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Cross-Chanel Evidence Taking after 1 January 2020

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> *"The strength of a claim or defence turns as much on issues of fact as on issues of law, and consequently on the strength of the evidence relied upon."*
>
> *R Fentiman, International Commercial Litigation (Oxford, 2016), 19.27*

This statement holds of course true in relation to both domestic and cross-border disputes. But in cross-border litigation and arbitration, having to obtain reliable and admissible evidence located in foreign jurisdiction adds additional layers of complication. Thus, the ability to take evidence abroad efficiently, effectively, fairly and economically is an important strategic consideration for parties to litigation and arbitrations alike.

This is the first of three blogs that look at obtaining of evidence abroad in cross-border litigation and arbitration. It looks at the current situation pertaining to the taking of evidence abroad between the European Union (EU) and United Kingdom of Great Britain (UK) (cross-Channel taking of evidence) after the latter left the EU earlier in 2020.

The current situation

Within the EU, the taking of evidence abroad is communitised and a multilateral framework, which has been modelled on the 1970 HCCH Evidence Convention and is based on judicial cooperation, supports the cross-border taking of evidence among the EU's Member States: the *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* (EER).

The EER applied to the cross-Channel taking of evidence and in the wake of the Brexit, Art. 68 b *Brexit Agreement* extends the application of the EER for a transitional period until the 31 December 2020. Letters of Request that will reach the designated courts or central authorities on either side of the Channel before the expiry of this deadline, will be executed under the EER.

However, the fate of the application of the EER to the cross-Channel taking of evidence remains uncertain. While both the EU and the UK desire the continuation of well-functioning cooperation in the area of international civil procedure, including the taking of evidence, whether, and if so, how, this cooperation continues, needs to be seen.

What happens after 31 December 2020?

Under Art. 132 *Brexit Agreement*, the EU and the UK had the option to extend the transitional period. But on 15 June 2020, both announced jointly that there will be no such extension. This came not as a surprise. For political and legal reasons, an extension had already been highly unlikely. First, the UK had earlier nailed its political colours to the mast, announcing on many occasions that it will not seek, or agree to, any form of extension beyond 31 December 2020. Second, s. 15 of the *EU (Withdrawal) Act 2018* barred the UK Government from entering into any extension agreement with the EU.

Thus, the application of the EER between the EU and the UK via Art. 68 b *Brexit Agreement* will come to an end on 31 December 2020.

There are several options how the cross-Channel taking of evidence from 1 January 2021 onwards may look like. However, as one commentator already pointed out, most of these options are likely to be more theoretical than real. This is because they would either require the continuation of the UK's ties with the European Court of Justice (ECJ) for the

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purposes of the EER, or because they would risk a fragmentation of the European Justice area. Yet, regaining an autonomous UK legal system, severed from the apex jurisdiction of the ECJ, was seen by the Brexiteers as a major goal of the Brexit. It is thus unlikely that the UK would agree to such options. Similarly, solutions that would risk a fragmentation, putting at risk the harmonisation achieved under the EER, are unlikely to be palatable for the EU.

Therefore, while options are available, chances appear to be low that these will ultimately be pursued further.

What does this mean for cross-border litigation / arbitration parties?

The good news is that while it is unlikely that there will be business as usual, parties to cross-border litigation and arbitrations will not face a vacuum as of 1 January 2021. Instead, even if there is no agreement between the EU and the UK, parties can continue to rely on judicial cooperation for the purposes of cross-Channel evidence taking.

That is because in 1976, the UK acceded to the 1970 HCCH Evidence Convention. This instrument offers tried and tested cooperation mechanisms that facilitate cross-border evidence taking globally. As most EU Member States, except for Austria, Belgium and Ireland, are also Contracting Parties to this instrument, it will apply among those bound by the Convention without any further steps required by either the EU or the UK.

Therefore, from 1 January 2021, cross-border litigation and arbitration parties will be able to request cross-Channel evidence taking, utilising the cooperation mechanisms established by the 1970 HCCH Evidence Convention. This includes the use of Letters of Request under Chapter I and the commissioning of diplomatic and consular agents as well as commissioners under Chapter II of the Convention. And because the 1970 HCCH Evidence Convention is technology neutral, it does not stand as an obstacle in the way of using modern technologies – despite its age.

Given the maturity of the framework established by the 1970 HCCH Evidence Convention, as well as the cooperation mechanisms that are well established and rehearsed on both sides of the Channel, the instrument seems indeed well suited to the task of providing appropriate means for the efficient, effective, fair and economical taking of reliable and admissible evidence in cross-border litigations and arbitrations.

Grotius Chambers can help to prepare for the changes

For cross-border litigation and arbitration parties, the transition from the EER regime towards that of the 1970 HCCH Evidence Convention will require some adjustments. The procedures will change and the forms that are required under the 1970 HCCH Evidence Convention differ from those that operate under the EER. That all requirements are adhered is not only important for the reliability and admissibility of the evidence taken, but also to ensuring the enforceability of judgments and arbitral awards based on the evidence.

With its extensive experience in international civil procedure and legal cooperation, Grotius Chambers is well placed to advise current and prospective litigation / arbitration parties on this transition, with a strong focus on managing any possible risks. Our pragmatic approaches ensure that parties will be able obtain reliable and admissible evidence efficiently, effectively, fairly and cost-efficiently.

Do you have questions? Then contact us!