

## Comment—EU-UK Trade and Cooperation Agreement impact on cross-border dispute resolution

**The EU-UK Trade and Cooperation Agreement (TCA) agreed between the EU and the UK contains extensive provisions on judicial and law enforcement co-operation in relation to criminal matters, but is silent on civil judicial co-operation, leaving open questions regarding the immediate implications for cross-border dispute resolution once the Brexit transition period ends at 11 pm on 31 December 2020 (IP completion day). However, noting that the agreement on the TCA may give cause for cautious optimism in respect of the UK's application to accede to the Lugano Convention, Gordon Nardell QC and Michal Hain, barristers at Twenty Essex, comment on the agreement and its impact for cross-border dispute resolution and legal services. The Law Society of England and Wales has welcomed the agreement but noted its limitations in the fields of cross-border legal services and dispute resolution.**

This analysis was first published on Lexis®PSL on 30 December 2020 and can be found [here](#) (subscription required).

Reminder: On 24 December 2020, the UK Government and the European Commission announced a deal in principle on the legal terms of the future UK-EU relationship. A copy of the draft EU-UK TCA, agreed at negotiator level (to be ratified) has been published, along with a number of associated declarations and agreements including a separate Nuclear Cooperation Agreement and an Agreement on Security Procedures for Exchanging and Protecting Classified Information. For background reading, see: [LNB News 28/12/2020 12](#).

In terms of the impact on dispute resolution, Gordon Nardell QC and Michal Hain say:

'First, the TCA is notable for what it does not say about dispute resolution: while it makes extensive and detailed provision for judicial and law enforcement cooperation in relation to crime, it is entirely silent on cooperation in the sphere of civil justice. That is hardly surprising: the future UK-EU relationship on allocation of civil jurisdiction and mutual recognition of judgments was always part of a separate conversation, one lately culminating in a will-they-won't-they guessing game on the EU's eventual reaction to the UK's request to accede to the Lugano Convention as a replacement for the Brussels I regime. However, the very fact that the TCA has been reached at all gives some cause for optimism—if very cautious—that there may be some movement on Lugano soon, though of course not soon enough to avoid a significant gap on 1 January 2021 in relation to cases falling outside the transitional protection of the Withdrawal Agreement.

What about the legal services that parties to cross-border disputes rely on? The Prime Minister has lauded “access for solicitors, barristers” as an important achievement of the agreement. Legal services get their own section (section 7) of Title II (Services and investment) of Part Two of the TCA. But the actual text of the Agreement is a little less headline-grabbing. The government's own “Table of Victories”—where “Legal Services” are said to be a “UK WIN”—nevertheless concedes that “[t]he substantive provisions reflect current MS domestic rules which will not change as a result of the agreement”. For the most part, the commitments accepted by the EU and its Member States under section 7 read with the national reservations listed in Annex SERVIN-4, provide little beyond the baseline World Trade Organization's General Agreement on Trade in Services (GATS) commitments that would have applied in a “no deal” scenario. That reflects the reality of the UK's “third country” status: UK lawyers, on the whole, now find themselves in the same position as, for example, their US counterparts.

The most significant changes from the regime under the EU Lawyers' Directives are that the TCA's guarantees of access for UK lawyers under their "home" title (barrister, solicitor or Scottish advocate) are limited to their home jurisdiction law and public international law, expressly excluding EU law; and that entry and stay of individual practitioners to provide their services are now subject to time limits and the right of Member States to require visas. In practice, some Member States operate a more permissive regime than the GATS/TCA backstop—as regards both the permitted scope of practice for third country lawyers and visa-free entry and stay—and as the government's scorecard notes, that is unlikely to change as a result of the deal. But the key takeaway is that the scope of permitted services, and the requirements for lawful entry and stay for professional services providers, now depend on a patchwork quilt of national rules and procedures.

One particular note of caution concerns legal privilege. Any advice given beyond the strict confines of what is permitted under Member State rules risks losing its protection, potentially resulting in exposure of the advice to an opposing party or regulatory authority. Practitioners will need to be especially careful to check the position, both in new cases and ongoing ones that straddle the end of transition.

Finally, a piece of more positive news concerns flows of personal data from the EEA to the UK, an integral part of servicing cross-border client relationships in the dispute sphere as in other legal fields. The UK still awaits completion of the Commission's assessment of adequacy as a basis for data exports under Article 45 of the General Data Protection Regulation, Regulation (EU) 2016/679. In the meantime, the TCA provides standstill protection. Article FINPROV.10A of the TCA declares that transmission of data to the UK "shall not be considered a transfer to a third country" during the "specified period", which expires four months (extendible to six) after IP completion day, or on the date of an earlier Commission adequacy decision.'

### **Response from the Law Society**

In a parliamentary briefing on the domestic legislation introduced to implement the TCA in UK law, the Law Society of England and Wales welcomed the agreement as a positive development, but noted its limitations in respect of cross-border legal services and dispute resolution. The Law Society will continue working with national regulators in the EU and EEA with a view to reducing any barriers. On the matter of the Lugano Convention, the Law Society reiterated its concern, stressing the importance of an urgent resolution:

'We remain concerned about civil judicial cooperation and mutual recognition of judgments after 1 January.

We are aware that the UK will not be able to implement the Lugano Convention in its own right ahead of the end of transition, and that the Convention will need to be ratified between the EU, EFTA countries and the UK. The UK applied to accede to the Convention in April 2020 and the EFTA states have indicated their approval. The EU has yet to make a decision.

Even if the EU agrees the UK's accession to the Lugano Convention in the aftermath of the Agreement, there will still be a significant enforcement gap of several months. The Convention will then need to be ratified by all the parties (the EU, Denmark, Norway, Iceland, Switzerland and the UK), and will enter into force three months after the ratifications have been deposited.

As per the Withdrawal Agreement Article 67, the Brussels I regulation and Lugano Convention, will cease to be relevant from 1 January 2021, and any new cases instituted after that will fall under national procedural laws, unless there are old bilateral conventions or possibility to use the Hague 2005 Choice of Court Agreements Convention.

This will severely complicate the enforcement of judgments, placing a burden on courts—as well businesses' and consumers' ability to access justice, leaving them unable to commit to cross-border contracts with confidence. Any measure to ensure the Lugano Convention is in

place as soon as possible would be of benefit not just to lawyers, firms and the legal sector, but all businesses and consumers across the UK and EU who wish to enter into agreements across borders.'

The Law Society briefing is accessible [here](#).

### Guidance and preparation for IP completion day

Much of the official guidance issued in preparation for IP completion day remains relevant, though it may be subject to further amendment and review. A range of Brexit transition guidance has been published by the UK and the EU relevant to the matters discussed above, see for instance:

- [European Commission—Sectoral guidance notices: Civil justice and private international law](#)
- [European Commission—Sectoral guidance notices: data protection](#)
- [Ministry of Justice—Cross-border civil and commercial legal cases: guidance for legal professionals from 1 January 2021](#)
- [Ministry of Justice—Changes to legal practice from 1 January 2021: guidance for legal professionals](#)
- [DCMS—Using personal data in your business or other organisation from 1 January 2021](#)
- [ICO—Data Protection at the end of the transition period](#)
- [Law Society—Brexit: preparing for the end of the transition period](#)

Following the announcement of the TCA, a number of government departments have published updated guidance to help stakeholders prepare for the end of the transition period and beyond. Both the UK and EU are keeping their Brexit-related guidance under review and re-issuing stakeholder notices where necessary or appropriate. As revised Brexit notices and guidance documents are being issued it is a good idea to bookmark the relevant guidance pages and check for updates, in particular:

- [GOV.UK—Transition guidance and regulation](#)
- [European Commission: Getting ready for the end of the transition period](#)

The draft text of the deal is accessible [here](#).

Sources:

- [Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the one Part, and the United Kingdom of Great Britain and Northern Ireland, on the other Part](#)
- [Law Society—Parliamentary briefing: European Union \(Future Relationship\) Bill](#)

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