

## Corporate Newsletter

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## A hard Brexit for European cross-border dispute resolution? – What companies outside the EU and the UK should know (Part I)

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### A. INTRODUCTION

For Japanese companies, the European Union's ("EU") single market offers the possibility of conducting most of their European business through only one European headquarter. Before the United Kingdom's ("UK") withdrawal from the EU (so called "**Brexit**"), which ultimately became effective on 1 January 2021, this included access to the UK.

The EU and the UK agreed on the EU-UK Trade and Cooperation Agreement,<sup>1</sup> preventing a so-called "*hard Brexit*". This agreement now governs the EU-UK relationship and the regulatory framework for companies conducting cross-border commercial transactions between the UK and the EU's single market. In light of the Japan-EU (2019)<sup>2</sup> and Japan-UK (2021)<sup>3</sup> free trade agreements, there is no lack of potential business opportunities for Japanese companies in both the EU

<sup>1</sup> See for a comprehensive overview of the agreement on the EU's website at [https://ec.europa.eu/info/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement\\_en](https://ec.europa.eu/info/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en).

<sup>2</sup> The Japan-EU Economic Partnership Agreement came into force on 1 February 2019 and the full text can be found at <https://www.mofa.go.jp/files/000382106.pdf>.

<sup>3</sup> The Japan-UK Comprehensive Economic Partnership Agreement was signed on 23 October 2020 and came into force on 1 January 2021. See for the full text at: <https://www.mofa.go.jp/files/100111408.pdf>. This dynamic is further fueled by the UK's recent formal request to begin the Comprehensive and Progressive Agreement for Trans-Pacific Partnership accession process, to which Japan is a signatory. See for the UK's announcement at <https://www.gov.uk/government/news/formal-request-to-commence-uk-accession-negotiations-to-cptpp>.

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and UK. Most Japanese companies have and will continue to consider the influence of Brexit on their European business strategies, including the location and number of European offices.

While the EU-UK Trade and Cooperation Agreement addresses a wide range of issues, it does not address matters of judicial cooperation between the EU and UK in cross-border civil and commercial disputes. This leaves Japanese companies conducting business between the EU and UK in an ambiguous legal landscape when facing potential disputes. This newsletter addresses some of the key aspects of EU/UK cross-border dispute resolution *post* Brexit on the basis of the following example:

A Japanese company operates in Europe through a subsidiary with its office in Duesseldorf, Germany (“**JP Corp.**”). In January 2021, JP Corp. contracts with a London based company (“**GB Corp.**”, jointly with JP Corp., the “**Parties**”). In February 2021, a serious dispute arises between the contracting parties, making it imminent that either Party will sue the other.

Part I of this newsletter series will address issues of jurisdiction and service of process. In Part II, we will analyze questions of governing law and choice of law, taking of evidence, as well as recognition and enforcement of judgments.

## B. JURISDICTION

Determining “jurisdiction” answers the question of which court is the competent authority to hear and decide a particular dispute between parties. For the EU and UK, the answer to this question might be substantively different before and after Brexit. If the Parties wish to bring legal proceedings, they will need to consider whether the courts in Duesseldorf, London, or in a different country have jurisdiction to hear the dispute.

### I. Brussels I Regulation (recast)

Within the EU, the **Brussels I Regulation (recast)**<sup>4</sup> governs jurisdiction for proceedings initiated on or after 10 January 2015; it determines which court is competent to hear the dispute. Where the Brussels I Regulation (recast) is applicable, i.e. between EU Member States, it takes precedence over otherwise applicable international agreements or national laws. Before Brexit, the question of jurisdiction in a dispute between JP Corp. and GB Corp. would have been governed by the Brussels I Regulation (recast).

However, the Brussels I Regulation (recast) has ceased to apply to legal proceedings initiated after Brexit which are between a party from an EU Member State and one from the UK – without any direct replacement.<sup>5</sup> Generally speaking, under the Brussels I Regulation (recast), if a court of one EU Member State has jurisdiction over the dispute, another court addressed with the same dispute would have to stay the proceedings until the court with jurisdiction has decided on the matter. This is the default mechanism, regardless of where the proceeding was initiated first.

The Brussels I Regulation (recast) provides for an effective mechanism to determine jurisdiction and to avoid multiple simultaneous proceedings in different countries. For businesses operating across EU borders, in the case of a dispute, the Brussels I Regulation (recast) provides clarity around the assumption of jurisdiction – leading to a higher degree of

<sup>4</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), online at <https://eur-lex.europa.eu/eli/reg/2012/1215/2015-02-26>.

<sup>5</sup> A published letter on twitter (see <https://twitter.com/StevePeers/status/1359251129234837508/photo/1>) shows that it is the UK’s understanding, that the predecessor agreements to the Brussels I Regulation are not applicable post Brexit. See also <http://www.disputeresolutiongermany.com/2021/02/hard-brexit-for-judicial-cooperation-no-revival-of-brussels-rome-conventions/>. This is also supported by the *lex posterior derogat (legi) priori* principle, which essentially states that previous agreements are repealed by succeeding agreements governing the same subject.

predictability and certainty. Essentially, this limits potential tactical maneuvers by which parties and their counsel may try to delay or derail proceedings. Will these advantages (in the view of a party bringing a claim) or potential disadvantages (for a party being faced with a lawsuit) now be inapplicable in relation to a dispute between JP Corp. and GB Corp.?

## II. Lugano Convention

Another international convention governing the question of jurisdiction in civil and commercial matters is the 2007 **Lugano Convention**.<sup>6</sup> This convention is supplementary to the Brussels Regime and governs the question of jurisdiction between the EU Member States, Iceland, Switzerland, Norway and Denmark. It was mainly modeled after the Brussels I Regulation (recast)'s predecessor and contains similar rules. With Brexit, the UK also ceased to be a party to the 2007 Lugano Convention by virtue of the termination of its EU membership.

In April 2020, the UK applied to become a party of its own right to the Lugano Convention. Until now, the EU has signaled no willingness to approve the UK's application. This means the UK's application is pending for the time being, as all contracting states to the Lugano Convention have to approve a new applicant. Its framework would therefore not be applicable to the jurisdiction of courts in a dispute between JP Corp. and GB Corp.

## III. Hague Convention

In case JP Corp. and GB Corp. have expressly designated the jurisdiction of a particular court by way of a choice of court clause in their contract, the 2005 **Hague Convention on Choice of Court Agreements**<sup>7</sup> might become relevant. As both the UK and every EU Member State are parties to this convention, it may apply to cross-border disputes between the Parties even after Brexit. The Hague Convention on Choice of Court Agreements provides a framework under which disputing parties' exclusive choice of jurisdiction clauses are recognized and judgments rendered by courts based on them are enforceable. The Hague Convention on Choice of Court Agreements only applies to business-to-business disputes and exclusive jurisdiction clauses. Other disputes or jurisdiction clauses are subject to the otherwise applicable national laws.

The Parties' choice of court clause could for example state that disputes only should be brought in the courts of Paris, France. In this case, the courts in London or Duesseldorf would generally lack jurisdiction, even after Brexit.

Some legal uncertainty remains for contracts which were concluded before Brexit. The Hague Convention on Choice of Court Agreements has been in force throughout the EU since 1 October 2015. The UK became a contracting party of its own right as of 1 January 2021, i.e. after leaving the EU. However, since the UK was not a party of its own right when it was an EU Member State, it is uncertain whether courts of EU Member States will recognize the UK as a contracting state to the Hague Convention on Choice of Court Agreements for the time prior to its own accession to the Convention.<sup>8</sup>

Thus, in the alternative scenario where JP Corp. and GB Corp. had concluded a contract before Brexit containing an exclusive choice of jurisdiction of the courts of Paris, they run the risk that some EU Member States' courts might consider the clause as not being covered by the Hague Convention on Choice of Court Agreements. A court in Duesseldorf or Paris might not enforce the Parties' exclusive jurisdiction clause on the basis that the UK was not a member of its own right to the convention, while a court in London might see this differently and decline jurisdiction because the exclusive jurisdiction clause refers the Parties to the courts of Paris. It remains to be seen how the courts on each side of the Channel will deal with this issue.

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<sup>6</sup> Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007 in Lugano, online at <https://eur-lex.europa.eu/eli/convention/2007/712/oj>.

<sup>7</sup> Convention of 30 June 2005 on Choice of Court Agreements, online at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98>.

<sup>8</sup> European Commission, Notice to Stakeholders regarding the withdrawal of the United Kingdom and EU Rules in the field of civil justice and private international law, para. 3.3 online at [https://ec.europa.eu/info/sites/info/files/brexit\\_files/info\\_site/civil\\_justice\\_en.pdf](https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/civil_justice_en.pdf).

#### IV. The question of jurisdiction has become more complex

As the above shows, in a potential dispute between JP Corp. and GB Corp., Brexit has made the determination of court jurisdiction more complex. The Brussels I Regulation (recast) ceased to apply in EU-UK relations, and the Lugano Convention is yet to substitute it. The Hague Convention on Choice of Court Agreements is only applicable to a dispute between JP Corp. and GB Corp. if they have agreed on an exclusive choice of court agreement – and possibly only in the case where this occurred after Brexit.

In light of this, a company like JP Corp. involved in cross-border business activity with UK businesses, or vice versa, does not only have to diligently consider future contracts and disputes, but also would be well advised to review executed contracts containing jurisdiction clauses and consider the consequences for possible future disputes.

If JP Corp. and GB Corp. have not concluded an exclusive choice of court agreement after Brexit, the Parties could likely face a situation where there is no international agreement applicable to the question of jurisdiction between the UK and EU Member States – requiring resort to potentially diverging national laws to determine the question of jurisdiction.

#### C. SERVICE OF PROCESS

Service of process is the procedure by which a party initiating a lawsuit against another party gives the latter party appropriate notice of legal action, enabling the other party to properly respond to the proceedings. Service of process is therefore practically important in any dispute. Before Brexit, the EU Service Regulation<sup>9</sup> was applicable to the service of process between parties to a dispute residing in different EU Member States, including the UK. Under this Regulation, parties have a variety of methods available to ensure an efficient procedure, even if the detailed implementation still heavily depends on the individual Member States' national regulations. The system is far from perfect, as individual states can prevent direct service to the effect that even between EU Member States centralized bodies have to be involved in the service of process. The most recent reform attempts do not seem to have overcome this issue.<sup>10</sup> Nevertheless, the EU's recent reform of its Service Regulation bears potential for a broader digitalization and could make way for electronic service of process among EU Member States from 1 July 2022.<sup>11</sup>

After Brexit, however, the question of service of process between JP Corp. and GB Corp. is no longer governed by the EU framework, as the EU Service Regulation has ceased to apply. JP Corp. and GB Corp. have to resort to other applicable international agreements. For the service of process, the applicable international agreement is the 1965 **Hague Service Convention**,<sup>12</sup> which governs the service of process between its 78 contracting parties. The UK as well as all EU Member States are parties to this Convention.

If JP Corp. wants to initiate a dispute against GB Corp., it will have to effect service on GB Corp. in the UK. Absent an exclusive jurisdiction clause, JP Corp. may determine that a court in Duesseldorf has jurisdiction over its dispute with GB Corp. Under the Hague Service Convention, the most commonly used procedure would require JP Corp. to petition the

<sup>9</sup> Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), online at <https://eur-lex.europa.eu/eli/reg/2007/1393/2013-07-01>.

<sup>10</sup> See for this at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST\\_5722\\_2020\\_INIT&rid=5](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_5722_2020_INIT&rid=5) as well as a comment at <https://eapil.org/2020/02/19/towards-a-new-service-regulation-some-reflections/>.

<sup>11</sup> See for the Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast), online at <https://eur-lex.europa.eu/eli/reg/2020/1784/oj>. This reform will apply from 1 July 2022.

<sup>12</sup> Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, online at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=17>.

court in Duesseldorf to initiate the procedure. JP Corp. would have to fill out the Hague Service Convention's necessary model forms. This includes the request itself and an English summary of the documents to be served. The Duesseldorf court would then have to send the documents to a central authority in the UK. This authority could either freely choose any means of service of process valid under its own law or apply a method requested by JP Corp. As the Hague Service Convention does not contain any time limits, this can lead to a lengthy process, often stretching over several months.

In addition to the Hague Service Convention, service of process might be possible by the methods and proceedings set out in the law of the country in which the service is to be effected or by using consular authorities. To avoid lengthy and costly procedures, JP Corp. and GB Corp. could also consider appointing agents for service of process in the relevant jurisdiction. In case of a dispute and proceeding to be initiated in Duesseldorf, subject to an appointed agent of GB Corp. in Germany, JP Corp. could simply effect service of process through service to GB Corp.'s agent in Germany. This could be one way to streamline any potential problems with the service of process even before a dispute arises.

## D. CONCLUSION

Looking at only the questions faced by parties at the outset of a of cross-border dispute, it seems appropriate to refer to Brexit as a "*hard Brexit*" in the context of judicial cooperation in civil and commercial matters.<sup>13</sup> Companies entangled in cross-border disputes *post* Brexit are facing a different and likely less comfortable situation when dealing with questions of jurisdiction and service of process. In the case of jurisdiction, this likely even applies to contracts executed before Brexit. This warrants that, as a practical step, existing and new contracts should be carefully reviewed, and possibly adjusted, in order to ensure that the individual contractual provisions or general terms are still effectively reflecting the parties' intentions in the *post*-Brexit framework.

In our upcoming newsletter "*A hard Brexit for European cross-border dispute resolution? – What companies outside the EU and the UK should know (Part II)*", we will report on additional issues companies have to consider when resolving their disputes by way of litigation. This includes an analysis of the governing law and choice of law, the taking of evidence, as well as recognition and enforcement of judgments. Please stay tuned for more.

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<sup>13</sup> See for this characterization for example <http://www.disputeresolutiongermany.com/2020/12/judicial-cooperation-in-civil-matters-hard-brexit-after-all/>, <http://www.disputeresolutiongermany.com/2021/02/hard-brexit-for-judicial-cooperation-no-revival-of-brussels-rome-conventions/> and <https://twitter.com/GAVClaw/status/1359385553163202560>.



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