



BREXIT: EASIER, CHEAPER AND MORE EFFICIENT CROSS- BORDER LITIGATION

The UK Government's most recent position paper shows a clear desire to continue civil judicial co-operation with EU member states post-Brexit. The Government's drive to maximise security and continuity despite uncertain times ahead is therefore positive news for businesses, but will ultimately depend on the UK's negotiating foothold in continuing Brexit negotiations.

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Introduction

On 22 August 2017, the UK Government published its paper entitled “Providing a cross-border civil judicial co-operation framework; a future partnership paper.” This paper is one of a series of position statements published to date in the “Brexit” negotiations and has been drafted in response to the European Commission’s position paper on “Judicial Co-operation in Civil and Commercial Matters” (TF50 (2017) 9/2- Commission to the UK) which was dated 12 July 2017.

The UK paper makes it clear that “international civil judicial co-operation is in the mutual interest of consumers, citizens, families and businesses in the EU and in the UK. With this in mind, the UK Government is seeking a close and comprehensive framework of civil judicial co-operation with the EU. That framework would be on a reciprocal basis, which would mirror closely the current EU system, and would provide a clear legal basis to support cross-boarder activities after the UK’s withdrawal”. This appears to be good news for business generally and, in particular, for those involved in international trade.

What does the UK paper propose?

The UK paper states that “the optimum outcome for both sides [to the negotiation] will be an agreement reflecting our close existing relationship, where litigating a cross-border case involving UK and EU parties under civil law, wherever it might take place, will be easier, cheaper and more efficient for all involved.” To that end the UK “will seek an agreement with the EU that allows for close and comprehensive cross-border civil judicial co-operation on a reciprocal basis.”

In particular, the UK paper suggests that the Rome I and II instruments, respectively governing choice of law in contracts and the applicable law in non-contractual matters will be incorporated into UK statute. These were to automatically be adopted in any event, together with all other EU law in force as on the date of the Repeal Bill. However, in our view this statement usefully highlights the UK Government’s commitment to maintaining stability and reducing uncertainty for business following Brexit.

The UK paper highlights various of the existing EU measures in place governing judicial co-operation, including; (a) the Brussels I Recast Regulation (governing jurisdiction

and recognition and enforcement of judgments); and (b) the Insolvency Regulation (covering applicable law and recognition in insolvency proceedings). The paper suggests that insofar as possible similar or more efficient provisions will be introduced between the UK and the EU. In particular, the UK paper suggests that the new framework to be agreed “will be based on a commitment to:

- build on the strong foundation of existing co-operation and belief in shared values such as the rule of law, respect for international law and democracy;
- continue to collaborate at bilateral, regional and multilateral levels; and
- develop our relationship over time as our societies, the laws that govern them and opportunities for further co-operation develop.”

In addition, the UK suggests that it will look to become a signatory in its own right to international treaties, such as the Lugano Convention (governing jurisdiction, recognition and enforcement of judgments in civil and commercial matters) to which it is already a signatory by virtue of its current membership of the EU.



One of the key factors underpinning the UK Government's position is set out at paragraph 14. This states:

"Businesses and investors value certainty. The EU and the UK will continue to be key trading partners and to invest in each other's economies. Confidence in cross-border commercial contracts and investment relationships is underpinned and enhanced by clear rules governing: which country's courts hold responsibility for resolving disputes; the enforcement of the resulting judgment in other countries where a party has assets; and the approach to managing insolvency in cross-border situations."

The UK paper states that when the UK leaves the EU, the European Court of Justice will cease to have direct jurisdiction in the UK. It suggests that "where appropriate, the UK and the EU will need to ensure future civil judicial co-operation takes into account regional legal arrangements, including the fact that the [European Court of Justice] will remain the ultimate arbiter of EU law within the EU." This raises the issue of whether some form of arbitral tribunal will be required to determine the effect of identical laws that may be subject to different interpretation by Courts in the UK and the EU going forwards.

What if the EU does not agree?

At this stage it is not possible to know what will happen in the event of a "Hard Brexit". However, in our view, the proposals contained in the UK paper are likely to have the support of business which will value certainty in the resolution of disputes arising out of international trade irrespective of where that business is located. The issue for the UK is likely to be the broader negotiating position adopted by the EU to date, namely that the UK should not be permitted to maintain the benefits of EU membership after it has left. This is largely a political, rather than an economic driver, albeit an important factor. At Annex A of its paper, the UK Government has set out its view of the "principles that should govern the winding down of our existing relationship in the event that no agreement on a future relationship can be reached". The good news for business is that it appears that the UK's general position in these circumstances is that legal certainty should be maximised "to the benefit of citizens and business by ensuring that their properly negotiated arrangements are respected." Further, the UK paper is in line with the EU's general principles set out in its July 2017 paper that existing EU rules should continue to apply in respect of contractual and non-contractual

arrangements that were concluded prior to the withdrawal date.

HFW's Perspective/Conclusion

In our view the UK's position paper will be welcome news for business, especially cross-border trade between the UK and the EU. It underlines the UK's commitment to maintaining stability and certainty following Brexit. While the European Commission may initially resist the UK's proposals for political reasons it is likely that the UK's position will have the support of industry both in the UK and the EU and appears to be sound as a matter of economic policy. As such we expect the UK's plans for judicial co-operation to be given a significant degree of acceptance in the longer term.

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