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Brexit

Possible consequences for litigation

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When Article 50(3) is invoked there will be a two-year period in which the U.K will negotiate a new relationship with Europe. Until then the status quo continues to apply. The effect of Brexit goes well beyond trade or immigration. EU legislation is heavily enshrined in UK law for decades. Any primary legislation enacted to incorporate EU law would remain in place unless and until it is expressly repealed. However, EU law incorporated by secondary legislation would in all likelihood automatically disappear as soon as the UK Parliament repeals the European Communities Act, unless such repeal is with express savings. This table looks at the alterative models available to the UK and briefly summarises the possible/likely effect each would have.

	Current position within EU	**Norwegian Model**	**Swiss Model**	**Customs Union/WTO/Free Trade Agreement**
Jurisdiction	Brussels 1 – there is party autonomy to choice of jurisdiction. There is also mutual recognition of jurisdiction clauses. The court first seized would have to stay proceedings commenced in breach of an exclusive jurisdiction clause to allow the chosen court to rule on jurisdiction. The fall back in the event of no jurisdiction agreement/clause is that the defendant is sued where he is domiciled. [NB: Brussels 1 does not apply to arbitration].	Lugano convention – Brussels regulation – similar to Brussels 1 but lacks the clarity and benefits of Brussels 1. Does not oblige an EU member state court to stay proceedings commenced in breach of an exclusive jurisdiction clause to allow the chosen court to rule on jurisdiction. Therefore there are risks of 'court first seized' /torpedo actions.		Hague Convention – applies only to exclusive jurisdiction clauses. Common Law – forum Conveniens principles apply – the English court will consider any relationship the dispute has with the jurisdiction.
Enforcement of judgments and orders	Brussels 1 – there is mutual recognition and reciprocal enforcement of civil court judgments and orders. [NB: it does not apply to arbitration awards or court orders giving judicial force to an arbitration award.] Also, the EEO Regulation can be used in the event of a judgment/order by consent; a default judgment; or a judgment obtained after a trial in which the defendant did not defend the claim in court.	Lugano Convention - broadly the same as Brussels 1. However, unlike in Brussels 1 the court in the enforcing state may refuse to enforce a judgment on the basis that: 1. it contravenes public policy; 2. the debtor did not have enough time to respond to the claim; 3. the judgment is irreconcilable with a judgment given in a dispute between the same parties in the enforcing state.		The UK may try to enter agreements to maintain reciprocity for enforcement of UK judgments with each EU member state. Failing such agreement the common law position for enforcing a foreign judgment applies requiring determination of the substance of the dispute. Member states are also likely to require a re-determination of the case or determine enforceability according to their own national laws. There is a risk that declaratory orders and injunctions issued by the UK courts will not be recognised by courts of member states. NB: The Administration of Justice Act and Foreign Judgments (Reciprocal Enforcement) Act between them cover enforcement in Commonwealth Countries and Crown states such as the Isle of Man.

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Service	Service Regulation 1393/2007 – there is no need to obtain permission from the court to issue or serve proceedings out of the jurisdiction on a defendant in an EU member state. The regulation permits a wide variety of methods of service and is quick and cost effective.	Lugano Convention – no permission is required for issuance and service of proceedings outside the jurisdiction to a defendant in a Lugano state country.		Issuance and service of proceedings on a Defendant in a Hague Convention signatory state does not require the permission of the court. However the Hague convention is limited to exclusive jurisdiction agreements and service is slower as it has to be done via a central authority designated by the state. Where the Hague Convention does not apply, then (unless there are reciprocal arrangements in place) permission for issuance and service out would be required.
Choice of law	Rome I contracts – contracting parties choose the law that applies to their contract. Rome II – torts – Parties have the right to choose which law applies to non contractual relations between them. Article 4 concentrates on the location of any damage in deciding the applicable law.	The UK could choose to continue to apply Rome I and II. The EU courts apply Rome I/II even if the parties to the dispute are not from an EU member state and so would continue to do so even if a UK person or entity are party to the proceedings. Alternatively, the UK can revert back to the Rules in place pre Rome I/II. The Rome Convention and the Contracts Applicable Law Act 1990 both respect the parties' choice of law in contractual disputes. The position in tort/non contractual matters is different as unlike Rome II the Private International (Misc) Provisions Act 1995 focuses on the country in which the tort occurred rather than the location of the damage. Furthermore, unlike the position under Rome II, the parties will no longer have an express right to choose which law applies to non-contractual relations between them.		
		The UK's obligations under the EEA Agreement include an obligation that EU legislation continues to be incorporated into English law, but only as regards those matters covered by the EEA Agreement.		The UK would not have to incorporate any EU legislation into English law.

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<tr><td>Anti-suit injunctions

Issued by the court</td><td>It is not possible to obtain an anti-suit injunction to stop proceedings in another EU member state court in breach of an exclusive jurisdiction clause providing for English court or arbitration proceedings (court: Turner & Grovit [2004] 2 LLR 169/ arbitration: West Tankers C-185/07) as such injunctions undermine the principles of comity and mutual trust.

It is arguable, but has not yet been tested, that the Gazprom decision permits the issuance of an anti-suit injunction by the Court in support of arbitration.

Although Gazprom concerned the original Brussels Regulation the Attorney General Wathelet considered Brussels I recital 12 in Gazprom and stated that West Tankers would be decided differently under Brussels I as applications for anti-suits would amount to ‘ancillary proceedings’ expressly permitted by recital 12(4).

The CJEU in Gazprom limited its decision to the original Brussels Regulation holding that the Regulation regulates conflicts of jurisdiction as between member state courts, not courts and tribunals. The principles of mutual trust are not engaged by arbitration.</td><td colspan="2">It is not clear whether such injunctions could resume if the UK becomes a member of the EEA/EFTA as the Lugano Convention would apply and the Front Comor case (C-185/07) held that there is no jurisdiction to grant an anti-suit injunction to restrain a person from commencing or continuing proceedings before the courts of a Member State or a Lugano Convention Country.

However, the English Court might arguably decide to follow the ‘spirit’ of Gazprom.

Whichever model is agreed the process for service of proceedings and enforcing any anti-suit injunction obtained might be affected by any change in the provisions regarding service, recognition and enforcement. While local courts and or respondents might ignore any such anti-suit it would still be an effective tool as ignoring such an injunction is contempt of court and puts the respondent/its directors at risk of being imprisoned or fined and any assets they might have in the UK would be at risk.</td><td>It is expected that a Customs Union or WTO model outside the EU/EEA/EFTA would permit such anti-suit injunctions.</td></tr>
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	Current position within EU	**Norwegian Model**	**Swiss Model**	**Customs Union/WTO/Free Trade Agreement**
Issued by the tribunal	It is possible to obtain and enforce an anti suit injunction Award issued by an arbitral tribunal in support of arbitration proceedings, as the CJEU decision in the Gazprom case (C-0536/13) held that there is nothing in the Brussels Regulation that precludes an EU court from giving effect to an anti-suit injunction Award issued by an arbitral tribunal.	The Norwegian/Swiss models however might arguably prejudice the position as the Lugano Convention does not contain recital 12. Much will depend on any case law emanating from the English Court on this issue as arbitral tribunals follow legal precedent. In the meantime, unless and until such case law arises any an applicant for such an anti suit Award could try to persuade the tribunal to follow the 'spirit' of Gazprom.		It is expected that the position with a model outside the EEA/EFTA would not alter the position. Any arbitration Award granting an anti suit would continue to be enforceable under the New York Convention.
Enforcement of Arbitration Awards	Brussels 1 does not apply to arbitrations. Enforcement in New York Convention Signatory states is via the New York Convention.	Enforcement in NY Convention signatory states would continue to be via the New York Convention. If the Award is turned into a UK judgment then the position would be as for UK judgments – see above. Note that Brussels 1 does not apply to arbitration awards, including court orders which give judicial force to arbitration awards.		
Commercial Agents	Council Directive 86/653/EEC implemented by Commercial Agents (Council Directive) Regulations provide for co-ordination of laws across European member states with regard to protection of commercial agents. On termination an agent is entitled to: unpaid commission; minimum notice; pipeline commission; an indemnity or compensation. The Regulations have been implemented by statutory instrument. The English court interpretation of the Regulations is that they apply only in relation to goods agents and do not apply to agents who deal solely in services.	Similar provisions apply in each of the EEA countries. It is expected that access to the internal market for goods and services would require the UK to have the same or similar commercial agent laws as other EU countries. At the moment UK courts would currently have to follow any decision of the CJEU in their interpretation of the Regulations. If the UK were to leave the EU and implement its own legislation along similar lines to the Regulations it would be open to the UK courts to interpret the legislation without any interference from the CJEU.		Once the European Communities Act is repealed any statutory instruments brought into being under it fall away. Should this occur it would totally wipe out the Regulations and the protection afforded to commercial agents through them. The UK could either choose to "save" the Regulations when the Act is repealed or pass a new Act of Parliament with the same or similar protections for agents. If the law changes substantially then it is likely that the case law developed under the Regulations may become obsolete.

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Sale of Goods and Consumer law	The Consumer Credit Act 1974, the Unfair Contract Terms Act 1977, the Sale of Goods Act 1979 and the Food Safety Act 1990 have all been legislated by way of implementation of EU consumer law, which allows each member state to implement its own policies. Injunctions Directive 98/27/EC allows independent public bodies to exercise injunctions where consumers have suffered collective harm; the Regulation on Consumer Protection Co-operation EC No 2006/2004 co-ordinates enforcement action between member states; and the Consumer Rights Directive 2011/83/EU is intended to simplify consumer rights when buying or selling goods and services. The Consumer Agenda for 2014-2020 is aimed at: 1- improving safety, 2- enhancing knowledge so that the consumer can make an informed choice, 3- improve implementation / enforcement of consumer protection rules; and 4- align rights and policies to economic and societal change.	The EEA Agreement incorporated the Consumer Agenda on 14/11/2014 and Annex XIX to the EEA Agreement covers consumer protection so if the UK becomes an EEA/EFTA state EU consumer law would continue to apply.	Will depend on bilateral agreements.	The UK is unlikely to but could repeal EU consumer legislation and would not have to follow the Consumer Agenda. However, if UK businesses wish to continue to export goods to the EU or any EEA/EFTA state then the UK would have to negotiate with the EU an agreement which would ensure equivalent standards for any goods sold to EU customers and would have to follow formal steps for approval of imports into the EU.

	Current position within EU	**Norwegian Model**	**Swiss Model**	**Customs Union/WTO/Free Trade Agreement**
Influence of EFTA/CJEU courts	Must follow CJEU. Refer issues to CJEU for guidance.	Subject to EFTA court which follows CJEU. Can't refer to CJEU for guidance/interpretation of EU regulations/laws – risk of diversion from decisions of other member states.	Follows EFTA court which follows CJEU.	No longer subject to EFTA or CJEU courts.
Human Rights	The ECHR predates the EU and the UK's obligations under the convention would continue to apply. Brexit would not affect the UK's ECHR obligations, the application of the Human Rights Act or the UK court's relationship with the European Court of Human Rights.			However, it is open to the UK in the event of total Brexit to withdraw from the ECHR.
Company Law	Company law is largely left to the individual state to regulate and is primarily a matter for domestic law. That said, the Regulation on the Statute for a European Company Council Directive 2003/72/EC and Regulation on the European Economic Interest Grouping provide legal provisions for the creation of legal entities which facilitate closer business relationships across member states. The Regulation on the application of International Accounting standards requires EU listed companies to produce group accounts in accordance with International Accounting Standards. There are also directives covering among other matters the disclosure of company documents, the validity of obligations entered into by a company, and nullity, the formation	EU company law is covered by Article 77 and Annex XXII of the EEA Agreement. Therefore, should the UK adopt the Norwegian or Swiss model by joining EEA/EFTA it would still be bound by the rules of EU company law. The UK would be required to comply in full with almost all EU corporate laws and regulations, including those it is opposed to. The UK could however try to negotiate dispensations, but such negotiations are not guaranteed to succeed.	Under the Swiss model or a total exit Companies would only have to abide by international standards of accounting and reporting and would not have to follow EU Company law. However one must keep in mind that UK companies wishing to trade in the EU or to open offices there would still have to comply with all relevant EU directives. It is open to the UK to agree to continue to abide by existing EU Company Law as part of the exit arrangements.	

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	of public limited companies and their capital arrangements, foreign branches and single member companies.			
Competition Mergers & Acquisitions and State Aid	UK's national competition laws are based on EU competition rules and sometimes go beyond the EU regime. The UK Competition Authority is currently empowered to enforce EU and UK competition rules. The Competition Act 1998 (s60) provides that the Competition and Markets Authority and the UK Courts must be consistent with EU Competition law and the decisions of the EU Courts and have regard to the decisions of the European Commission. State Aid granted by a member state favouring certain undertakings or the production of certain goods distorting competition is currently prohibited unless it is approved in advance by the European Commission.	There would be little change as the EEA largely replicates the EU competition rules and has similar State Aid rules enforced by the EFTA Surveillance Authority which has the same enforcement powers as the European Commission. The UK would still be required under the current EEA Agreement to comply with the EU Takeovers Directive. The EU Cross Border Merger Directive would continue to apply	Switzerland only participates in the EU competition regime via bilateral agreements, and so much will depend on the terms of any such agreements	EU competition law applies where business is conducted and not where the company doing business is domiciled. Therefore, any UK companies wishing to conduct business within the EU would still have to comply with EU Competition law in any event. EU anti-trust rules apply to the behaviour of companies (whether or not they are domiciled within the EU) if their conduct has an appreciable effect on trade between EU Member States so UK Companies would still have to be wary of these rules. Competition rules applicable in the UK would be decided at a national level. The UK's national laws prohibiting anti-competitive agreements are substantially the same as EU rules and unlikely to change. However, the European Commission and the Competition Market Authority might both have jurisdiction to enforce competition rules and companies might find themselves subject to two investigations and two sets of penalties. Companies domiciled within the UK would no longer benefit from the 'one stop shop' and would have to file merger control notifications at both UK and EU levels and may be subject to parallel anti-trust investigations in both the UK and the EU. UK business (both domestic firms and foreign ones based in the UK) could face compliance issues in the event that the UK regime diverges significantly from the EU regime. State Aid Rules would cease to apply to the UK.

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Money Laundering Regulations	The Financial Action Task Force's recommendations 2012 were incorporated by the EU in the Fourth Money Laundering Directive. The UK along with the majority of EU member states is a member of the FATF and is therefore bound by the FATF's rules irrespective of its membership in the EU. Furthermore the UK has chosen to abide by a higher standard than that set by EU law in implementing the FATF rules, so there are unlikely to be any changes or any significant changes to the money laundering rules.			