



## Ep. 28: UK Dispute Resolution Post-Brexit

March 11, 2020

**Jose Garriga:**

Hello, and welcome to *OnAir with Akin Gump*. I'm your host, Jose Garriga.

Brexit is now squarely in the U.K.'s rearview mirror. As of January 31st, the nation is no longer an EU member state. Among the many changes that may unfold as a result of this rupture are those involving the U.K. system of justice.

We're welcoming back to the studio today Akin Gump litigation partner Mark Dawkins and senior counsel Sheena Buddhdev. You may recall their appearance on the show last August in which they discussed the potential impact of Brexit on dispute resolution in the U.K. Well, now they're back to brief listeners on dispute resolution in this post-Brexit environment.

Welcome to the podcast.

Mark, Sheena, thank you for coming back on the show today. I think the first question on listeners' minds, particularly outside the U.K., after January 31st, may have to be, what changed? And then, what does this mean for the U.K.'s justice system? Mark, if you could lead off with your reply.

**Mark Dawkins:**

Thanks, Jose. Yes, so indeed what did just happen, as you say, with effect from 31st of January this year, the U.K. has no longer been an EU member state. Although there were some celebrations, and some people shedding tears, if you had blinked, you might actually have missed it. This is because although Brexit has happened, nothing has, in fact, changed yet, so we are still obliged to conform with EU law and regulation.

We still get the benefits of free trade, free movement of people and free movement of capital. And we can still take our pet dog on holiday to France with a pet passport. And all that is because we are in what has been called a "transition period." The transition period expires on 31st of December, 2020, and is intended to allow the U.K. to remain fully within the warm embrace of the EU whilst negotiating over its future trading relationship with the EU.

However, let's make a prediction. You may recall that, toward the end of last calendar year, there was a huge amount of press coverage around threats of a no-deal Brexit in

the U.K. Well, I would predict that all the heat that arose late last year in relation to the no-deal Brexit will be repeated in much the same way towards the end of this year. And that's because the U.K. government has laid out its approach to negotiation in some detail, and it's clear that there are several yawning chasms between the U.K.'s position on a future trading relationship and that of the EU, particularly in relation to what had been referred to as the "level playing field measures." And I'll come back to those a bit later.

It remains to be seen whether these yawning chasms can be bridged by negotiation, but, particularly bearing in mind the personalities in Boris Johnson's government, there'll no doubt be brinkmanship up until the last minute. That's all really political background, and what we want to talk about is the law, and as you say, Jose, in particular, the impact of Brexit on the U.K. system of justice.

So, has anything changed yet? Well, not much. The EU laws that applied to the U.K. prior to Brexit remain in force and will continue to apply in the same way that they always have until 31st of December, 2020. During the interim period and under the transition arrangements, the framework for civil justice and judicial cooperation continues to apply between the U.K. and all EU states.

That framework covers determining which courts have jurisdiction, ascertaining which law applies to contractual and noncontractual disputes and obligations, how to effect service of proceedings overseas within the EU, the basis upon which judgments will be enforced, and obtaining evidence from overseas within Europe. Now, in summary, as you'd expect, the preexisting EU framework, which continues for the U.K. during 2020, facilitates and simplifies and sets up clear rules under each of these five areas. That framework will continue in force throughout this year.

**Jose Garriga:** Understood, thank you. So, one thing that you mentioned was a transition period. What exactly can listeners expect will happen during and then after that time, Sheena, if you would, please?

**Sheena Buddhdev:** Sure, of course, Jose. Let's divide it up into two issues. First of all, choice of law. I suspect commercial parties will be concerned about whether their choice of English law will still be recognized across the EU, and if they'd previously chosen English law to govern their contracts before Brexit, will it still be the right choice after Brexit? And you may recall we addressed this first point in our first podcast, and the short answer is and remains, absolutely yes. The rules governing recognition of contractual choices of law within the EU are governed by a regulation known as the Rome I regulation.

This makes it clear that the EU courts must respect choice of law in contracts even if that choice of law is in a non-EU state. That regulation will not change after Brexit and will remain binding on EU member states. Having said that, Rome I will disappear from the U.K. statute book at the end of the transition period, by the end of this year, but will be reincorporated into U.K. law under the terms of the relevant Withdrawal Act.

Turning secondly to recognition and enforcement of English court judgements, again, you may recall that, in our first podcast, we explained that, as matters currently stand, the U.K. is part of a pan-European regulation called the Recast Brussels Regulation. And under this regulation, a judgment in a member state is enforceable in any other member state without any formal declaration of enforceability being required. By virtue of being a member of the EU, the U.K. is also a party to the Lugano Convention, which is largely similar to the Recast Brussels Regulation, but to which Norway, Switzerland,

Iceland, and Liechtenstein are parties, and these are EFTA [*European Free Trade Association*] states.

During the transition period, all English court judgments will continue to be enforceable in the courts of the EU member states and the EFTA states in accordance with these regimes, and judgments in each of the member states and EFTA states will continue to be enforceable in the English courts. The big question is, what will happen after this transition period?

At the end of the transition period, the Recast Brussels Regulation will be revoked and cease to apply here. However, the withdrawal agreement clearly provides that the Recast Brussels Regulation and the Lugano Convention will continue to apply in respect of English court judgments obtained in legal proceedings commenced before the end of this year. If parties currently have proceedings on foot in England, and if there is a future judgment which needs to be enforced in one of the member states—EU member states—or one of the EFTA states, the regimes currently in place for reciprocal recognition of judgements, as I've just discussed, will apply.

The Regulation and the Convention will not, however, apply to judgments made in legal proceedings commenced after the end of this year, so, after the transition period. So, for parties who are currently negotiating contracts and who wish to include an English jurisdiction clause, they need to bear in mind that, if they do end up in some sort of dispute with their counterparty after the transition period has ended, an English court judgment will not be recognized and enforced in the EU member states under their current regimes.

But all is not lost, so let me explain what could happen. Naturally, the U.K. hopes they'll be able to reach an agreement with the EU on a future relationship which results in the U.K. signing up to the Lugano Convention in its individual capacity, rather than a member of the EU. Now, that's the U.K.'s aim. Mark has mentioned that, no doubt, there'll be some sort of brinkmanship, but one will hope that common sense and pragmatism will prevail.

If, however, the negotiated exit is not possible, I think the question that everyone's asking is, what will fill that gap? There are two possible answers to that.

One is the Hague Convention, and, again, we mentioned the Hague Convention in our first podcast. So, where a contract contains an exclusive jurisdiction clause entered into after 1st of October, 2015, the Hague Convention provides for exclusive jurisdiction clauses to be upheld in signatory states and for enforcement of judgments concerning contracts containing such clauses to be a relatively straightforward process. And the convention is currently in force in all EU member states as well as Mexico, Montenegro and Singapore.

The U.K. has deposited an instrument of accession, and, in the event of a no-deal, it will accede to the convention in its own capacity. There is, however, some debate about whether the Hague Convention will apply to exclusive jurisdiction clauses agreed in contracts during the current transition period when the U.K. is not a party to the Hague Convention in its own right. We hope and expect that these sorts of creases will be ironed out to ensure that exclusive jurisdiction agreements do not fall into some sort of void or gap. And I'll come to practical considerations as a result of that shortly.

The second option is member states' own laws on recognition. The position is not quite so straightforward where parties have a non-exclusive jurisdiction clause in their contract. In the absence of an exclusive jurisdiction clause, English court judgments will be enforceable in all EU member states, not in accordance with the Hague Convention or any other regime, but in accordance with each member state's own domestic laws, one would, therefore, expect all English court judgements that were previously capable of enforcement under the Recast Brussels Regulation or the Lugano Convention to be enforceable, but under the local laws. And, as a consequence, the process may not be quite so streamlined and quick, but, nevertheless, that judgment will be capable of enforcement.

**Jose Garriga:**

Thank you, Sheena. A reminder, listeners, we're here today with Akin Gump litigation partner Mark Dawkins and senior counsel Sheena Buddhdev, discussing dispute resolution in this new post-Brexit environment.

So, let's follow up a bit on what you were talking about. Sheena, you alluded to this: what are some practical steps that listeners might take if they are, in fact, entering into a contract during 2020?

**Sheena Buddhdev:** In reflecting on what I've just said, firstly, consider making your jurisdiction clause an exclusive English court jurisdiction clause so you benefit from the Hague Convention. And I mentioned this gap that parties may fall into. Erring on the side of caution, you may wish to consider including a term in your contract which requires the parties to restate the clause after 1st of January 2021, once the U.K. has acceded to the Hague Convention in its own right. That's one practical step.

Another step is that the parties may wish to consider an arbitration clause. With arbitrations, enforcement is more certain because of the New York Convention, but there are disadvantages to arbitration over litigation, and we find this all too easy for commentators to suggest that arbitration and litigation are interchangeable. But in our first podcast, we explained why international businesses for many, many years have always favored English courts, and those reasons should remain at the forefront of parties' minds when considering the forum they wish to choose for the determination of any disputes they may get embroiled in.

**Jose Garriga:**

Thank you, Sheena. And I would suggest listeners take a listen to that initial podcast. It was very informative regarding the topic and made a very persuasive case in that regard.

To wrap up, what should listeners be looking forward to, and looking out for, between now and the end of the year? Mark, what do you think about that?

**Mark Dawkins:**

Well, this update has really been to keep listeners in the picture. I think, as everyone will have gathered, the legal issues that we're addressing and which is really, as you said at the beginning, Jose, it's about the impact of Brexit on the U.K. system of justice. That's pretty much been left in a holding pattern whilst these heavily politicized trade negotiations proceed. I mentioned earlier that we could expect some brinkmanship towards the end of the year. However, it's quite possible there will remain real divisions of principle between the U.K. and the EU which can't be reconciled, or at least not during the transition period.

Boris Johnson has made it clear that he prioritizes U.K. sovereignty ahead of free trade with the EU. And what that means is he does not want to accept what's been called the

“level playing field” the EU say they require. And on that level playing field, in order to get free trade, the EU say that the U.K. would need to comply with all of EU regulations and standards so that goods and services will be guaranteed to match the EU standard. But Boris Johnson doesn't want to do that.

If he doesn't move, and if the EU don't move on their requirement, we are very much back to the no-deal scenario which I mentioned earlier, and we discussed in a podcast late last year. But as we said then, that doesn't mean that the system of English justice as a forum for resolving international disputes is in any way materially impaired. All the qualities of independent and experienced judges, adaptable common law, transparency and efficiency remain unaffected. And as Sheena has just explained, there are very likely going to be good answers to questions around the enforcement of English court judgements in EU member states. However, it may well be the case that it's more difficult for me to take our Jack Russell on family holidays to France next year.

**Jose Garriga:**

Thank you Mark, and let's hope that's an era that does not come to pass because no one wants to put a Jack Russell out. As a terrier owner, I can speak to their singlemindedness.

Thank you both. Listeners, you've been listening to Akin Gump litigation partner Mark Dawkins and senior counsel Sheena Buddhdev. Thanks for appearing on the show today and bringing our listeners up to date and up to speed on developments in this post-Brexit world.

And thank you, listeners, as always, for your time and attention. Please make sure to subscribe to *OnAir with Akin Gump* at your favorite podcast provider to ensure you do not miss an episode. We're on among others, iTunes, SoundCloud and Spotify.

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Until next time.

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