

A Post-Brexit Look from the EU Perspective at International Commercial Litigation Involving UK-Based Parties

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UK and EU (PIL)

- UK = EU (EC) = from 1 January 1973 until 31 January 2020
- Article 81 TFEU: Judicial Cooperation in Civil Matters (Private Int'l Law-PIL)
- During EU membership period, UK adopted EU PIL legal instruments (although with opting-out powers)
- EU PIL instruments ceased to apply in the UK after 1 January 2021

EU PIL in Commercial Matters: Most Relevant Instruments

○ International Jurisdiction

○ RB1Bis (<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012R1215&from=EN>)

○ Applicable when defendant is domiciled in the EU, when the dispute involves exclusive jurisdiction matters (article 24) or when the parties have agreed to the jurisdiction of the courts of EU Member States either expressly (article 23) or implicitly (article 24)

○ Lugano Convention II (2007) ([https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22007A1221\(03\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22007A1221(03)&from=EN)) = EU(+Denmark)+Iceland + Norway + Switzerland (EFTA States except Liechestein)

○ Applicable when defendant is domiciled in Iceland, Norway or Switzerland, when the dispute involves exclusive jurisdiction matters (article 22) or when the parties have agreed to the jurisdiction of the courts of any of those three countries either expressly (article 23) or implicitly (article 24)

○ Applicable Law

○ RR1 (<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF>)

○ RR2 (<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32007R0864&from=en>)

○ Recognition and Enforcement of Foreign Decisions

○ RB1Bis + Lugano Convention II (2007)

Int'l Jurisdiction from the UK perspective

- UK: Back to the Past?
 - Sources: Int'l Conventions and domestic international jurisdiction rules (statutory + case law)
- Is the Brussels Convention (1968) still in force (and applicable) in the UK?
- Unsuccessful attempts (so far?) to join autonomously the Lugano Convention
 - UK applied to become a party on 8 April 2020
 - Accession requires unanimous consent from all other parties to the Convention: EU has opposed (<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021DC0222&from=EN>)

Int'l Jurisdiction of EU Member State Courts involving UK-Based Parties

- RB1 Bis applies only when defendant is domiciled in the EU (general rule)
- But (exceptions) it shall apply to UK-based (domiciled) parties in situations of exclusive jurisdiction (article 24) or choice of EU Member State Courts, either expressly (article 25) or implicitly (article 26)
- If RB1 Bis is not applicable, int'l jurisdiction of EU Member State Courts in cases of UK-domiciled parties shall be determined by the domestic international jurisdiction rules of the corresponding EU Member State
- Reasoning above applies similarly in situations covered by the Lugano Convention II (2007)

Int'l Jurisdiction: Common Ground

- **HCCH (Hague Conference) Convention of 30 June 2005 on Choice of Court Agreements** (<https://www.hcch.net/en/instruments/conventions/full-text/?cid=98>)
 - Applies to int'l jurisdiction (Chapter II) but also to recognition and enforcement (Chapter III)
 - Entered into force (internationally speaking): 1 October 2015
 - When in the UK?
 - Status Table (<https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>): EU (+Denmark) + UK + México + Montenegro + Singapore
 - Applies only to exclusive choice of court agreements (articles 1 and 3) in situations/matters not excluded by article 2 when the choice is concluded after the date of entry into force of the Convention in the country of the chosen courts
 - Does not apply to intra-EU cases (RB1Bis prevails) but applies in the EU where at least one of the parties to the agreement is resident in a non-EU Member State party to the Convention (i.e., UK).
 - Jurisdiction of the chosen Court (article 5) and obligations of a Court not chosen (article 6)

Applicable Law

- Still the same (almost)
- The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019
(<https://www.legislation.gov.uk/ukdsi/2019/9780111180785/contents>)
- Therefore, the UK continues to apply the rules set out in Rome I and Rome II
- Universal application of both Regulations

Law Applicable to Contractual Obligations: Selected Issues

- Under RR1, the UK courts provided a particular approach to implicit choice of law clauses (article 3.1) and to escape devices (article 4.3)
 - Reading: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2573226
- Intra-EU cases (article 3.4): choice of the law of England & Wales after Brexit (shall not prejudice the application of EU provisions, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement (mandatory rules))
- Overriding MMP (article 9) in cases involving UK-based parties
 - The Ingmar case (CJEU): <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61998CJ0381&from=EN>

Recognition and Enforcement of Foreign Judgements

- EU Member State Courts judgments in the UK: UK domestic rules apply after Brexit
- UK Courts judgments in EU Member States:
 - Judgments issued in proceedings initiated before 1 January 2021: RB1Bis applies
 - Judgments issued in proceedings initiated on or after 1 January 2021: RB1Bis does not apply. Domestic rules apply.

R/E Foreign Judgments: Future Common Ground?

- **HCCH Convention of 2 July 2019 on the recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters** (<https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>)
 - Entry in force: 1 September 2023
 - Status: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=137>
 - UK is not a Contracting Party. So far, only EU Member States and Ukraine
 - But UK is a Contracting Party to the HCCH Convention on Choice of Court Agreements (2005): Chapter III

Service of Legal Documents on UK Parties

- EU Service Regulation (2007) no longer applicable in the UK (<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32007R1393>)
- Service to be performed according to international instruments (Hague Service Convention 1965) or other available mechanisms

Other EU PIL Instruments no longer in force in the UK

1. Insolvency Regulation (Recast) ([Regulation \(EU\) 2015/848](#));
2. European Account Preservation Order Regulation ([Regulation \(EU\) 655/2014](#));
3. European Small Claims Procedure Regulation ([Regulation \(EU\) 861/2007](#));
4. European order for payment procedure Regulation ([Regulation \(EC\) 1896/2006](#));
5. European Enforcement Order for uncontested claims Regulation ([Regulation \(EC\) 805/2004](#)); and
6. Regulation on taking of evidence ([Regulation \(EC\) 1206/2001](#), though the [The Hague Convention on the Taking of Evidence of 1970](#) remains applicable