

# CROSS BORDER DISPUTES NAVIGATOR 2021

## THE NEW EUROPE AND BEYOND

Choice of Law, Jurisdiction & Enforcement,  
Service, Evidence and Arbitration

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## CHOICE OF LAW

### Rome Regime

- Law Applicable to Contractual obligations – (593/2008) - Rome I
- Law Applicable to non- contractual obligation (864/2007) - Rome II



## JURISDICTION & ENFORCEMENT

### Brussels / Lugano / Hague Regimes

- Jurisdiction, recognition and enforcement of judgments
- Hague Convention on Choice of Courts



## SERVICE AND EVIDENCE

- EU Service Regulation 1393/2007
- EU Evidence Regulation 1206/2001
- Hague Convention on Service of judicial and extra-judicial documents
- Hague Convention on Evidence



## ARBITRATION (unaffected)

- UNCITRAL
- New York Convention 1958 on Recognition and Enforcement of Foreign Arbitral Awards
- Washington / Geneva Conventions

### A. Choice of Law – Rome Regime

No change from Irish or EU Courts' perspective (for now). The **Rome Regulations** have been retained by the UK under its [domestic laws](#) (as [amended](#)).

Subject to exceptions, such as the application of certain mandatory rules:

- › choice of law clauses designating an EU Member State's law should continue to be upheld by the UK courts
- › choice of law clauses designating English law should continue to be upheld by EU Member States courts
- › potential for the rules in the UK and EU to diverge over time as UK is no longer bound (i) by decisions of the ECJ or (ii) to follow any EU amendments to the Rome Regulations

### B. Jurisdiction, recognition and enforcement of judgments

Since 1 January 2021, the provisions of the Brussels Recast Regulation no longer apply to the UK, except where the proceedings were instituted before 31 December 2020 (and in very limited circumstances, afterwards) (Article 67, [UK-EU withdrawal agreement](#)).

In April 2020 the UK applied to accede to the **2007 Lugano Convention** (the Brussels Recast equivalent with the EFTA Member States – Norway, Iceland and Switzerland). The EFTA members have agreed to the application but the EU has not yet agreed.

In the meantime, the UK has acceded to the Hague Convention on Choice of Court Agreements ("Hague COCA") which took effect on 1 January 2021.

If proceedings issue *after* 1 January 2021 and pending the UK acceding to the **2007 Lugano Convention**, then either (i) Hague COCA could apply (where there is an exclusive jurisdiction clause) or (ii) the more cumbersome **Common Law** or **Civil Law** principles will be applied.

Even if the EU agrees to the UK's accession to the 2007 Lugano Convention, there will be an **enforcement gap** of several months and possible return of the **Italian Torpedo**.

Hague COCA is more restrictive than Brussels Recast Regulation (Art 2). Critically, non-exclusive and asymmetric jurisdiction clauses (ie exclusive for one party but non-exclusive for the other – and which appear in many finance agreements) are outside its scope. Also, Hague COCA does not apply to "interim measures of protection" so, for example, judgments granting an interim freezing order of a defendant's assets could not be enforced under Hague COCA.

There is also a potential risk ("**change of status risk**") where Hague Contracting States might not apply Hague COCA to contracts with exclusive English jurisdiction clauses between the date that it originally applied to the UK by virtue of its EU membership (1 October 2015) and the date that it entered into force in the UK as a party in its own right (1 January 2021).

### C. Service and Evidence

Since 1 January 2021, the provisions of the **EU Service Regulation** and **EU Evidence Regulation** *no longer* apply to the UK (except for Service or Evidence requests prior to 31 December 2020).

After 1 January 2021 (i) the Hague Convention on Service of Judicial and Extrajudicial documents in civil and commercial matters and (ii) the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters will apply between the UK and the contracting states to both conventions.

Ireland is a contracting state to the Hague Service Convention.

Ireland is not a contracting state to the Hague Evidence Convention. Therefore, after 1 January 2021 the UK is now in the same position as other non-EU states when it comes to taking evidence (ie Letters Rogatory).

Notwithstanding Ireland being a contracting state to the Hague Service Convention, it continues to remain advisable to include a service of process clause in contracts.