

The EU–UK Trade and Cooperation Agreement: What You Need To Know

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The EU–UK Trade and Cooperation Agreement (TCA) was signed on 30 December 2020 and, from 1 January 2021, the UK and the EU have entered a new phase in their international legal relationship. This article looks at what that means for governing law and dispute resolution clauses in international contracts, and what it means for the enforcement of UK court judgments within the EU.

There have been some important changes since 1 January 2021. However, some important matters do not change as a result of Brexit and the TCA.

For example, the selection of English law as the governing law of a contract (or of an EU27 national law as the governing law of a contract) will be enforced in the UK and EU27 pursuant to the same Rome I rules already in place.

The same rules will apply to the enforcement of arbitral awards in the UK and EU27 (and worldwide), and are governed by an entirely different international treaty unconnected to the EU treaties.

Exclusive jurisdiction clauses will be upheld by the English and EU27 national courts, and resulting judgments will be enforced pursuant to an international treaty to which both the UK and EU are now parties.

Also, none of the core advantages of English law change as a result of Brexit. English law continues to be a commerce-friendly legal system, with the fundamental principle of freedom of contract meaning that businesses and individuals can tailor their contracts, allowing for flexibility in concluding contractual terms with minimal interference by the courts in commercially negotiated terms.

Outside of the EU, an English court judgment will be enforced in exactly the same way as it was prior to 1 January 2021.

Within the EU, the UK previously benefited from a European legislative regime, in particular the Recast Brussels Regulation, which provides a streamlined process for the reciprocal enforcement of judgments between the courts of EU member states. From 1 January 2021, this regulation no longer applies to the UK.

However, in circumstances where a contract contains an exclusive jurisdiction clause, from 1 January 2021 onwards significant comfort is provided by the Hague Convention on Choice of Court Agreements 2005 (the Convention).

The Convention provides that a judgment given by a court designated in an exclusive choice of court agreement shall be recognised and enforced in other contracting states in accordance with the terms of the Convention. The EU is a contracting state to the Convention. The UK deposited its instrument of accession on 28 September 2020, bringing the Convention into force for the UK on 1 January 2021.

However, particular care should be taken when using any non-exclusive jurisdiction clauses (including asymmetrical clauses, as found in many lending agreements, allowing the lender to commence proceedings in any jurisdiction but binding the borrower to a specific jurisdiction). Such non-exclusive and asymmetrical clauses will likely still be upheld by English courts, but there is some potential for divergence between the English and EU27 courts in upholding such clauses.

The UK has also applied to become a party to the Lugano Convention which is agreed between the EU, Norway, Iceland, Switzerland, and Denmark. The Lugano Convention sets out a system for jurisdiction and enforcement of judgments which is very similar to that set out under the Recast Brussels Regulation.

There are some practical steps which business should be taking to mitigate any potential impact of changes in the legal landscape around dispute resolution.

For example, clauses should be drafted to make it clear and unambiguous which court (or arbitral tribunal) is to have jurisdiction in the event of a dispute and which law is to govern the contract.

Also, if your counterparty is domiciled outside of the UK, but your contract contains a jurisdiction clause in favour of the English courts, to avoid service complications you should ensure that your contract contains a clause requiring your counterparty to appoint a process agent in the UK to accept legal proceedings.

Whilst English governing law clauses will continue to be recognized by the EU27 courts, you could also consider using exclusive jurisdiction clauses to improve the enforceability of a resulting UK judgment within the EU27.

Finally, in view of the ambiguity as to whether the Convention applies to exclusive jurisdiction clauses concluded prior to 1 January 2021, for business-critical contracts, it would be prudent to consider whether the ambiguity can be removed through supplemental agreement with your counterparty.

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