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Technical Notice – No Deal Brexit – Civil Litigation involving EU Member States

In November 2018, the European Union (the “EU”) and the United Kingdom (the “UK”) concluded the terms of a Withdrawal Agreement providing for the UK’s orderly departure from the EU. Gibraltar forms part of these arrangements. The Agreement includes a transition period until the end of 2020. The transition period would also apply to Gibraltar. The Agreement has been debated and voted upon at length but is still subject to ratification by the UK Parliament and the European Parliament.

The door is now open for a short extension to the Article 50 process. There will be an extension to 22 May if the Withdrawal Agreement is approved. The extension will run to 12 April if the Withdrawal Agreement is not approved.

In the meantime, HM Government of Gibraltar (“HMGoG”) continues to plan for the eventuality that the UK and Gibraltar may leave the EU without this Agreement.

Purpose

The purpose of this Notice is to explain the effect of a No-Deal exit from the EU on the handling of civil legal cases involving other EU jurisdictions. Therefore, this Notice covers rules such as those concerning applicable legislation in cross-border civil and commercial disputes, cross-border insolvency proceedings and matters of family law.

Existing Position

Gibraltar currently applies EU rules to determine:

- the courts of which jurisdiction should hear a civil, commercial or family law case raising cross-border issues with other EU Member States;
- which country’s laws apply;
- how a judgment obtained in Gibraltar or an EU Member State should be recognised and enforced in each other’s jurisdictions; and



- how cross-border legal procedural matters are handled (such as taking evidence in one country for use in proceedings in another).

Gibraltar also applies a number of international agreements applicable to it under its terms of membership of the EU. These agreements also enable elements of judicial cooperation with non-EU countries such as Switzerland, Norway and Iceland or other countries that are parties to those international conventions.

Gibraltar also applies international conventions that have been extended to it by the UK.

In case of a Withdrawal Agreement

With respect to the application of EU rules, if the Withdrawal Agreement enters into effect the status quo would remain up to the end of the transition period – that being 31 December 2020.

The position in relation to international conventions would remain unaltered by Gibraltar's departure from the EU where the UK is a member of such conventions in its own right and the relevant conventions have been extended to Gibraltar.

If there is no Withdrawal Agreement

In the event of a No-Deal Brexit there would be no reciprocal EU framework providing for ongoing civil judicial cooperation between Gibraltar and EU Member States. Notwithstanding the above, the Gibraltar European Union (Withdrawal) Act 2019 (the "Act"), will have the effect of converting EU law applicable to Gibraltar at the moment of exit into Gibraltar law. The Act will also create powers to enable corrections to be made to the laws that would otherwise no longer operate appropriately once Gibraltar has left the EU. Consequentially Gibraltar will, unilaterally and voluntarily, continue to apply EU law relevant to the areas described in this Notice.

Importantly however, EU Member States will not, post-Brexit, consider Gibraltar to be covered by EU rules. EU Member States will instead apply their own domestic rules covering non-EU Member States. Therefore, by way of example, the process of registering and enforcing a judgment order obtained in Gibraltar in an EU Member State may be more complex than is currently the case under relevant EU legal frameworks.

Furthermore, as detailed below, Gibraltar will continue to apply existing international agreements currently applicable to Gibraltar, such as the Hague Conventions.

Guidance concerning specific areas in a No-Deal scenario

- Civil and commercial judicial cooperation

As explained above, the Act will effectively migrate EU law, which currently has direct effect in Gibraltar, into Gibraltar domestic legislation so that those rules continue to apply as from exit day. Therefore, Gibraltar will, pursuant to domestic law, continue to apply inter alia the Brussels Ia Regulation[1], the Enforcement Order Regulation[2], the Order for Payment Regulation[3] and the



Small Claims Regulation[4]. Gibraltar will also continue to apply the EU/Denmark 2005 Agreement[5] (which extends the Brussels Ia rules to Denmark) and the Lugano Convention (which is the basis of Gibraltar's civil judicial relationship with Norway, Iceland and Switzerland). HMGoG will make any necessary corrections under the vires afforded by the Act to ensure the continued operability of these frameworks.

However, as previously underlined, Gibraltar will apply these measures unilaterally and not on the basis of reciprocity. Therefore if assistance is sought in the countries to which these EU rules apply, that assistance may need to be sought pursuant to the national legislation applicable in the countries concerned or pursuant to alternative international conventions. In the context of the latter, it is important to note that in a No-Deal scenario the UK will, in its own right, become a party to the 2005 Hague Convention on Choice of Courts Agreements and that that Convention will be extended to Gibraltar.

Separately, Gibraltar will retain Rome I[6] and Rome II[7] rules on applicable law in contractual and non-contractual matters. This will ensure that businesses and individuals will generally be able to continue to use the same rules as at present to determine which law would apply in cross-border disputes.

- Cross-border insolvency cooperation

By virtue of the Act, Gibraltar will also continue to apply the Insolvency Regulation[8]. Therefore, orders made pursuant to insolvency proceedings opened in EU Member States will be recognised in Gibraltar pursuant to the same rules.

However, applications may need to be made in accordance with an EU Member State's domestic legislation to have orders made in Gibraltar registered and recognised elsewhere in the EU.

Additionally, EU insolvency proceedings and judgments may continue to be recognised in Gibraltar under the UNCITRAL Model Law on Cross-Border Insolvency. This already forms part of Gibraltar's domestic rules on recognising foreign insolvencies. Gibraltar proceedings and judgments may also be recognised in EU Member States that have legislation based on the Model Law.

- Family law cooperation

In family law cooperation, the key EU regulations are Brussels IIa[9] and the Maintenance Regulation[10]. The Act provides for the continued application of these measures in Gibraltar.

Alternatively, in many cases, relevant Hague Conventions can be relied upon where these apply and Gibraltar has, for example, recently enacted legislation to implement the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance which will be extended to Gibraltar. Another example is the 1970 Hague Convention on the Recognition of Divorces and Legal Separations.

- Service of documents and the taking of evidence



Gibraltar will continue to implement the Service Regulation[11] and the Taking of Evidence Regulation[12]. Separately, Gibraltar will continue to participate in the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

- Matters involving other UK jurisdictions

As part of the EU, and with specific regard to proceedings involving the different jurisdictions that make up the UK, it was not always the case that EU rules applied as between, for example, Gibraltar and England & Wales. In relation to specific EU instruments legislation in place in Gibraltar did at times provide for the application of EU rules as between Gibraltar and the UK. For instance, Section 39(1) of the Civil Jurisdiction and Judgments Act, clarifies that Gibraltar and the United Kingdom shall be treated as if each were a separate Member State for all purposes connected to the Brussels Ia and Brussels IIa Regulations. Another example is the Insolvency (Cross Border Insolvencies) Regulations 2014 in connection with the operation of the Insolvency Regulation. These rules will not change.

All other cases, where Gibraltar and the UK are not to be treated as separate EU Member States for the purposes of applying EU instruments on civil and commercial judicial matters, would be unaffected by a No-Deal exit. In these cases, domestic rules, relevant to either the UK jurisdiction concerned or to Gibraltar, would apply as usual.

In the UK, the 1968 Brussels Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters shall, as a matter of English law, continue to apply as between Gibraltar and the UK by virtue of the Civil Jurisdiction and Judgments Act 1982 (Gibraltar) Order 1997.

Further information

This Notice is meant for guidance only.

HMGoG would advise any party to a cross-border legal dispute, including businesses, consumers and families, to consider the effect that these changes would have on any existing or future cases involving parties in EU Member States. Where appropriate, professional legal advice on the implications of these changes should be sought.

Footnotes:

1. 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.
2. Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.
3. Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.



4. Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.
5. Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
6. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.
7. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.
8. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.
9. Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.
10. Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.
11. 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).
12. Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.