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Cross-border enforcement of Judgments and Brexit

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On 31 December 2020 the UK's transitional period in the process of leaving the EU will come to an end. But what will that mean for civil claims and enforcement of judgments?

Before Brexit

At the moment civil judgments issued by the courts of one country in the EU are automatically recognised and enforceable in the courts of the other countries, with a very narrow scope for resisting enforcement. Decisions on whether a specific court has jurisdiction to hear a dispute are similarly streamlined. Assuming nothing else is agreed before the end of the year, from 1 January 2021, the UK will no longer be a party to this uniform regime for deciding jurisdiction and enforcement civil court judgments across the EU.

There are some transitional provisions for court proceedings started before 1 January 2021 by which the above principle will continue to apply as between the UK and the EU. So if proceedings are being considered as between companies based in the UK and an EU country, these should be commenced without delay and before the 31 December 2020 in order to be able to use the above regime.

After Brexit

Any claims issued after 31 December 2020 by the UK courts, will be treated as claims from a non-EU jurisdiction for the purposes of deciding jurisdiction and recognizing judgments – and vice versa.

So for example:

If you are in dispute over the supply of services from, say, a French business with a branch in London and you issue proceedings in London and secure judgment in your favour – at the moment your judgment will be automatically recognised in France so you can proceed to enforce it directly against the business's assets in France by lodging the correct papers (translated into French) with the appropriate French authority.

There will be virtually no grounds for the French court to interfere with the English judgment as the English court and the French court apply the same EU-wide rules for deciding whether they have jurisdiction over the claim when it is started, and therefore they recognise the validity of the judgment that results from that claim.

If you do not issue your claim until 2021, then to enforce the judgment you receive in France you will have invoke the exequatur procedure as set out in the French Civil Code – which means you would have to issue fresh proceedings in France, serve those proceedings via subpoena on the French business and the French court would have to check that the French conditions for granting exequatur are satisfied: these are that the London court had jurisdiction to hear the dispute under French law, that it complies with French public policy and that it wasn't obtained by impermissible forum shopping.

It will be the same in the other direction too. An Italian judgment can be enforced in England simply by translating the judgment along with a certificate from the Italian court and lodging it here. Only if the judgment were obtained without proper notice or appearance, or was manifestly contrary to UK public policy would the English court consider a challenge to its enforceability. And that doesn't simply apply to money orders – but to injunctions as well.

If the judgment is issued in Italian proceedings started after 31 December 2020, a fresh claim would need to be issued in the UK, with detailed statements of case, formal service, defences and full court fees payable. Even if no defence is mounted, the process can take a few months to reach default or summary judgment and will cause extra costs to be incurred.

It is not only the moving of judgments from one jurisdiction to another that will potentially be more expensive and time consuming next year. The EU regime also applies common rules on jurisdiction. Once those disappear, then the risk of parallel proceedings in the UK and in EU will increase. Parties may find themselves fighting the same or similar claims in two different jurisdictions because the courts in each jurisdiction consider that they are entitled hear the case. However, the English courts will potentially regain their ability to issue injunctions against a party to a case here prohibiting them from pursuing parallel claims in another jurisdiction.

Alternative outcomes

The above presupposes that no further agreements on civil jurisdiction matters are reached before the end of the transition period. On the table at the moment is the UK's request to join an alternative regime, the Lugano convention, which binds EU member states along with Switzerland, Norway and Iceland to a similar but not quite as streamlined, common regime for jurisdiction and recognition of judgments.

The UK will also join the Hague Convention on Choice of Court Agreements 2005, of which the EU is already a member. This will provide a common regime for jurisdiction and recognition of judgments in relation to monetary claims subject to a contractual exclusive jurisdiction agreement.

What can contractual parties do to prepare?

Wherever possible, parties should include an exclusive jurisdiction clause in their contracts. This would potentially bring that contract within the Hague Convention regime set out above and avoid the delay and costs of fresh proceedings being necessary for enforcement.

Parties should also consider using international arbitration as their preferred method for dispute resolution, which would bring their disputes outside of the Court regime and any decisions by arbitration tribunals would be automatically recognised and enforceable in every EU country (because every EU country has acceded to the New York Convention on the Enforcement of Arbitral Awards 1958).

Commercial arbitration has become the most popular method of resolving international trade disputes and could become the method of choice for any commercial parties negotiating contracts with UK companies. It has flexibility, confidentiality and enforceability and can bring matters to a conclusion efficiently (and so less costly) and with finality.

If you have any questions or would like any further information on this subject, please do get in touch.

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