate disputes.

After Brexit, Ireland will be the only English-speaking common-law legal system in the EU. This carries with it some potential advantages – namely, parties who currently use the laws of the laws of England & Wales and the United Kingdom's legal system, together with its EU membership, to pursue international business, may be attracted to choose Irish law and avail of the similar legal system in Ireland for ease of doing business with the remaining EU Members States.

A judgment from an Irish court will also continue to enjoy enforcement in all other European Union member states post-Brexit in accordance with the Recast Brussels Regulation. However, the recognition and enforcement of United Kingdom judgments across the European Union in a post-Brexit scenario where the United Kingdom leaves the EU with no agreement reached remains unclear. Pending clarity,

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that risk can be alleviated by choosing an alternative legal forum, such as Ireland, to adjudicate disputes.

In addition, various international organisations have already taken steps recommending Irish law and Ireland as a desirable location to resolve disputes. For example, in 2018 the International Swaps and Derivatives Association published an Irish law ISDA Master Agreement to add to its existing governing law options. This will enable parties to continue to transact derivatives under the laws of an EU member state that is a common law jurisdiction and to benefit from the automatic recognition and enforcement of judgments referred to above. Under the common-law, in the absence of a binding Irish precedent, regard will be had by Irish judges to decisions of the English courts in similar cases (and indeed other common law jurisdictions).

Where to next?

It remains to be seen what the result of the negotiations between the European Union and the United Kingdom, during the optimistically titled 'transition period', will be. Significant differences remain. Prime Minister Boris Johnson has asserted various "red lines" relevant to the legal landscape, such as no role for the European Court of Justice in the United Kingdom and no obligation for the United Kingdom to be bound by EU law. The European Union's position is that overarching institutional frameworks and effective dispute resolution mechanism are required.

The United Kingdom remains resolutely opposed to a longer transition period. Therefore, whilst Brexit's long-term repercussions for the various legal systems and economies remain unclear, at least one certainty appears to be the exit date of 31 December 2020, regardless of whether or not there is a trade deal in place.

In the absence of a trade deal and the UK Government adopting the Rome and Brussels Regulations, parties entering into contracts subject to the laws of England & Wales and their Courts should consider all governing law and jurisdiction options.

Endnotes

¹ Press statement by Michel Barnier following the second round of future relationship negotiations with the United Kingdom (STATEMENT/20/739) https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_739 (last visited on 26 August 2020).

² [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/TXT\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/TXT(02)&from=EN) (last visited on 26 August 2020).

³ A visible border on the island of Ireland was removed as a result of the signing of the Good Friday Agreement in 1998. The last British watchtower was dismantled in 2006.

⁴ The Good Friday Agreement was the Agreement signed between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland on 10 April 1998. It is widely credited with a return to peace on the island of Ireland.

⁵ https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_104 (last visited on 26 August 2020).

⁶ <https://services.parliament.uk/bills/2019-21/europeanunionwithdrawalagreement.html> (last visited on 26 August 2020).

⁷ <https://dbei.gov.ie/en/Publications/Publication-files/Assessment-economic-impacts-Ireland-EU-UK.pdf> (last visited on 26 August 2020).

⁸ <https://ec.europa.eu/trade/policy/in-focus/ceta/> (last visited on 26 August 2020).

⁹ <https://www.norway.no/en/missions/eu/areas-of-cooperation/the-eea-agreement/> (last visited on 26 August 2020).

¹⁰ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF> (last visited on 26 August 2020).

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¹¹ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:0049:EN:PDF> (last visited on 26 August 2020).

¹² The Brussels I Regulation Recast regulates jurisdiction and recognition and enforcement of judgments between European Union Member States. It applies to legal proceedings instituted on or after 10 January 2015 and judgments in proceedings on or after the 10 January 2015.

¹³ <https://www.legislation.gov.uk/uksi/2018/1257/contents/made> (last visited on 26 August 2020).

¹⁴ <https://www.hcch.net/en/instruments/conventions/specialised-sections/service> (last visited on 26 August 2020).

¹⁵ <https://www.hcch.net/en/instruments/conventions/specialised-sections/evidence> (last visited on 26 August 2020).