Brexit: policy paper for cross-border framework—an EU perspective

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Dispute Resolution analysis: Last month's UK government proposal for cross-border cooperation in Brexit was met with guarded approval, not least for its acceptance of the need to grant jurisdictional concessions during a transitional period of leaving the EU. Matthias Weller, Professor at the EBS Law School in Germany and a guest researcher at the Max Planck Institute, cites the inevitable problems that nevertheless await in a climate of business uncertainty, with litigation likely moving out of the UK or expedited to benefit from what pre-Brexit clarity remains.

Original news

Brexit: UK wants 'close and comprehensive' judicial co-operation with EU, LNB News 22/08/2017 92

The government has published a new policy paper which considers a cross-border civil judicial co-operation framework with the EU post-Brexit. The government says it is vital that both parties agree to 'coherent' common rules that govern interactions between legal systems. It says that while the UK will sit outside the direct jurisdiction of the Court of Justice of the European Union, the UK will seek to agree 'close and comprehensive' arrangements for civil judicial co-operation.

What are the key issues dealt with in the policy paper from a dispute resolution perspective?

The UK government's policy paper, 'Providing a cross-border civil judicial cooperation framework—A future partnership paper', aims at securing legal certainty and continuing confidence in dispute resolution in the UK for cross-border cases beyond Brexit. Since the arbitration infrastructure is hardly affected, the position paper does not deal with this issue.

In order to mitigate the disruptive effects of Brexit on cross-border litigation regarding the future EU27, the paper considers certain options, including a possible future agreement between the UK and the EU27 on the core areas of cross-border litigation, namely:

- international jurisdiction of the courts to adjudicate a case, including in particular choice of court agreements and lis pendens issues
- the applicable law, and
- the recognition and enforcement of UK decisions in the EU27 and vice versa

These are central issues stabilising both business and personal/family relations which are currently regulated by a large number of EU instruments listed in the paper.

In a future agreement the UK government would first of all seek to re-establish a close and comprehensive cross-border civil judicial co-operation on a reciprocal basis along the lines of the current judicial co-operation, but would avoid any direct jurisdiction of the Court of Justice. Whereas mutual recognition and enforcement of judgments must be based on a mutual agreement to provide for a workable framework (otherwise the respective national laws of the UK and the EU27 would apply, and in some Member States these laws will be outdated compared to the standards of modern judicial co-operation), the EU rules on choice of law can be replicated unilaterally by the UK, and this is indeed what the paper suggests.

However, not being bound by the case law of the Court of Justice brings about the danger that the UK courts and the EU27 courts more and more depart from each other after Brexit. Of course, UK courts remain free to take account of Court of Justice case law as a matter of persuasive authority, but still differences are likely to emerge, and this increases complexity and thus uncertainty.

On the other hand, this is anyway the situation under a Convention or Treaty on jurisdiction and/or recognition and enforcement (or any other subject) when there is, as in most cases, no common court to decide with binding effect on interpretative questions. Under a common Convention or Treaty, however, there would at least be the implicit obligation of the contracting parties to take account of court decisions on the instrument in other contracting states and to do their best to uphold a coherent application.

In addition, the UK government plans to be active on the international level, in particular in the Hague Conference on Private International Law and the United Nations Commission on International Trade Law (UNCITRAL), bodies that generate Conventions open to all states, not only to EU Member States—for example the 2005 Hague Convention on Choice of Court Agreements. However, it will take some time to accede as a single state to this Convention after dropping out from the Convention as an EU Member State because there seems to be no established way for a Member State of the EU to start accession proceedings before the status as an EU Member State expires. On the other hand, it

would appear quite formalistic to see the UK blocked from starting accession proceedings until its very end of EU membership. Further, the government will seek to continue to participate as a single state in the Lugano Convention, but the existing contracting states must unanimously agree to a new state's accession.

A last point—and may be the most important—is the concern for transitional rules. Whatever the regime may be after Brexit, it should be as clear as possible what the law is directly after Brexit. In this respect, the paper envisages the following: the existing EU rules on jurisdiction should continue to apply to all legal proceedings instituted before the withdrawal date. This reflects the principle of perpetuation fori, ie the doctrine that once jurisdiction is established, any following changes of facts and law should be of no further relevance to this issue.

The situation is more complicated in respect to choice of court agreements because these are usually concluded much earlier than a litigation based on them starts, whereas the principal procedural rule would be to look at the jurisdictional law as it stands when the proceedings are initiated. This, however, would mean that the parties would have to renew their agreements after Brexit according to the new law to be on the safe side. However, the paper suggests in this respect to apply pre-Brexit law, ie EU law, beyond Brexit as long as the agreement as such was concluded prior to Brexit. In respect to recognition and enforcement of judgments, the paper envisages applying EU law beyond Brexit as long as the proceedings from which the judgment arose were started prior to Brexit.

These are sound positions and principles. But will they be enough to take care of the concerns in the business community? It is here that uncertainties arise—wherever an agreement is necessary on these matters, this will, of course, depend on consent on the part of the EU27, and the EU27 will want to avoid the impression of any 'cherry-picking'.

The legal landscape for judicial co-operation of the UK with the EU27 will inevitably be different, and very likely less favourable, after Brexit compared to before it. Thus, uncertainty will remain. For example, it is difficult to imagine that the UK will manage to negotiate a recognition and enforcement of judgments as smoothly as under the new Brussels Ibis Regulation where judgments from other Member States are to be treated as if they were domestic judgments. And choice of forum agreements will be less safe under both the Lugano Convention and the 2005 Hague Choice of Court Convention than under the Brussels I (recast) Regulation (Regulation (EU) 1215/2012) in which the UK had particularly pushed for making choice of forum agreements more reliable.

With all due respect to the sovereign's decision, and its government implementing it ('Brexit means Brexit'), the sovereign might want, in all its sovereignty, to reconsider its decision at some later stage, as any disadvantages and drawbacks of this decision become apparent and understood. The 'divorce bill' and a very tight schedule are but two such complications that await.

What are the implications for litigators and their clients? How should they advise their clients in the interim?

Against this background, business parties should consider arbitration, be it in the UK or elsewhere. Alternatively, parties may try to check and, as the case may be, redraft their choice of forum agreements against several potential legal backgrounds, if possible, in order to make sure that it remains valid and effective whatever the legal landscape may look like after Brexit.

In certain scenarios it might be an option to choose a jurisdiction within the remaining EU27 Member States, in particular when it appears to be of vital interest that the judgment can freely move within these states afterwards.

When a litigation comes closer, it might be an option to start it before Brexit in order to benefit from the transitional rules described above, because these rules should easily meet with consensus and it is therefore likely to see them put in place within the future negotiations.

Interviewed by Julian Sayarer.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.

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