

# **Cross-EU border civil and commercial legal cases from 1 January 2021: guidance for legal professionals**

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# Cross-EU border civil and commercial legal cases from 1 January 2021: guidance for legal professionals

## Summary

Updated guidance for legal professionals on applicable law and on jurisdiction and recognition and enforcement of judgments in cross-EU border civil and commercial legal cases from 1 January 2021.

The UK has left the EU, and the transition period after Brexit comes to an end on 31 December 2020.

This page tells you what you'll need to do from 1 January 2021. It will be updated if anything changes.

## Detail

This guidance is provided for the information of legal practitioners involved in cross-EU border civil and commercial cases. It is not legal advice. It is not a complete statement of the law.

Practitioners should be aware that they may need to consider judgments from both the UK courts and judgments from the Court of Justice of the European Union (CJEU) where relevant, in line with the European Union (Withdrawal) Act 2018.

This guidance only relates to cases involving the courts of Scotland.

Members of the public and businesses involved in cross-border civil and commercial cases may need to seek local legal advice.

## EU Exit statutory instruments

Note that the following statutory instruments will be amended with effect from 11pm on 31 December 2020 to ensure in particular that their provisions are consistent with Title VI of the [Withdrawal Agreement](#):

- [Civil Jurisdiction and Judgments \(Amendment\) \(EU Exit\) Regulations 2019](#) (SI 2019/479)
- [Law Applicable to Contractual Obligations and Non-Contractual Obligations \(Amendment etc\) \(EU Exit\) Regulations 2019](#) (SI 2019/834)
- [European Enforcement Order, European Order for Payment and European Small Claims Procedure \(Amendment etc.\) \(EU Exit\) Regulations 2018](#) (SI 2018/1311)

Note also that the Private International Law (Implementation of Agreements) Bill (currently before Parliament) contains provisions giving legal effect in domestic law to the 2005 Hague Convention on Choice of Court Agreements and amending the [Civil Jurisdiction and Judgments \(Hague Convention on Choice of Court Agreements 2005\) \(EU Exit\) Regulations 2018](#) (SI 2018/1124), which are due to come into force at the end of the Transition Period.

The EU Commission have published [guidance](#) on cross-border civil and commercial legal cases.

## 1. Jurisdiction and recognition and enforcement of judgments

### 1.1 Current law

Currently, the main rules governing jurisdiction and the recognition and enforcement of judgments in cross-border civil and commercial disputes involving parties domiciled in the UK and EU member states (and in relation to the Lugano Convention: Switzerland, Norway and Iceland) can be found in the following EU instruments and international agreements:

- [Brussels Ia Regulation](#) – which provides rules on jurisdiction, recognition and enforcement for cross-border disputes where the defendant is domiciled in an EU member state (note that Brussels Ia contains special jurisdiction rules for consumer, employment and insurance disputes, as well as exclusive jurisdictions). There are also historic cases for which the rules in predecessor instruments – the Brussels I Regulation and the Brussels 1968 Convention – apply. (Note that the 1968 Convention continues to apply in its own right to certain territories of the Member States that were expressly excluded from the scope of Brussels I (and subsequently Brussels Ia)).
- [EU – Denmark Agreement 2005](#) – which extends the Brussels Ia rules to Denmark.

- [Lugano Convention 2007](#) – which provides rules on jurisdiction, recognition and enforcement for cross-border disputes involving a party or parties domiciled in an EU member state or in Norway, Iceland or Switzerland, with certain exceptions.
- [2005 Hague Convention on Choice of Court Agreements](#) – which provides rules giving effect to exclusive choice of court agreements.

## **1.2 From the end of the transition period**

The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 2019/479), which come into force at the end of the transition period (11pm on 31 December 2020), set out a number of amendments to legislation in the field of civil judicial cooperation in civil and commercial matters, including rules of jurisdiction and recognition and enforcement of judgments. They also revoke the Brussels Ia Regulation and its predecessors as they apply in the UK, and extinguish the effect of the Lugano Convention 2007 and the EU-Denmark Agreement in the UK. The Regulations will be amended by a further instrument (the Civil, Criminal and Family Justice (Amendment) (EU Exit) Regulations 2020) in order to align the existing savings provisions with the requirements of Title VI of the Withdrawal Agreement. Once amended, the 2019 Regulations will also include savings provisions that have the effect of preserving the 2007 Lugano Convention (and certain cases falling under the 1968 Brussels Convention) for cases that are ongoing at the end of the transition period.

The 2005 Hague Convention on Choice of Court Agreement will continue to apply to the UK (without interruption) from its original entry into force date of 1st October 2015. It is expected to be given the force of law in domestic law from 1st January 2021 by the Private International Law (Implementation of Agreements) Bill (currently before Parliament), which also amends the Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018 (SI 2018/1124).

### **Transitional cases ongoing in Scotland at the end of the transition period**

The treatment of transitional cases (where proceedings commence before the end of the transition period) is governed by:

- for cases under the Brussels 1a Regulation and its predecessors and the EU-Denmark Agreement, Articles 67 and 69 of the Withdrawal Agreement
- for cases under the Lugano Convention, regulation 92 of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019.

Both Article 67 (and 69) and regulation 92 provide that courts in Scotland will continue to apply the existing jurisdiction and recognition and enforcement of judgments rules (e.g. as appropriate, those of Brussels Ia and the Lugano Convention) to cases where the proceedings were commenced, but not concluded, before the end of the transition period. Article 67 (and 69) and regulation 92 also provide that courts in Scotland will continue to apply the existing recognition and enforcement rules (e.g. those of Brussels Ia and Lugano respectively) where the parties have concluded a court settlement, or formally drawn up or registered an “authentic instrument”, before the end of the transition period, and recognition and enforcement is sought after that date in Scotland.

Both Article 67 and regulation 92 include judgments delivered, whether before or after the end of the transition period, by a court in the UK or an EU member state in proceedings commenced before the end of the transition period, but which have not been enforced in an EU member state or the United Kingdom respectively before the end of the transition period. After the end of the transition period, exclusive choice of court agreements entered into from 1 October 2015 which choose a UK court or the court of an EU member state for the resolution of disputes, will continue to be subject to the terms of the 2005 Hague Convention on Choice of Court Agreements.

## **New cases starting in Scotland after the end of the transition period**

### **Jurisdiction**

After the end of the transition period, the rules governing jurisdiction in all cross-border disputes, including those involving parties domiciled in the EU (or in other states party to the Lugano Convention 2007), will be governed by the domestic law of each UK jurisdiction. In Scotland:

- the rules are found in Part III and Schedules 8 and 9 of the [Civil Jurisdiction and Judgments Act 1982](#); and
- for consumer and employment claims – some specific provision on jurisdiction is made in sections 15B to 15E of the Civil Jurisdiction and Judgments Act 1982.<sup>1</sup>

For claims initiated after the end of the transition period, involving an exclusive choice of court agreement entered into from 1 October 2015, in which the chosen court is established in a contracting party to that Convention (which includes all EU member states) the rules of the Hague Convention 2005 on Choice of Court

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<sup>1</sup> These provisions can be found in section 26 of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019/479

Agreements (to be implemented by the Private International Law (Implementation of Agreements) Bill) will apply.

## **Recognition and enforcement of judgments**

After the end of the transition period, the rules governing recognition and enforcement of foreign judgments in cross-border disputes are generally contained in the common law. However, for certain countries, one of the following statutes provides a route for recognition and enforcement of certain judgments:

- [Part II of the Administration of Justice Act 1920](#); or
- [the Foreign Judgments \(Reciprocal Enforcement\) Act 1933](#).

In the case of judgments arising from exclusive choice of court agreements within scope of the 2005 Hague Convention, the Convention rules (as implemented by the Private International Law (Implementation of Agreements) Bill) will apply.

### **1.3 Cases in an EU member state**

The treatment of transitional cases by EU member state courts is governed by Title VI of the Withdrawal Agreement.

The EU Commission have published [guidance](#) on cross-border civil and commercial legal cases, including on the approach that EU member states will take regarding exclusive choice of court agreements choosing UK courts concluded since 1 October 2015.

### **1.4 Potential accession to the Lugano Convention**

On 8 April 2020, the Government applied for the UK to rejoin the Lugano Convention as an independent contracting state. It is now waiting for the other contracting parties to decide whether to agree to the UK joining the Convention. This guidance will be updated if the UK is able to rejoin this Convention with details of what this will mean for jurisdiction and the recognition and enforcement of judgments in cases to which the Convention applies and confirmation of the date from which this will be effective.

## **2. Special European procedures**

### **2.1 Current law**

The following three EU Regulations deal with cross-border civil and commercial claims, providing standard, simplified procedures for obtaining and/or enforcing orders or judgments in certain types of claims:

- The [European Enforcement Order](#) (Regulation (EC) No. 805/2004) (the EEO Regulation);
- The [European Order for Payment Procedure](#) (Regulation (EC) No. 1896/2006) (the EOP Regulation);
- The [European Small Claims Procedure](#) (Regulation (EC) No. 861/2007) (ESCP Regulation).

## **2.2 From the end of the transition period**

Legislation dealing with the EEO, EOP and ESCP Regulations is contained in the following statutory instrument: the [European Enforcement Order, European Order for Payment and European Small Claims Procedure \(Amendment etc.\) \(EU Exit\) Regulations 2018 \(SI 2018/1311\)](#). This instrument revokes the retained EEO, EOP and ESCP Regulations and variously revokes and amends related EU amending measures and domestic legislation (other than the relevant court rules). The European Enforcement Order, European Order for Payment and European Small Claims Procedure (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1311), will be amended with effect from 11pm on 31 December 2020 to ensure in particular that their provisions are consistent with Title VI of the Withdrawal Agreement.

### **Transitional cases ongoing in Scotland at the end of the transition period**

Article 67 of the Withdrawal Agreement provides that:

- the EEO Regulation will continue to apply to judgments given in legal proceedings instituted before the end of the transition period, and to court settlements approved or concluded and authentic instruments drawn up before the end of the transition period, provided that the certification as a European Enforcement Order was applied for before the end of the transition period;
- the EOP Regulation will continue to apply to European payment orders applied for before the end of the transition period. Where, following such an application, the proceedings are transferred according to Article 17(1) of the EOP Regulation, the proceedings shall be deemed to have been instituted before the end of the transition period;
- the ESCP Regulation will continue to apply to small claims procedures for which the application was lodged before the end of the transition period.

### **New cases starting in EU member states after the end of the transition period**

From the end of the transition period, the European Enforcement Order, European Order for Payment and European Small Claims Procedure (Amendments etc.) (EU Exit) Regulations 2018 (SI 2018/1311) mean that:

- EEOs, EOPs and ESCP judgments issued by EU member state courts will no longer be recognised or enforceable in the UK; and
- UK courts will be unable to certify judgments as EEOs, issue EOPs or ESCP judgments. Claims which would have been capable of being pursued in the UK under the EOP or ESCP Regulations prior to the end of the transition period will need to be made in the appropriate court as ordinary civil claims.

### **2.3 Cases in an EU member state**

The treatment of transitional cases by EU member state courts is governed by Title VI of the Withdrawal Agreement.

The EU Commission have published [guidance](#) on cross-border civil and commercial legal cases.

## **3. Applicable law**

### **3.1 Current law**

The current rules governing applicable law in civil and commercial cases in the UK and EU member states can be found in the following EU instruments and agreements:

- for contractual obligations, the [Rome I Regulation \(EC\) No 593/2009](#) (the Rome I Regulation applies to contracts entered into from 17 December 2009; the 1980 Rome Convention on the law applicable to contractual obligations applies to contracts entered into between 1 April 1991 and 16 December 2009);
- for non-contractual obligations, the [Rome II Regulation \(EC\) No 864/2007](#).

### **3.2 From the end of the transition period**

Legislation dealing with the “Rome” rules on applicable law is contained in the following statutory instrument: [The Law Applicable to Contractual Obligations and Non-Contractual Obligations \(Amendment etc.\) \(EU Exit\) Regulations](#) (SI 2019/834). This instrument amends the Rome I and Rome II Regulations as retained by the EU



Withdrawal Act 2018 so that they will operate effectively as domestic law after the end of the transition period, and makes amendments to other related legislation.

This statutory instrument also preserves and amends the Rome Convention Rules, which are set out in the [Contracts \(Applicable Law\) Act 1990](#) so that they will continue to apply to contracts entered into between 1 April 1991 and 16 December 2009. This SI will be amended prior to 31 December 2020 by a further instrument to ensure in particular that its provisions are consistent with Title VI of the Withdrawal Agreement.

### **Cases in Scotland after the end of the transition period**

Article 66 of the Withdrawal Agreement provides that:

- the Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council) will continue to apply in respect of contracts concluded before the end of the transition period;
- the Rome II Regulation (Regulation (EC) No 864/2007 of the European Parliament and of the Council) shall apply in respect of events giving rise to damage, where such events occurred before the end of the transition period.

For contracts concluded, or where an event giving rise to damage occurs after the end of the transition period, the retained Rome I and Rome II Regulations (and, for relevant old contracts, the Contracts (Applicable Law) Act 1990 as amended by the [Law Applicable to Contractual Obligations and Non-Contractual Obligations \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) (subject to further amendments being made by statutory instrument before the end of the transition period) will apply to determine applicable law in relation to contractual or non-contractual obligations. The retained versions of Rome I and Rome II Regulations will also apply to determine applicable law in the case of intra-UK conflicts of laws (or conflicts of laws between the UK and Gibraltar), where the contract is concluded, or the events giving rise to the damage occurs, before the end of the transition period.

### **3.3 Cases in an EU member state**

In EU member states:

- the Rome 1 Regulation will continue to apply in respect of contracts concluded before and after the end of the transition period; and
- the Rome 2 Regulation shall apply in respect of events giving rise to damage, where such events occurred before or after the end of the transition period.

Practitioners should note, however, that both the Rome I and Rome II Regulations apply whether or not the applicable law is the law of an EU member state or a third country (see Article 2 of Rome I and Article 3 of Rome II).

For more information, please consult the EU Commission's [guidance](#).

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