Brexit (2): Consequences on Cross-Border Civil Litigation

As mentioned a couple of weeks ago, I have decided to devote a series of blog posts to the consequences of Brexit on cross-border-civil litigation and arbitration.

After a first post which discussed the issue of whether arbitration could be used to fix unresolved post-Brexit U.K.-EU matters, this post examines the consequences of Brexit on rules regarding jurisdiction, choice of law and recognition and enforcement of foreign judgments.

Currently, the EU enjoys one of the most complete systems of private international law in the world. Through its Brussels I Recast Regulation and Rome (I and II) Regulations, the EU regime provides for rules on jurisdiction, choice of law and recognition and enforcement of judgments. In addition, the Lugano Convention aims at extending the Brussels I Regulation’s regime on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters within the EU to cross-border litigation with countries not being part of the EU (Iceland, Norway and Switzerland). Finally, the EU legal regime also comprises other sets of instruments aimed at the taking of evidence abroad or the enforcement of judicial orders. Together, these rules support
a “free movement” of judgments, which underpins much intra-EU trade.

The application and interpretation of all those rules are, however, subject to the scrutiny of the Court of Justice of the European Union (the CJEU). As you certainly know, this supremacy and direct jurisdiction of the CJEU on the interpretation of legal norms was one of the main campaign arguments of pro-Brexiters*.

Anyway, now that the U.K. is about to leave the EU, I found that it would be interesting to examine how cross-border litigation rules are likely to be affected by Brexit**.

While no future model will completely replicate the benefits of the current system, it is clear that international dispute resolution concerns are beginning to be taken seriously by both the EU and U.K. The U.K. House of Lords published a Final Report on cross-border civil and commercial disputes in March 2017, and the European Commission issued a Notice to Stakeholders, noting that the U.K.’s withdrawal from the EU will create “considerable uncertainty” and reminding practitioners of the “legal repercussions” which will follow Brexit.

This being said, the U.K. has become a global hub for international litigation, and English law is one of the most popular choices for commercial contracts. It is assumed, therefore, that the U.K. government will wish to maintain that pre-eminence by retaining close links with the EU system. While a number of post-Brexit scenarios are possible, none offers the same degree of predictability and uniformity as the current system.

First, the U.K. may decide unilaterally to apply the provisions of the Rome and Brussels Regulations (adopting the EU laws by an Act of Parliament). This is the general approach envisaged by the EU Withdrawal Bill (which, when enacted, will
implement Brexit by (i) repealing the European Communities Act 1972 (which permitted U.K. accession to the EU Treaties) and (ii) incorporating existing EU law into domestic U.K. law). A problem arises, however, because the Brussels and Rome regimes necessarily require reciprocity and mutual trust. These principles are systemically important to the functioning of the EU’s internal market. They have traditionally been assured by judgments of the CJEU, so it would be important that U.K. courts would continue to pay close regard to the past and future decisions of the CJEU. As discussed above, however, the continuing jurisdiction of the CJEU will be a highly sensitive political question.

The U.K. is therefore faced with two other broad choices: either agree with the EU that the Brussels and Rome framework would continue to apply to the U.K. post-Brexit, or negotiate a brand new treaty specifically to govern U.K.-EU private international law. Both these possibilities would, of course, take time to negotiate, and would require the agreement of all the remaining EU Member States. The CJEU would be likely to retain a significant role as well, and would have the power to declare the eventual agreement incompatible with EU law if it felt that the coherence and autonomy of the EU’s internal legal order were under threat.

In August 2017, the U.K. government published a position paper in which it set out its priorities for a future EU-U.K. cross-border litigation regime. In this position paper, the U.K. government expresses:

- its intention to “seek an agreement with the EU that allows for close and comprehensive cross-border civil judicial cooperation on a reciprocal basis, which reflects closely the substantive principles of cooperation under the current EU framework”;

- its “intention to incorporate into domestic law the Rome I and II instruments on choice of law and applicable law in
contractual and non-contractual matters";


– its will “to continue to participate in the Lugano Convention that, by virtue of [the U.K.’s] membership of the EU, forms the basis for U.K.’s civil judicial cooperation with Norway, Iceland and Switzerland“***.

If no agreement is reached, and the U.K. simply leaves the EU without making provision for international disputes, the potential for uncertainty is significant. For example, if a future defendant is domiciled in the U.K., international jurisdiction would be governed by the national rules of the Court seized of the matter. Likewise, the loss of automatic recognition of judgments would increase procedural complexity and expense. Unless the U.K. and the State in which recognition and enforcement is sought are both parties to an international convention, judges would be obliged to fall back on their national rules.

In conclusion, it appears that uncertainty is likely to grow in the field of cross-border civil litigation post-Brexit. While parties will look for the security and predictability of maximum alignment between the U.K. and EU, this will require creative thinking and compromise from both sides. As with many aspects of the U.K.’s withdrawal, it’s unclear whether we can expect much detail soon.

* Admittedly, it must be noted that, in the last couple of years, the CJEU has (at least in the field of international litigation) adopted several decisions which have struck a fatal blow to key common law doctrines or concepts (see for instance Owusu v. Jackson (C-281/02) and Turner v. Grovit
(C-159/02) which respectively found that the doctrines of forum non conveniens and anti-suit injunctions violated EU law).

** In contrast to transnational litigation rules, the effects of Brexit on international arbitration should be rather limited since this field remains immune from EU influence and harmonization. In the field of arbitration, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards will continue to apply and to provide the necessary rules on the recognition and enforcement of arbitral agreement and arbitral awards.

*** This last point is likely to be more problematic than the U.K. government is willing to admit. Indeed, although the U.K. is currently a member of the Lugano Convention thanks to its membership to the EU, it will stop from being a party to this Convention on Brexit Day and will need to re-join it in its own name (which in principle requires the U.K. to become an EFTA member). In addition, the U.K. government overlooks the fact that the Lugano Convention obliges the courts of the non-EU States to “pay due account” to the judgments of the CJEU.