# English Court disputes in 2020:

## The English Court's approach to jurisdiction, service and case management in the midst of the global pandemic

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# Introduction

## “Nobody knows anything.”

(*Adventures in the Screen Trade* by William Goldman (1983))

We live in extraordinary and uncertain times. Any prediction about the state of the global economy, or indeed the European litigation market, in the years to come is tentative at best, at this time. The serious level of uncertainty across all industries and jurisdictions has not, however, stopped many from making bold statements about commercial disputes in the English courts. There are, for example, predictions of a ‘litigation tsunami’ in London, to rival that which occurred in 2009. The prospect of English law disputes turning upon force majeure provisions, and whether the COVID-19 pandemic is a force majeure event, has been mooted for some months now. Lord Neuberger, the former president of the Supreme Court, stated, in April 2020, that “the legal world has a duty to the rest of the world to prepare itself” for the morass of claims arising from the pandemic, and that some forms of “breathing space”, including early mediation, should be considered by all commercial parties, to avoid a deluge of litigation.

However, we are not convinced that force majeure disputes will necessarily lead to a surge of court disputes. Litigation turns upon factors other than just the substantive law. Reputational considerations must be considered. It will be testing, for example, for UK retail banks, acting as lenders, to insist upon strict contractual performance against borrowers, when the UK government has been repeatedly vocal about the need for the banking community to assist small businesses. Strategic issues are also relevant. It will not always be attractive for parties to rely upon force majeure provisions in long-term litigation, in order to avoid contractual performance for a significant period of time, when the consequences of failing in such an argument will be severe. It may well be the case that force majeure disputes will be ripe for settlement, with each side affording the other some ‘breathing space’.



## The litigation landscape in London

We do, however, expect the English courts to remain busy throughout 2020 and 2021. The attraction of England as a forum for commercial disputes is well known and will likely remain so. But, in our view, there are a number of procedural issues that will impact upon the popularity of the English courts, and the manner in which cases will be litigated in this jurisdiction, particularly since COVID-19 continues to affect all of our everyday working lives. Many of these procedural issues have attracted little fanfare or press comment. There has, of course, been wide-spread praise for the manner in which the English courts have conducted virtual hearings in 2020. The courts do deserve recognition for this achievement, but it does not surprise us. The English courts have long been comfortable with the prospect of witnesses providing testimony via video link or other media. We should also not lose sight of the fact that Commercial Court judges, in London, are hardly technophobes. In our experience, they are as comfortable with technology as those that appear before them.

That being said, the courts have traditionally expressed reluctance in permitting significant witness evidence to be given by video link or other media, particularly in disputes turning upon the credibility of witnesses of fact. However, our own recent experience of remote hearings is that the cross-examination of witnesses can be carried out effectively via video-conferencing platforms. This now appears to be an increasingly widespread view, and we expect the courts to continue to show such flexibility going forward, even when travel restrictions have been lifted. That change of approach may have consequences beyond practicalities. For example, jurisdiction disputes often in-volve questions as to the prejudice or difficulties faced by foreign parties or witnesses participating in English court hearings. Those prejudices will, we predict, be considered less significant as travel to London will not always be necessary for each participant or witness. The ability of foreign defendants to avoid English court litigation, on the basis of practicalities, may therefore be impacted.

Finally, no discussion or prediction about the London litigation landscape can avoid Brexit. It is, again, a subject of increasing global attention, and will continue to be so, as we head towards the end of 2020. Likely regulatory changes resulting from Brexit may have consequences as significant as those caused by the COVID-19 pandemic.

We summarise below a number of procedural and substantive issues that, despite the lack of commentary or scrutiny, will be important to consider for those that wish to bring proceedings in this jurisdiction, or find themselves facing such proceedings. There are, of course, any number of other issues which will impact upon litigation in England. The UK government has, for example, recently passed the Corporate Insolvency and Governance Act 2020, which limits the entitlement of creditors to petition for the winding up of a UK company on the basis of its inability to pay debts during the COVID-19 period. We do not deny the importance of this legislation and key court decisions. However, the purpose of this newsletter is to comment upon other issues, which may have not attracted the same level of press attention but are nevertheless likely to be important to any party facing or contemplating litigation in London. In English court litigation, the devil is often in the detail. This, our second newsletter, therefore comprises articles on the following topics:

(i) Our update on procedural changes recently imposed as a result of COVID-19

(ii) Our own recent experiences in relation to practical considerations surrounding the service and timings of litigation

(iii) The potential fall-out of EU regulatory changes arising from Brexit, and the prospect of the return of the ‘Italian torpedo’

We hope it goes without saying that Reed Smith has been involved in a number of the cases, referred to in this newsletter.


# Temporary and permanent changes to civil procedure in light of the Covid-19 pandemic

The courts have not been slow to recognise and address the need for reform, in light of the extraordinary circumstances of 2020. The principal procedural rules for London commercial litigation, the Civil Procedure Rules (the CPR) and their Practice Directions (PD), have recently been updated to address the impact of the pandemic, but in a manner that may permanently affect foreign litigants. We summarise below some of those key changes.

## Temporary changes to the CPR

### Extensions of time

Litigants have long been able to agree changes to court deadlines, where there is an express or implied sanction for non-compliance, as long as they do not put a hearing date at risk. Such extensions could be up to a maximum of 28 days. This is in addition to the parties' abilities to agree extensions for an indefinite period of time, where there are no express or implied sanctions. But that has now changed. In response to the pandemic, a new, temporary PD (PD 51ZA) was enacted. This effectively doubles the maximum amount of time available to parties to agree changes to court deadlines, irrespective of whether they contain a sanction for non-compliance. Accordingly, parties may now agree extensions of up to 56 days for court deadlines, as long as a hearing date is not put at risk, without having to notify or seek approval from the court. This extension came into effect on 6 April 2020 and will be in force up until 30 October 2020. PD 51ZA also expressly requires the court to consider longer extensions and to take into account the impact of the pandemic when considering such applications.

While the above is of interest to both claimants and defendants in proceedings, unfortunately for defendants, the temporary extension does not seem to apply to the filing and serving of a defence. We would nevertheless expect the court to be sympathetic to extensions of the time for any defence in the current environment, but it is important that defendants do not rely, say, upon the hope of agreement with opposing counsel on this issue.

In terms of the court's sympathies, it appears to be alive to parties seeking advantages, due to timing constraints caused by the pandemic. In *Stanley v. London Borough of Tower Hamlets* [2020] EWHC 1622 (QB), an application to set aside a default judgment succeeded, due to the extraordinary events that preceded the application. The claimant had, in that case, served its claim form on the defendant at its London offices two days after the UK government imposed lockdown restrictions, which included the prevention of all non-essential travel to work. The court was prepared to set aside the default judgment due to the "unprecedented national health emergency".



## Permanent changes to the CPR

### Statements of truth

Following a Court of Appeal judgment in *Liverpool Victoria Insurance Company Limited v. Dr Asef Zafar* [2019] EWCA 392 (Civ), as of 6 April 2020, documents which require a signed statement, confirming a belief in the truth of the facts within that document, must now also require the signatory to make the statement: "I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth." The penalty for verifying a document containing a false statement without an honest belief as to its truth has long been contempt of court. This amendment, however, confirms the English court's clear stance on the issue.

### Witness statements

Changes were also made in respect of witness statements from witnesses who speak a foreign language. From 6 April 2020, if the witness giving a statement is providing their statement in a language other than English, the witness statement and statement of truth must be in the witnesses' own language. Moreover, the witness statement must provide details of the process by which it was prepared, including whether an interpreter was used. If a party wishes to rely on a foreign language witness statement, it must file the foreign language witness statement with the court, have it translated and the translator must sign the original statement confirming that the translation is accurate. The witness statement must include the date of translation in the top right-hand corner. These are, of course, sensible, pragmatic expectations made by the court, but they must be followed. They are particularly important to bear in mind if the dispute is conducted with urgency, as these steps, whilst sensible, may take a little while to fulfil.

### Remote hearings

While not a strict update to the CPR, the courts have produced a 'Protocol Regarding Remote Hearings' paper which confirms that, where possible, hearings, whether they are applications or full trials, will be held remotely during the COVID-19 pandemic. Therefore, foreign clients and witnesses should not assume that, due to travel restrictions, and with the majority of the workforce still working from home, hearings will not go ahead.

The use of remote hearings in English litigation has attracted significant and positive press attention. There is likely to be a fundamental shift in the court's approach to the use of technology in conducting hearings. We give two examples of the court's recent willingness to embrace the virtual world.

First, in *National Bank of Kazakhstan v. Bank of New York Mellon* (unreported, 19 March 2020), an application was made for the hearing to be adjourned, given the pandemic and the inability of the parties to attend in person. Submissions were made that the proposed technological solution for the hearing would be an "unmitigated disaster". Rejecting the application, Mr Justice Teare directed the parties to use their best efforts to accommodate the entire trial remotely, via video-conference.

The judge held that the "default position now in all jurisdictions must be that a hearing should be conducted with one, more than one, or all participants attending remotely" and "it is incumbent on the parties to seek to arrange a remote hearing if at all possible".

Second, in *Re One Blackfriars Ltd (In Liquidation)* [2020] EWHC 845 (Ch), the action involved a five-week trial, listed in June 2020. An adjournment was sought by one side for COVID-19 reasons. The trial was scheduled to involve four witnesses of fact and thirteen expert witnesses. If the application to adjourn was successful, the next available trial date would have been in June 2021. The application to adjourn was dismissed. In particular, the judge held that recent legislation, notably in the form of the Coronavirus Act 2020, sent "a very clear message that [Parliament] expects the courts to continue to function so far as they able to do safely by means of the increased use of technology to facilitate remote trials".

Notwithstanding the above, we express some caution about the universal nature of this shift in approach. First, we expect that, with the passage of time, the court will plainly return to physical hearings, and the location of the Royal Courts of Justice in London, together with the London legal community, will mean that there will be a return, in large part, to substantive hearings and, in particular, trials being held in person. Second, even at this time, it should not be assumed that all foreign governments are willing to allow their nationals or others within their jurisdictions to be examined over a video-conferencing system before a court in England. Not all logistical challenges to remote trials will be overcome.

Finally, we note, from our experience, that the long-standing rules on witness evidence were not designed for witnesses to provide evidence abroad while the whole hearing is conducted remotely. Therefore, it may be appropriate to ask the witness, while they are providing their evidence, to confirm that they are alone in the room and that they are not receiving any assistance from third parties during the hearing. Additionally, providing more than one camera in the room in which the witness is providing testimony may be required to ensure the witness is not referring to notes or being prompted. We recommend that any witness providing evidence remotely is warned that their testimony may be recorded and/or livestreamed and that references may be made to the video of them providing evidence.

# Practical considerations relating to service of English proceedings out of the jurisdictsion

Claimants looking to serve English proceedings on foreign defendants out of the jurisdiction are often faced with complex substantive and logistical issues in doing so. Questions surrounding jurisdiction, and whether the claimant has permission to serve proceedings out of the jurisdiction, are regularly the subject of comment and analysis in the legal press. In this note, we instead reflect on some of the practical and logistical considerations connected with the application to the English court for permission to serve, and the actual exercise of serving, English proceedings on a foreign defendant. In considering these practical and logistical issues, we also look at the ongoing impact of Brexit and the Covid-19 pandemic on the most commonly used routes for service out of the jurisdiction.[1]

## The application for permission – timings and practical points

If the claimant concludes that the court's permission for service out of the jurisdiction is required, then the claimant must submit an application for such permission. More often than not, the application for permission and the evidence in support will be lengthy and cover a significant amount of ground. The claimant has to meet tests around the strength of its case, to ensure that a jurisdictional gateway under the CPR is correctly triggered and that England is the proper forum for the dispute. But, as the application is made without notice to the defendant, the claimant also has a duty of full and frank disclosure to the court. That means setting out as best it can all and any objections that a defendant might conceivably have to the application. For claims of certain value and complexity, this can be an extensive and time-consuming exercise.

One immediate concern is that, under CPR 7.5 (2), the claimant only has six months from the date of issue to serve proceedings on a foreign defendant outside of the jurisdiction. Rarely is that enough time to conclude whether the court's permission is necessary, make any necessary application and then serve the proceedings on the defendant. However, it is still vital that the application is made as soon as possible before the expiry of the six month period following the date of issue provided for service of proceedings outside of the jurisdiction. While the court is willing to grant extensions of time for service of the claim form both prospectively and, albeit less readily and only where there are good reasons, retrospectively, it will expect the claimant to have done as much as it could within the six month period to clarify the permission question, to have sought, if necessary, permission and to have begun the process of service. The court will not be impressed if the claimant sits on its hands until towards the end of the six month period, especially if there are limitation issues connected with its claim.



As at the date of this newsletter, it is not currently clear what material effect the Covid-19 pandemic is having or has had on the permission application process. Our sense is that those applications which can be dealt with 'on paper' are being considered by the English court at the normal rate. What is less clear is when a judge considers a hearing is required. That might take time to arrange and will almost certainly have to take place on a remote basis in the short to medium term. In short, this is yet another reason for the claimant to avoid delay.

## Effecting service abroad – points to consider

Service of foreign proceedings can, in theory, be effected under one of the methods allowed for under the following:

(i) The EU Service Regulation (1393/2007/EC) (the Service Regulation).

(ii) Any Civil Procedure Convention, as defined at CPR 6.31 (c) and which includes the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Convention).

(iii) If the law of the destination state permits, through the judicial authorities of that country, (in certain circumstances) through the country's government, through a British consular authority in that country, or through any other method permitted by the law of the country in which they are to be served.

The Service Regulation and the Hague Convention are the two most commonly used routes, albeit that, as we explain below, the former may cease to be relevant following the end of the post-Brexit transition period. The rules involved, as well as the approach of the relevant part of the English court involved, can seem esoteric, but it is vital that the claimant fully understands and adheres to the necessary procedure to be followed.

## Service under the Service Regulation

The Service Regulation takes precedence over all other agreements, including the Hague Convention, when it comes to the service of proceedings between parties in EU member states. There are four permitted methods of service under the Service Regulation: the transmission method (under which each member state must designate public officers, authorities or other persons to act as transmitting agencies for the transmission of judicial documents, and as receiving agencies for receiving such documents); by post; by direct service through judicial officers, officials or other competent persons of the member state addressed; or through diplomatic or consular agents of the member states involved.

The transmission method is the most commonly used. Under that method, it is vital the claimant obtains as much guidance and information from the English court's Foreign Process Section (FPS) as possible on service in the member state in question and, after the request for service has been sent by the FPS, maintains a regular dialogue with it on progress with the request, so the claimant is able to explain fully to the court the status of its request for service should a further extension of time be needed for service of the claim form.

As to the other methods provided for by the Service Regulation, while they might ostensibly appear a quicker way of effecting service than the transmission method, they carry with them their own particular risks and do not require the FPS and its counterpart in the destination member state taking responsibility for service of the documents. For example, in the absence of an acknowledgment of receipt of documents served by the postal method, the claimant may find it has issues evidencing service has in fact been completed. Likewise, in respect of the direct service method, careful attention should be paid to who is authorised to effect service according to the law of the member state.[2] In fact, as a general rule, the claimant should be sure to check the particular service requirements of the member state in which documents are to be served before taking any steps under any of the methods provided for by the Service Regulation.

## The potential impact of Brexit

Brexit inevitably acts as a significant qualification to the use of the Service Regulation by claimants who have issued proceedings in England and Wales. As matters stand, with the UK now having left the EU earlier this year, the Service Regulation will only continue to have effect until the end of the transition period on 31 December 2020, and UK legislation to be enacted on that day will prevent the Service Regulation from subsequently being incorporated into English law.

There are currently no plans for the UK and the remaining member states to adopt an equivalent convention or treaty. While this could change between now and the end of the transition period, as the UK and the vast majority of the remaining member states are all contracting parties to the Hague Convention,[3] that convention will likely govern most requests for service of proceedings out of the jurisdiction after 31 December 2020.

What is not clear is what will happen to requests for service under the Service Regulation made, but not completed, before 31 December 2020, including where the requests have been sent on by the FPS to the receiving agency in question. It may be that, as the receiving agency in the member state in question often doubles as the "central authority" for the purposes of the Hague Convention, the states involved can find some way for the service process in question to continue. In any event, if a claimant finds itself in this position, it should make sure it is in regular contact with the FPS regarding the status of its request for service and take any steps as necessary as soon as it can to extend time for service of the claim form.

## Service under the Hague Convention

If the Service Regulation does not apply, it is likely, depending on the destination state in question, that the claimant will look to serve under the Hague Convention.

The primary method of service under the Hague Convention is through a "central authority", established by each contracting state, which is authorised to transmit and receive requests for service. In England and Wales, the designated central authority is the Senior Master; in practical terms, their obligations under the Hague Convention are carried out by the FPS.

When serving from England and Wales through a central authority under the Hague Convention, the claimant must file certain prescribed documents with the FPS for onward transmission to the central authority of the destination state. The claimant will also need to provide translations of the documents to be served in the official language of the destination state, as well as duplicates of all documents, in both English and foreign language versions. Once the documents for service are filed, the FPS will forward them to the central authority of the destination state.

The Hague Convention also permits service through consular and diplomatic agents, by post, through judicial officers or under any bilateral agreement concluded between the contracting states in question. It may be, on grounds of costs and expediency, those methods appear more attractive than the central authority route, but, as with service under the alternative methods provided under the Service Regulation, the claimant must carefully consider whether the method in question is permitted under the local law of the destination state, whether the destination state has objected to the method in its accession to the Hague Convention or whether the method might carry with it increased difficulty when it comes to evidencing that service has taken place.

## The likely length of time to serve under the Service Regulation and Hague Convention

A real and material concern for both parties and the court is how long service outside of the jurisdiction takes when using the transmission method under the Service Regulation or the central authority route under the Hague Convention. Our experience and the indicative timeframes provided by the FPS suggest anything from a matter of months in Service Regulation cases to over a year where the Hague Convention is involved.

We have also seen instances where, through no fault of the claimant, the method of service cannot be completed. That might be because, for example, the way in which the destination state's central authority processes requests for service provides an opportunity for the defendant to easily avoid or refuse being served with the documents.

Where does that leave the claimant, especially when a significant period of time may have elapsed since proceedings were first issued? Does it have to begin the service process again from scratch? Not necessarily. If established processes of service out of the jurisdiction have effectively left the litigation in limbo and the claimant has done all it can to serve proceedings using the traditional channels, then the English court is able to consider alternative methods of service under CPR 6.15 (for example, to an email address the claimant knows is used by the defendant, or on English solicitors who have been instructed but not authorised to accept service of proceedings) or to dispense with formal service of the claim form altogether under CPR 6.16. These applications are not readily granted, so the claimant will need to be able to explain that it has acted promptly in all attempts to serve proceedings, that it has exhausted all conventional methods of service and that, in the case of alternative service, there is an obvious method which should now be allowed in the circumstances of that particular case and in the interests of justice.

## The impact of COVID-19 on service out of the jurisdiction

Predictably, the global pandemic has had a significant impact on the service of English proceedings out of the jurisdiction, especially on the commonly used routes outlined above involving the FPS. In April 2020, the Senior Master published various changes to the operation of the FPS as a consequence of COVID-19. These changes included the suspension of the processing of requests for service of court documents on parties outside of the jurisdiction, and the suspension of service through foreign governments, judicial authorities or British consular authorities. This meant the effective suspension of proceedings issued against defendants based out of the jurisdiction, where service required the input of the English court system.

Those suspensions have now been recently lifted, and the FPS is now, as at the date of this newsletter, able to process requests for service of proceedings on defendants based outside of the jurisdiction. That said, we note two points of caution.

First, it is not clear what type of backlog the COVID-19 related suspension has created for the FPS, and it may be some time before it can be expected to return to processing requests at the rate it did prior to the pandemic.

Second, the impact of COVID-19 in the UK is not the only relevant factor a claimant needs to consider. There is also the impact COVID-19 may well have had on the destination state and the infrastructure it has in place for the processing of requests for service. In addition, there are other practical issues to consider arising from how governments around the globe are tackling the virus; for example, a destination state's policies on social distancing may well have a direct effect on whether service can actually be completed in accordance with local law.

As with the application for permission and initiating the service process, the English court will expect the claimant to be proactive and to act without delay. If the court is satisfied it has, then it is likely to look favourably on applications the claimant makes to either provide more for service of the claim form to take place through a traditional channel, or to otherwise enable the litigation to move forward.

# The cross-border regime in England in the aftermath of Brexit

## Introduction

The United Kingdom (the "UK") formally left the European Union (the "EU") on 31 January 2020, with the Brexit transition period currently set to conclude on 31 December 2020, and with it the end of the UK's membership of the EU.

A key procedural question arises in these circumstances: how will the UK courts decide upon jurisdictional questions in cross-border disputes following the end of Brexit?

## Background

On 15 May 2020, the UK government and the European Commission each published a statement indicating that little progress had been made in the recent rounds of negotiations on the future relationship between the UK and the EU. The lack of progress in these negotiations makes it unlikely that the current jurisdiction regime between them can or will continue to apply following Brexit.

The current regime is well-established and relatively well-regarded. It is based heavily upon Regulation (EU) No. 1215/2012 of 2012 [1] (the Recast Regulation), which provides, for example, that court judgments delivered in one EU member state, currently including the UK, are enforceable in other member states, without a declaration of enforceability being required.

Under the withdrawal agreement made between the UK and EU,[4] the UK is to be treated as a member of the EU until 31 December 2020. As a result, the Recast Regulation will continue to apply to any recognition and enforcement proceedings instituted before the end of the transition period. However, it is based on reciprocity, and with the transition period concluding at the end of this calendar year, the Recast Brussels Regulation will no longer apply in the UK.

Instead, on 8 April 2020, the UK submitted a request for accession to the 2007 Lugano Convention (the "Lugano Convention"), with effect from the end of the transition period.[5] There is no guarantee that the UK will obtain the requisite unanimous consent from all signatories to the Lugano Convention. The UK's request requires the consent of the EU, Denmark, Iceland, Norway and Switzerland, and the EU and Denmark are yet to consent. We expect that accession is likely to be part of the broader negotiations in this calendar year. The European Commission has already indicated that this accession request could be used as a bargaining counter as the UK seeks to finalise a trade deal with the EU. However, if the UK's request is met, it will likely have a profound impact on how parties will engage in cross-border litigation in front of the English courts.

## The effect of regulatory changes to cross-border commercial disputes in England

On a positive note, the Lugano Convention provides certainty on which country's court may hear a civil or commercial cross-border dispute, and ensures that the resulting judgment can be recognised and enforced between its members. Simply put, the Lugano Convention, just like the Recast Regulation, clarifies jurisdiction and thus helps prevent multiple court cases taking place on the same subject matter in different countries.

## The return of the Italian torpedo?

That being said, a key difference between the Recast Regulation and the Lugano Convention is the manner in which a court's jurisdiction over a dispute is decided where there are conflicting legal proceedings concerning the same subject matter in multiple member states (the *lis pendens* concept).

Under the former, if proceedings are begun in a jurisdiction that is different to that specified in an exclusive jurisdiction clause, the courts specified in the exclusive jurisdiction clause can instead continue to hear the dispute, with all other proceedings stayed, irrespective of which proceedings began first.[6] However, under article 27 of the Lugano Convention, the courts within which proceedings are first brought become the courts "first seised" and may continue to hear the dispute, with the consequence that all proceedings in other jurisdictions on the same subject matter must be stayed, even if there is a jurisdiction agreement or an exclusive jurisdiction clause in favour of another jurisdiction.

Accession to the Lugano Convention therefore gives rise to the risk of the Italian torpedo, the litigation tactic that came to the fore following the collapse of Lehman, in which a counterparty would deliberately start proceedings in one jurisdiction, often Italy, in breach of a jurisdiction agreement favouring another jurisdiction. The objective was often to take advantage of a slow-moving judicial system, due to the application of local civil law, creating significant delay to the determination of the dispute. As made clear by the EU Court of Justice in *Erich Gasser v. MISAT*, even where an exclusive jurisdiction clause exists, under the Lugano Convention, a court that is seised second must stay its proceedings unless or until the court first seised declares that it does not have jurisdiction.

Put simply, therefore, 2021 may see the return of the Italian torpedo in cross-border disputes.

## Comment

With the UK's departure from the EU now looming on the horizon, parties should be aware of this extra-jurisdictional challenge they may face in 2021. That being said, the Italian torpedo is a unique litigious tactic, and its impact can, in any case, be avoided by a proactive litigation strategy from the outset. It can, of course, be utilised as a favourable tactic for litigants as well, particularly for those for whom English court procedure may give rise to concerns or sensitivities, perhaps given the generally wide-ranging nature of disclosure in English litigation.

It is also important to recognise the more favourable, or uncontroversial, aspects of the Lugano Convention. It too encourages cross-border enforcement of judgments in the EU. The greater concern is, of course, that if the UK fails to accede to the Lugano Convention, then serious uncertainty will follow. There would then be extraordinary, if not impossible, timing constraints for the UK to adopt a cogent cross-border regime, other than the Recast Regulation or the Lugano Convention, before the end of the calendar year. The Lugano Convention would give rise to the issues above, but accession to the convention has one clear and outstanding advantage, and that is certainty.

## Endnotes

1 This note is concerned with service of proceedings in commercial litigation involving private individuals, corporate entities or institutions. It does not consider service requirements for a state or governmental body or the service of arbitration proceedings out of the jurisdiction – processes which are each subject to discrete sets of rules.

2 See *Asefa Yesuf Import and Export v. AP Moller-Maersk A/S (t/a Maersk Line)* [2016] EWHC 1437 (Admlty).

3 Where there is no convention or treaty in place in relation to the relevant destination state, the claimant can seek to serve through the destination state's government or a British consular authority in that country (with certain exceptions) or failing that, in accordance with the local law of the destination state.

4 The Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [TS No. 3/2020]. This governs the relationship between the UK and the EU during the transition period until 31 December 2020.

5 The UK automatically became a party to the Lugano Convention by virtue of its EU membership, but will cease to be a signatory when the transition period ends on 31 December 2020.

6 Article 31(2) of the Recast Regulation.



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