
IN BRIEF

▶ What impact will the EU referendum result have upon travel litigation?

# New territory (Pt 1)

The implications of Brexit for international travel claims are considered by Andrew Young & Katherine Deal


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On 7 June 2016, 3 Hare Court hosted a lively panel discussion on the implications for travel litigation of a then-hypothetical Brexit. Now that what was thought very unlikely just over a month ago has actually happened, international travel lawyers will need to consider urgently what the implications of the referendum result of 23 June are for the future conduct of international travel claims.

## Will Brexit have any impact on claims already running or claims about to be issued?

Although much is unclear about the likely outcome of the exit negotiations, one point not in doubt is that the negotiation process under Art 50 of the EU Treaty will not begin until the UK has notified the European Commission of its intention to leave the EU and that, during the negotiation period, the UK will remain a full member of the EU with all the privileges and obligations of membership. Therefore, as far as any current and pending claims are concerned, Brexit should have no immediate impact and there is no reason to rush in issuing proceedings in order to protect the position of prospective claimants.

However, one point that should be considered is the status of an English judgment obtained during the negotiations. Since the likelihood is that Regulation 1215/2012 will not be retained in exactly its present form, it cannot be assumed that any English judgment will be recognised and enforced by another member state once we are no longer ourselves a member state.

## How will the negotiations be conducted?

There is no precedent for a withdrawal negotiation under Art 50. An express right of with-drawal was only introduced by the Lisbon Treaty of 2007 and came into force in December 2009. Under Art 50(2), after a member state has notified its intention to withdraw from the EU to the European Commission, it is the job of the European Council to provide guidelines for the negotiation process. Article 50(4) expressly provides that the departing member state shall not participate in the discussions of the European Council relating to those guidelines, which might be thought to indicate that any deal offered to the departing member state would be on a "take it or leave it" basis. Some commentators have suggested that informal discussions could take place between the departing member state and the other member states and the EU institutions before the formal withdrawal notification is given, but the German Government has ruled that out in this case. On the other hand, Art 50(2) requires the Union to negotiate and conclude an agreement "in the light of the guidelines provided" which clearly indicates that there must be some scope for compromise on the guidelines.

Article 50(3) imposes a deadline of two years for the negotiations starting from the notification of withdrawal date. It is possible that negotiations could be concluded in less than two years in this case, but many commentators think that the process could take up to five years. After all, a simpler negotiation in the 1980s with Greenland,

which has a population of 55,000 and only one export, fish, took the full two years. If there is no deal after two years, there must be a risk that one or more of the other EU member states would not agree to an extension, in which case the UK would assume foreign country status, with none of the benefits of continued EU membership, or even associate membership, until the negotiations were concluded. It must be at least possible that, if negotiations do not make good progress in the early months, the threat of losing all EU benefits at the end of the two-year period could put great pressure on the UK government to reach a deal that was significantly less favourable than its minimum demands but was the most that the other EU member states were prepared to offer.

## How will the separation process be achieved from a legal point of view?

In theory, if the European Communities Act 1972 (ECA 1972) were simply repealed, all designated legislation made under it would be revoked by implication in the absence of a saving provision in the repealing legislation and all EU Regulations, which have direct effect in the UK would cease to be part of UK law when the UK was no longer a member of the EU. However, this is extremely unlikely to happen, because the UK will need to enter into some alternative form of trading agreement with the EU, the terms of which will probably require the UK to comply with some provisions of EU law. Also, some provisions giving effect to EU law are set out in other UK primary legislation and there are many regulations implementing EU law that were not introduced under the ECA 1972. Therefore, the UK government will almost certainly adopt a gradual process instead, in which specific provisions are repealed or revoked, while others are left in place as a result of the negotiation. Herr Schauble, the German finance minister, said recently of Brexit that "Out means out" and "In means in", but the reality is likely to be more complicated than that. For example, there has been comment that, in order to protect the current access rights of the City of London to the single market, the UK would have to agree to a Norwegian type deal, where Norway is part of the single market but has to comply with all provisions of EU social law.

## Would the Judgments Regulation still apply?

The Judgments Regulation 1215/2012 will cease to apply when the renegotiation process is completed, because as an EU Regulation (and not an EU Directive), it is only part of UK law for as long as the UK is an EU member state. What will take its place?

The UK might be able to negotiate a deal whereby the Judgments Regulation was enacted separately into UK law, with a separate treaty with the remaining EU member states to make it reciprocal. The EU member states would themselves still be bound by the Judgments Regulation as between themselves, so they might regard it as in their interests to do so (especially if free trade is to be protected—effective contracts depend at least in part on effective mechanisms for enforcement). The extent to which decisions of the Court of Justice of the EU might be regarded as anything more than of interest to English courts interpreting its version of the Regulation is questionable. Other alternatives could be considered by the UK, such as signing up to the Lugano Convention or making individual jurisdictional treaties with member (and non-member) states and, as a last resort, falling back on the common law rules on jurisdiction. Retention of the benefits of the Judgments Regulation would probably be the best option, if it could be secured through negotiation with the other member states, if only for the benefits of stability and consistency in these otherwise uncertain times.

## Direct rights of action

The retention of direct rights of action is not dependent on retention of the Judgments Regulation, although of course following *Odenbreit v FBTO Schadeverzekeringen NV: C-463/06* [2007] ECR I-11321, [2008] 2 All ER (Comm) 733, the Regulation has been relied upon to found thousands of claims in this jurisdiction against insurers in other member states. Claims have also been successfully brought against Australian, pre-accession Croatian insurers and many others, as long as there is a direct right under the applicable law and jurisdiction can be established under the common law rules. Although the "damage" gateway has recently been closed by the Court of Appeal in *Brownlie v Four Seasons* [2015] EWCA Civ 665, [2015] All ER (D) 77 (Jul) (currently on its way to the Supreme Court), much of the reasoning was founded on the need for consistency with an EU interpretation of what "damage" means and that need may no longer be as compelling.

## Choice of law

Issues of choice of law are, for accidents post 11 January 2009, currently governed by Rome II, which will lapse upon Brexit, absent other agreement. The Private International Law (Miscellaneous Provisions) Act 1995 has not been repealed and would be the default position to which to return. However, in the light of the Supreme Court decision in *Cox v Ergo Versicherung AG* [2014] UKSC 22, [2014] 2 All ER 926, it is entirely possible that the old emphasis on assessment being solely a matter for the forum may fall away, with more emphasis on assessments of damage mirroring far more closely that which the foreign law would produce. Certainly, the reasoning in *Cox* would suggest that the argument might well find more favour these days than previously that an assessment of damages in a Spanish law claim should reflect the Baremo.

## What will be the status of the Package Travel Regulations in the event of Brexit?

The Package Travel Regulations 1992 (PTR 1992) are part of UK domestic law and were enacted in order to comply with the EU Package Travel Directive 1990. As a piece of domestic subordinate legislation, PTR 1992 will not be directly affected by Brexit. Although they have the status of a statutory regulation made pursuant to ECA 1972 and so might theoretically be said to cease to have effect automatically if ECA 1972 were to be repealed, unless they were expressly saved by the repealing legislation, in practice it seems very likely that they would remain in full force, unless the UK government decided, as an independent step, to deregulate the travel industry and remove the various measures of consumer protection provided by PTR 1992. However, there has been no indication whatsoever from the UK government that it intends to take such a step: it would run directly contrary to the recent trend of increased consumer protection and it would be highly unpopular with the travelling public. Therefore, the overwhelming likelihood is that PTR 1992 will remain in force, despite the vote in favour of Brexit. The position might conceivably be different for the new Package Travel Directive, which extends the present consumer protection measures. These new provisions came into force on 31 December 2015 and must be applied in individual member states by 1 July 2018, at which point the Art 50 negotiations are likely to be still in progress, so it seems unlikely that the UK government would refuse to implement them, given that they were approved before the Brexit result. **NLJ**

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