# The Conscious Uncoupling of UK and the EU Law: A Brief Guide to Brexit and its Impact on Litigation and Bilateral Investment Treaty Arbitration in the UK

On 31 January 2020, after 47 years of membership, the UK left the European Union ("**EU**") ("**Exit Day**"). Like many long-term relationships that come to an end, the parties are going through a period of transition to allow them to move on from each other in an orderly fashion. This period lasts from Exit Day until 11pm on 31 December 2020 ("**IP completion day**") (the "**Implementation Period**"). During this time the UK and EU will negotiate the terms of their future legal relationship, with the current expectation (at least from the UK's perspective) that legal certainty will be achieved by IP completion day. This article provides guidance on the state of UK law during the Implementation Period and immediately thereafter, to the extent currently known. It also sets out potential areas for Brexit-related litigation and arbitration and explains how certain legal regimes which can run alongside civil litigation – such as the extradition regime – are likely to become more inefficient and uncertain.

## *The Withdrawal Agreement (the "WA") and the Political Declaration (the "PD")*

On 19 October 2019, the UK and EU agreed the terms of the UK's exit from the EU in the WA. The WA is the international agreement between the UK and EU that sets out the parties' respective rights and obligations following Exit Day, during the Implementation Period and, to some extent, thereafter. The PD was agreed at the same time and sets out the framework for the parties' future legal relationship after the Implementation Period, which it describes as "*an ambitious, broad, deep and flexible partnership*". It remains to be seen if this can be achieved, as the PD recognises that it must balance each parties' guiding principles, which conflict with each other, e.g. the UK requires its sovereignty and the EU the retention of its decision-making powers and the Single Market Imperative. The parties' positions in this regard do not appear to have shifted materially since the PD was published with the UK Prime Minister openly promoting a trade deal that does not require the UK to adhere to EU rules, while the Commission's negotiating directives (which were published on 25 February 2020 and mandate its approach to the negotiations) state in terms that any deal with the UK "*must respect to the integrity of the Single Market and the Customs Union*". As the parties stand in opposing corners, the stage is set for a robust trade negotiation.

## *The WA and the 2018 and 2020 Acts*

The WA was implemented into UK law by the follow Acts of Parliament:

(i) the EU (Withdrawal) Act 2018 (the "**2018 Act**"); and

(ii) the EU (Withdrawal Agreement) Act 2020 (the "**2020 Act**"), which amended the (foundational) 2018 Act to account for the terms of the WA.

The WA, the PD, and the 2018 and 2020 Acts provide that:

1. **during the Implementation Period it is *as if* the UK were still an EU Member State.** EU law applies in and to the UK and must be interpreted as before, including reference to the case law of the Court of Justice of the European Union ("**CJEU**"), and the European Commission retains jurisdiction over legal or natural persons in the UK. These provisions come to an end on IP completion day. This means that there should only be one set of changes for businesses and individuals to respond to at the end of the Implementation Period.

2. **on IP completion day EU law no longer has supremacy over UK law and a body of law called 'retained EU law' shall be created and transposed into UK law.** Retained EU law consists of the following elements, as operative immediately before IP completion day: (i) directly effective EU legislation, e.g. EU regulations; (ii) UK legislation which is EU derived, e.g. domestic legislation implementing EU directives; and (iii) EU rights, obligations, remedies, etc., that are recognised and available in UK law.

3. **retained EU law shall be subject to special treatment.** This includes that: (i) UK Ministers can amend it using statutory instruments ("**SI**s") in order to make it work effectively once EU law no longer has supremacy over UK law; (ii) the UK Supreme Court shall not be bound by any case law or general principles of the CJEU laid down from its inception up until IP completion day "**retained EU case law**" and may depart from such case law as it does from its own decisions; and (iii) the courts below the Supreme Court should interpret retained EU law according to retained EU case law (although this final point may change after IP completion day, as the UK will then have the power to amend the circumstances in which such courts are bound by retained EU case law).

***The Importance of Politics***

The UK and EU's ongoing trade negotiations will affect the legal issues considered in this article. Already the shifting politics has impacted on the integrity of the legal framework described above. The previous UK government was more committed to close alignment between UK and EU law. Accordingly, regulations passed during 2018/19 to amend UK law in preparation for a no-deal Brexit (which was then likely), mostly provide for such close alignment. This means that, although those regulations and related guidance are referred to below, as potential indicators of the parties' future relationship, they may now be outdated and are likely to be amended or repealed in 2020 if the current UK government agrees a more distant legal relationship with the EU.

Set out below are the current and potential post-Implementation Period positions.

## I. Jurisdiction and Enforcement of Judgments

Before Exit Day, the key legislation in this area was EU Regulation 1215/2012 (recast) (the "**Recast Regulation**"). The Recast Regulation provides specifically for the allocation of jurisdiction and the enforcement of judgments within EU Member State courts, and its provisions are intended to be applied by EU Member States only. Consequently, it would be meaningless were an English court to attempt to apply such provisions following the end of the Implementation Period when the UK will neither be, nor treated *as if* it were, an EU Member State.

Accordingly, the previous government passed the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 ("**CJJ Exit Regulations**"), the effect of which is to repeal the Recast Regulation (and its precursors) as of IP completion day. Unless an alternative arrangement between the UK and EU is agreed, the following regime would then likely apply in the UK:

(i) the 2005 Hague Convention on Choice of Courts Agreements, which provides for reciprocal enforcement of judgments between contracting states where jurisdiction is established via an exclusive jurisdiction clause. Signatories include the EU, Mexico and Singapore;

(ii) consumer and employment disputes would largely mirror the substantive provisions of the Recast Regulation; and

(iii) in all other respects, the rules determining the English court's jurisdiction and the recognition and enforcement of judgments would be based on the common law regime.

The Recast Regulation and English common law regimes are fundamentally different. The primary basis for jurisdiction under the Recast Regulation is the *domicile* of the defendant in an EU Member State, while the common law regime is based on service of process on a defendant while *present in the jurisdiction*. A further difference is that the common law rules allow English courts to decline jurisdiction if satisfied that the courts of another country would be manifestly more appropriate. There is no such discretion under the Recast Regulation. The Recast Regulation also provides for the near-automatic recognition and enforcement of Member State judgments with very narrow grounds for refusal, while enforcement under the common law requires separate proceedings to be issued, with (generally) much more flexible grounds for refusal.

As for potential agreements in this area between the UK and EU, the previous government indicated that it intended for the UK to accede to the 2007 Lugano Convention. This would keep the jurisdiction and enforcement regime substantively the same between the UK, EU, and Norway, Iceland and Switzerland, albeit differences would arise in the fact that: (i) the Lugano Convention has not abolished the 'first seised' rule for parallel proceedings where there is an exclusive jurisdiction agreement, meaning that tactics such as the 'Italian Torpedo' could make a return, and (ii) the enforcement of judgments under the Convention still requires a declaration of enforceability, thereby slowing down this process.

There is considerably greater scope for jurisdictional disputes in civil litigation if no alternative arrangements are agreed between the EU and the UK. For instance, since the UK will no longer benefit from the orderly *lis pendens* provisions of the Recast Regulation, the practice of deliberately commencing proceedings in unsuitable jurisdictions for the purpose of stifling claims will once again become a legitimate delay tactic for litigants. As a corollary, we would expect to see considerable use of anti-suit injunctions in the English courts seeking to prevent litigants from bringing proceedings in other EU Member State courts. These were precluded by the Recast Regulation, but will now be available again.

## II. Applicable Contract and Tort Law

Before Exit Day, the key provisions of UK law in this area were the:

(i) Rome Convention, re contracts concluded between 1 April 1991 and 16 December 2009 (inclusive);

(ii) Rome I Regulation (EC) No 593/2008 ("**Rome I**"), re contracts on or after 17 December 2009;

(iii) Private International Law (Miscellaneous Provisions) Act 1995 ("**PIL 1995**"), re torts on or after 1 May 1996 and, generally, pre 12 January 2009; and

(iv) Rome II Regulation (EC) No 864/2007 ("**Rome II**"), re non-contractual obligations where the events giving rise to damage occurred after 11 January 2009.

After the Implementation Period, Rome I and Rome II will be transposed into UK law as retained EU law. Therefore, absent any further agreement, the UK courts would effectively continue to apply the same rules. The UK and EU regimes would remain aligned, unless and until the EU amends Rome I and Rome II or the UK amends the retained EU law versions of those Regulations. However, as the UK shall be a 'third state' for the purposes of Rome I and Rome II, in some cases, an EU Member State court applying Rome I and Rome might produce a different result from a UK court applying the retained EU law version of Rome I

and Rome II. For example, some rules, such as Art.7(3), Rome I (insurance contracts), refer to EU Members States. This means that, where this rule requires risk to be located in a Member State, an EU Member State court applying this rule will not include risk located in the UK but as UK courts will be applying Rome I and Rome II *as if* the UK were still a Member State they will apply this rule in relation to risk in the UK as well as in the EU.

## III. Competition/Antitrust

Before Exit Day the European Commission had jurisdiction to investigate potential competition law infringements affecting the UK, while the UK's competition regulator, the Competition and Markets Authority ("**CMA**") and sectoral regulators, e.g. the Financial Conduct Authority ("**FCA**"), had to apply EU competition law alongside equivalent UK rules (which also had to be applied consistently with EU case law).

After the Implementation Period, retained EU law will, in theory, import the EU competition laws into UK law. However, this will not mean that the CMA (and its sectoral equivalents) will continue to apply the TFEU rules. They will apply UK competition law to infringements affecting the UK.

Certain provisions in the WA will also come into effect which provide that:

(i) the Commission will continue to have jurisdiction over infringement proceedings re Arts. 101 and 102, TFEU, initiated before the end of the Implementation Period;

(ii) infringement decisions re Arts. 101 and 102, TFEU, that were adopted by the Commission either before the end of the Implementation Period, or after this time where the proceedings were initiated before the end of the Implementation Period **and** are addressed to legal/natural persons residing/established in the UK will be binding in the UK and the appeals of those decisions shall continue to be heard exclusively by the EU courts.

If the parties fail to agree a deal before IP completion day, the Competition (Amendment etc.) (EU Exit) Regulations 2019, which were passed by the previous government, may come into force but they would need to be amended first as they conflict with the terms of the WA. Their effects include:

(i) the UK courts having discretion to act consistently with EU law;

(ii) infringement decisions after IP completion day would no longer be binding in the UK; and

(iii) 'pre-IP completion day competition law' would apply, meaning that follow-on claims can be brought which rely on decisions made by the Commission prior to IP completion day.

The UK Supreme Court's power to depart from retained EU law could generate post-IP completion day litigation in relation to competition law infringement decisions and damages actions, as this will become a more untested area of law. Equally, should the Exit Regulations 2019 come into force, additional litigation will likely arise from uncertainty surrounding how UK courts would and should apply their discretion to act consistently with EU law.

## IV. Data Protection

Before Exit Day, the main EU law governing the UK law in this area was the EU General Data Protection Regulation ("**GDPR**") and the UK Data Protection Act 2018 ("**DPA**"), which builds on the GDPA.

On IP completion day, the GDPR will be transposed into UK law, alongside the DPA. If the parties fail to reach an agreement before this time, the Data Protection, Privacy and Electronic Communications (Amendments etc.) (EU Exit) Regulations 2019, passed by the previous government, may also come into force. These make technical amendments to the retained EU law of the GDPR so that the applicable approach continues to be capable of implementation in the UK. EU law would, however, still apply to the processing of:

(i) EU data subjects' personal data in the UK if the processing started before, during and, in certain circumstances, after the Implementation Period; and

(ii) personal data where goods and services are offered to data subjects in the EU or their behaviour is monitored, even where the processor or controller is not established in the EU, e.g. it is in the UK.

Transfers of personal between the UK and EU would be made on the basis that both parties are 'third states' to the other's data protection regimes. The most likely basis for such transfers to be made in this situation is an adequacy decision by the transferring country regarding the receiving country. Although the previous UK Government expressed an intention to ensure that personal data can continue to flow between the UK and EU, this has yet to be agreed with the EU. In the absence of an adequacy decision in respect of the UK, transfers from the EU to the UK will need to rely on other bases provided for in the GDPR. In the absence of mutual adequacy decisions by the EU and UK, disputes may arise where data is transferred from the EU to the UK, specifically regarding the adequacy of the UK's safeguards and/or the necessity of the transfer. Disputes may also arise where an entity seeks to justify the processing of data in the UK on any of the remaining grounds in the retained EU law GDPR, where previously such processing was permitted on the basis of an obligation arising from a Member State (i.e. formerly UK) law.

## V. Market Abuse

Before Exit Day, the main source of EU law in this area in the UK was the EU Market Abuse Regulation (596/2014) ("**MAR**").

On IP completion day, the MAR will be transposed into UK law and, absent any agreement, the UK's position vis-à-vis the EU would be determined by the default Member State and EU rules applicable to third states at the relevant time. Meanwhile, the Market Abuse (Amendment) (EU Exit) Regulations (SI 2019/310) ("**UK MAR**"), which were passed by the previous government could come into force. These would modify the domesticated MAR to make it workable in the UK after its exit from the EU, resulting in modest changes, such as:

(i) the notification requirements would be limited to issuers with financial instruments admitted to trading or traded on UK trading venues in order to avoid double reporting for operators trading on EU trading venues and issuers who have admitted instruments to EU trading venues;

(ii) the European Securities and Markets Authority's powers would be transferred to the FCA and the Commission's power to make delegated acts under the MAR would be transferred to HM Treasury; and

(iii) the UK would have discretion not an obligation to share information or co-operate with the EU.

## VI. Resolution

The EU law in this area consists of the: (i) Bank Recovery and Resolution Directive (2014/5/EU) ("**BRRD**"); and (ii) Single Resolution Mechanism Regulation (806/2014) ("**SRMR**").

The BRRD aims to give authorities a minimum common set of 'tools' to tackle banks that are "*failing or likely to fail*" using national level co-operation arrangements rather than national insolvency laws. The SRMR does not apply to the UK.

On 7 June 2019, BRRD II Directive (2019/879) ("**BRRD** II") and SRM II Regulation ("**SRMR II**") were published, amending the BRRD and SRMR, respectively. The UK must transpose BRRD II into UK law by 28 December 2020.

On IP completion day, the BRRD shall be transposed into UK law the Bank Recovery and Resolution (Amendment) (EU Exit) Regulations 2018 ("**BRRD Exit Regs**") and Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 ("**FSMA Exit Regs**") may come into effect. These amend the retained EU law versions of the BRRD and related UK legislation to ensure they work effectively. These amendments include:

(i) aligning UK legislation's treatment of EEA states with that for 'third states': for example, EU-led resolutions would no longer be automatically recognised in the UK. This would mean banks in the EU could no longer count English law governed issued debt towards their minimum requirement of own funds and eligible liabilities (MREL). (It is anticipated that banks will include contractual recognition clauses if they wish to make any of their affected instruments MREL-eligible); and

(ii) removing the BRRD's operational and procedural mechanisms which currently require UK regulators to cooperate with other EEA authorities. However, the UK authorities will continue to co-operate with EEA counterparts for resolution purposes in accordance with the current approach to third state head-quartered G-SIIs.

If no agreement is reached before the end of 2020, litigation may arise from the coming into effect of UK's "third state" status and the consequent loss of automatic mutual recognition of resolution actions, which currently exists between the UK and EU Member States. Uncertainty surrounding the MREL eligibility of existing English law governed instruments could also lead to compliance disputes, despite the assurance by the EU's Single Resolution Board that it will carry out case-by-case assessments of any MREL shortfalls caused by Brexit.

## VII. European Arrest Warrant Regime

Before Exit Day, the UK was subject to the Council Framework decision 2002/584/JHA ("**EU Framework**"), as implemented into UK law by the Extradition Act 2003 ("**the Extradition Act**"). This introduced the European Arrest Warrant (the "**EAW**"), which streamlines the import and export of individuals suspected or convicted of crimes between Member States. The Extradition Act splits jurisdictions into Category 1 and Category 2 territories. EU Member States are in Category 1. Category 2 includes Australia, Canada, Norway and the USA. Category 1 territories benefit from more a straightforward and efficient process, whereas Category 2 territories are subject to more stringent requirements.

During the Implementation Period the situation is basically the same although complications exist as the UK is no longer an EU Member State, including:

(i) the German constitution prohibits extradition under the EAW to countries that are not EU Member States and so it is expected that Germany will no longer extradite its citizens to the UK;

(ii) Individuals with "settled status" in the UK (those who have lived in the UK for at least five continuous years) can no longer be extradited to a Member State, remain there for five years or more and return

to the UK under the freedom of movement regulations as they will have lost their "settled status" and therefore are likely to have to rely on general immigration rules, which risks being refused entry; and

(iii) Member States have the right to refuse to surrender their nationals to the UK during the Implementation Period. The UK would then have a month in which to declare that it would also not surrender its nationals to that Member State upon receipt of an extradition request.

The position after the Implementation Period is still quite uncertain. The Law Enforcement and Security (Amendment) (EU) Exit Regulations 2019, which were passed by the previous government, could come into force on IP completion day. They re-designate the remaining EU Member States as Category 2 territories for the purposes of the Extradition Act, i.e. those that have bilateral extradition agreements with the UK. Without further agreements with the EU this would mean that all EU-based extradition requests would be determined by reference to the European Convention on Extradition 1957 ("**1957 Convention**"). This raises serious difficulties though as not all Member States have domestic legislation implementing the 1957 Convention while others have only partially ratified it.

The UK might still be able to operate the EAW under the 1957 Convention but this appears highly unlikely as it would necessitating new domestic legislation in each Member State.

Perhaps the greatest hurdle to this outcome is the fact that while all Member States wish to preserve the CJEU as the ultimate arbiter of extradition cases, the UK does not. The UK's rejection of the CJEU's supremacy conflicts with the reciprocity needed in extradition agreements making it very difficult to formulate a workable extradition regime between the UK and EU. Hence, the 1957 Convention – with its attendant difficulties – appears likely to be the post-Implementation Period regime. Regardless of the regime that the parties ultimately agree, it is likely to be more cumbersome and complex than the EAW, which will introduce a degree of uncertainty to extradition thereby complicating the management of legal claims whose parties or witnesses become subject to an extradition application / order.

## VIII. Intra-EU Bilateral Investment Treaty ("BIT") Disputes

Following Exit Day, the UK immediately ceased to be an EU Member State. However, for the duration of the Implementation Period, it remains subject to EU law including all international agreements concluded by the EU (or Member States acting on behalf of the EU or acting jointly with the EU). International agreements entered into by the UK in its own right continue to apply during and after the Implementation Period. For example, the 1958 New York Convention will remain unaffected by withdrawal from the EU. The UK's future position with respect to its existing intra-EU BITs is less certain.

In January 2019, EU Member States (including the UK) made declarations stipulating that, pursuant to the CJEU's decision in *Achmea BV v Slovak Republic, Case C-284/16* dated 6 March 2018 ("**Achmea**"), intra-EU investor-State dispute settlement ("**ISDS**") provisions under intra-EU BITs were incompatible with EU law and, as according to the declarations, "inapplicable". The legal effect of the declarations remains contested, and a number of investment tribunals have posited that the declarations do not affect their jurisdiction, at least in proceedings that had commenced before the date of the declarations. It remains to be seen whether the same considerations apply to intra-EU investment arbitrations that commenced after the declarations were issued. EU Member States also undertook to terminate all existing intra-EU BITs. In October 2019, the Commission announced that almost all EU Member States had reached agreement on the text of a multilateral treaty for the termination of their intra-EU BITs (including all of the UK's existing intra-EU BITs) ("**Intra-EU BIT Termination Treaty**"). Addressing the enforceability of arbitral awards already rendered, a leaked

draft of the Intra-EU BIT Termination Treaty provides that all intra-EU BIT arbitrations concluded prior to 6 March 2018 (i.e., prior to the date of the *Achmea* judgment) remain unaffected. For any intra-EU investor-State proceedings that are yet to be concluded (with the exception of disputes conducted under the Energy Charter Treaty), the draft agreement envisages a "structured dialogue" which enables investors to initiate a settlement procedure with the Member State concerned within a period of six months from the termination of the relevant BIT, to be overseen by an impartial facilitator. Questions remain as to what happens if the parties fail to reach a settlement agreement pursuant to the structured dialogue mechanism. The draft Intra-EU BIT Termination Treaty further provides that no proceedings post-*Achmea* are capable of being initiated pursuant to intra-EU BITs. This is understood to apply to all proceedings that were initiated on or after 6 March 2018. As it stands, the termination of intra-EU BITs may lead to a gap in substantive investment protection rules and investor-State dispute resolution mechanisms between EU Member States.

The UK is yet to give its formal consent to be bound by the Intra-EU BIT Termination Treaty. A decision by the UK to ratify the treaty will have consequences for UK investors and EU Member States alike:

(i) If the Intra-EU BIT Termination Treaty enters into force between the UK and its existing intra-EU BIT partners, it would leave the UK without any BITs with EU Member States following its withdrawal from the EU. The draft Intra-EU BIT Termination Treaty purports to terminate intra-EU BITs without regard to any so-called "sunset clauses" in such BITs. "Sunset clauses" are included in BITs to preserve the rights of investors who made or acquired their investments whilst the BIT was in force to have recourse to the ISDS provisions for a transitional period even in the event of termination. The Intra-EU BIT Termination Treaty expressly aims to dispense with such provisions, but the question whether investors remain entitled to invoke sunset clauses regardless, despite such a stipulation in the Intra-EU BIT Termination Treaty, is expected to remain a contested issue before arbitral tribunals.

(ii) Alternatively, if the Intra-EU BIT Termination Treaty does not enter into force between the UK and any of its existing intra-EU BIT partners, existing BITs between those parties remain in force as if they were extra-EU BITs until such time as they expire, are terminated or are replaced by another agreement relating to the same subject-matter. It is possible that host States will contest the above interpretation on the basis that intra-EU BITs were not simply "dormant" during the membership of the UK in the EU, but were rendered definitively inapplicable. Following the Implementation Period, investors may be able to rely on the ISDS provisions in the relevant BITs to institute proceedings or continue proceedings without the implications of the *Achmea* decision or the January 2019 declarations. Similarly, awards issued by tribunals in relation to such proceedings may be capable of enforcement absent the provisions of the Intra-EU BIT Termination Treaty. The UK Supreme Court recently held that the EU law duty of sincere co-operation, incumbent upon the UK, did not trump the UK's international obligations to enforce an award under Article 54 of the ICSID Convention, because the UK joined and implemented the ICSID Convention prior to its accession to the EU. The decision lifted the stay on enforcement of a 2013 ICSID tribunal award against Romania relating to the 2002 Sweden-Romania BIT.

## IX. Conclusion

The future scope of the parties' post-Implementation Period relationship and its effect on potential litigation is very uncertain at the time of writing. However, given the UK's refusal to permit an extension to the Implementation Period there will, at least, in theory, be clarity on these matters by the end of 2020. We expect, however, to see Brexit related procedural and substantive issues becoming commonplace in English litigation during the course of 2020 and beyond.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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