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The Withdrawal Agreement: What does it mean for dispute resolution clauses?

CMS UK

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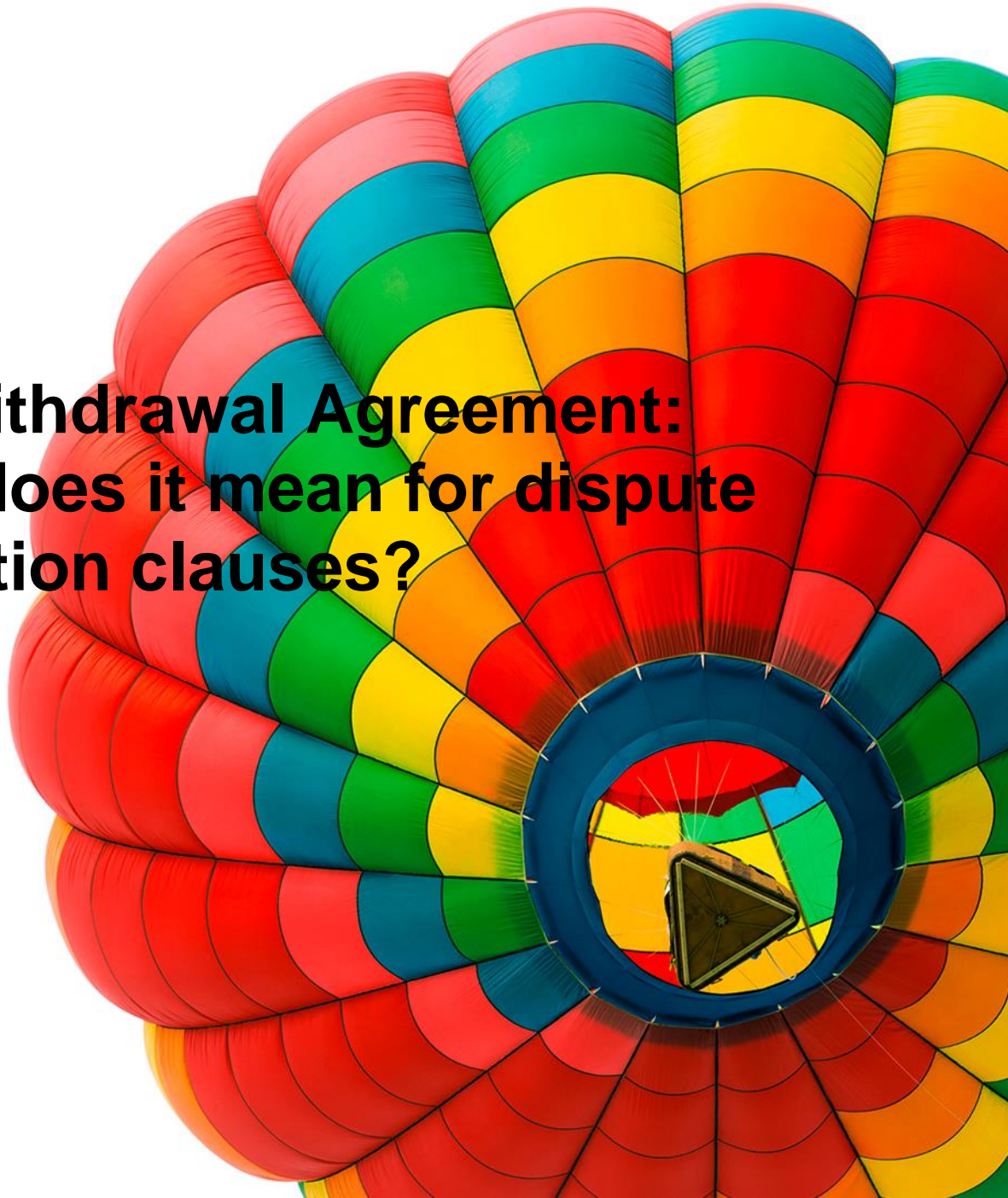


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Scope

Under the Withdrawal Agreement agreed between the UK and the European Council, the United Kingdom will leave the European Union at 11pm GMT on 31 January 2020. This will be followed by a transition period which is intended to allow the parties to negotiate a replacement free trade agreement. Unless extended, the transition period will end on 31 December 2020.

This note summarises the effect of the Withdrawal Agreement on the recognition of law and jurisdiction clauses and the enforceability of judgments. For more detail and for guidance on other areas, please email your usual CMS contact.



Governing law

Governing law determines which substantive laws the courts will apply to decide the merits of a dispute. In most large commercial disputes, the governing law will have been selected by the parties by means of a choice of law clause in the underlying contract.

The Rome I and Rome II Regulations oblige EU courts to recognise choice of law clauses, regardless of whether the law chosen is that of an EU member state or a non-member state. Choice of law clauses in favour of English law will therefore continue to be recognised by EU courts both during and after the transition period.

Rome I and Rome II will be incorporated into domestic law by the European Union (Withdrawal Act) 2018. This means that English courts will continue to recognise foreign governing law clauses in the same way as before, both during and after the transition period.

Non-EU courts, including EFTA courts, apply their own domestic conflicts of laws rules or bilateral treaties to decide whether or not to recognise choice of law clauses. This is unaffected by Brexit.



Jurisdiction

Jurisdiction determines which court will decide a dispute. In most large commercial disputes, the jurisdiction will have been selected by the parties by means of a jurisdiction clause (also known as a choice of court agreement) in the underlying contract. **Including an exclusive jurisdiction clause will avoid most post-Brexit problems related to jurisdiction and enforcement when dealing with EU counterparts after Brexit.**

During the transition period, there will be no substantive change to the jurisdiction regime applicable as between the UK, EU and EEA. After the transition period, the position will depend on the content of any new free trade agreement. It is possible that the Brussels and Lugano regimes (applicable to the EU and EEA countries respectively) will cease to apply to the UK. As between the UK, Gibraltar, the EU, Mexico, Montenegro and Singapore, the Hague Convention on Choice of Court Agreements would then apply. This provides a more basic regime that only recognises exclusive jurisdiction clauses.

No EFTA country has yet ratified the Hague Convention. **You may wish to consider arbitration rather than litigation when dealing with EFTA counterparts.** If court litigation is preferred to arbitration, an exclusive jurisdiction clause is likely to offer the widest scope for enforcement, but you should take specific local advice.



Service of process

Arrangements for service of proceedings are important largely because of timing and because of issues of control. During the transition period, there will be no change to the procedures available to UK litigants wishing to serve proceedings in the EU.

Some EU countries require a claimant in proceedings outside the EU to serve via a central authority, embassy or consulate. After the transition period, the same requirements may be imposed on UK litigants, unless any new agreement provides otherwise. **In relation to counterparties in these countries – currently Austria, Bulgaria, Croatia, Czech Republic, Greece, Hungary, Malta and Slovakia - it would be sensible to negotiate the appointment of a UK agent for service of process in any agreement which is expected to continue beyond the end of the transition period,** in order to minimise any delays.



Enforcement of judgments

Treaties concerning the enforcement of judgments generally provide a streamlined procedure under which the member states agree to enforce each other's judgments with no, or minimal, additional formalities. During the transition period, EU and EEA mechanisms for enforcement will continue to apply to the UK.

After the transition period, depending on the contents of any new free trade agreement, it is possible that the enforcement mechanisms provided by the Brussels and Lugano regimes will cease to apply to the UK. A similar mechanism will, however, be available as between the UK, Gibraltar, the EU, Mexico, Montenegro and Singapore under the Hague Convention on Choice of Court Agreements, provided the judgment in question is founded on an exclusive jurisdiction clause.

Since the EFTA countries are not currently members of the Hague Convention on Choice of Court Agreements, you may wish to consider arbitration rather than litigation when dealing with EFTA counterparts. Alternatively, take specific local advice on the enforceability of the proposed contract.



Arbitration

Arbitration agreements and awards are widely enforced under the New York Convention, which is independent of the EU and unaffected by Brexit. The UK and all EU and EFTA countries are parties to the New York Convention.

EU and EFTA member states

For ease of reference, the continuing member states of the European Union and the European Free Trade Area (EFTA) are as follows:

European Union

Austria	France	Netherlands
Belgium	Germany	Poland
Bulgaria	Greece	Portugal
Croatia	Hungary	Romania
Cyprus	Italy	Slovakia
Czechia	Latvia	Slovenia
Denmark	Lithuania	Spain
Estonia	Luxembourg	Sweden
Finland	Malta	

Denmark has special constitutional requirements that mean it generally participates in EU civil justice arrangements by means of a bilateral agreement rather than a Directive or Regulation. For details, email any of the contacts below or seek local legal advice.

EFTA

Iceland	Liechtenstein	Norway
Switzerland		

Switzerland has entered into a bilateral agreement with the UK in respect of certain matters of professional recognition. Liechtenstein is not a party to the Lugano Convention. For details, email any of the contacts below or seek local legal advice.



Useful resources

- [Brexit: research and analysis](#) (House of Commons)
- [The Brexit Papers](#) (Bar Council)
- [National Brexit information in Member States](#) (European Commission compilation of measures taken by individual EU Member States to prepare for Brexit)



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