

LITIGATION, DISPUTE RESOLUTION AND INVESTIGATIONS

Enforcing Irish judgments in the UK post-Brexit

11 January 2021

At midnight on 31 December, marking New Year's Day in Brussels and 11pm in London, the transition period provided for by the Brexit Withdrawal Agreement came to an end, cutting the UK loose from the EU almost a year after its formal departure.

Up to this date, EU rules, set out in what is generally known as 'the Recast Brussels Regulation', governed the enforceability of UK judgments in EU Member States (and vice versa). Now that the UK is no longer a party to this Regulation, how can Irish judgments be enforced in the UK (and vice versa)?

OPTIONS POST-BREXIT

Regrettably, the EU-UK Trade and Cooperation Agreement does not deal with jurisdiction and enforcement of judgments. Therefore, one must turn to the Lugano Convention, the Hague Convention and common law rules.

CAN A PARTY SEEKING TO ENFORCE AN IRISH JUDGMENT IN THE UK (OR VICE VERSA) RELY ON THE LUGANO CONVENTION?

In short, no, at least not for the time being.

In April 2020 the UK applied to accede to the Lugano Convention, which governs the enforcement of judgments between EU member states and the European Free Trade Association countries (at present, Lichtenstein, Norway, Switzerland and Iceland).

The UK's accession to the Lugano Convention would have largely preserved the status quo following the end of the transition period as its principles and processes mirror those set out in the Recast Brussels Regulation. However, the EU has not yet approved the UK's application.

CAN A PARTY SEEKING TO ENFORCE AN IRISH JUDGMENT IN THE UK (OR VICE VERSA) RELY ON THE HAGUE CONVENTION?

Yes, but only where the judgment is given on foot of an agreement that contains an exclusive choice of court agreement that falls within the Hague Convention.

The Hague Convention applies to international commercial transactions where contracting parties have entered into an exclusive choice of court agreement. This provides greater certainty to the parties relying on such agreements that the court of choice will be respected, and that any judgment made by that court will be recognised and readily enforceable in other jurisdictions. The current parties to the Hague Convention are the EU, Singapore, Mexico, Montenegro and the UK. The UK was a party to the Hague Convention by virtue of the EU's accession in 2015, but acceded to the Convention in its own right in 2020 to ensure its seamless application from 1 January 2021.

While the Hague Convention applies in principle, there remain two areas of uncertainty:

- **Exclusive choice of court agreements:** the Hague Convention only applies to foreign judgments given on foot of an exclusive choice of court agreement, which falls within the scope of the Convention. The UK and EU have differing opinions as to whether a unilateral agreement qualifies as an "exclusive choice of court agreement". A unilateral agreement generally gives one contracting party the option to select from a range the court in which to settle any dispute that may arise, while limiting the other party to the courts of a single state. UK case law suggests that there are "good arguments" that they do qualify, whereas the EU believes otherwise.
- **Temporal scope:** the Hague Convention applies to agreements containing jurisdiction clauses entered into after the Convention came into force in the relevant state. The EU and the UK disagree as to whether the Convention will be treated as having entered into force in the UK in October 2015, when it entered into force in the EU generally, or January 2021, when it entered into force in the UK specifically. There is therefore some uncertainty

as to whether the EU and its member states will treat an agreement entered into between October 2015 and January 2021 as falling within the scope of the Convention.

While the above issues are likely to be litigated in the future, the Hague Convention is set to play an important role in the future enforcement of judgments, while common law rules will determine matters that are excluded from the scope of the Convention, including consumer and employment contract disputes, personal injury claims, insolvency matters and family law disputes.

WHAT IS THE POSITION WHERE THE AGREEMENT ON FOOT OF WHICH THE JUDGMENT WAS GIVEN DOES NOT CONTAIN AN EXCLUSIVE JURISDICTION CLAUSE?

In the event that the choice of court agreement does not contain a jurisdiction clause, the court in which the proceedings were first brought will apply local common law rules to determine the issue.

However, where the agreement does contain a jurisdiction clause but is silent as to whether the jurisdiction of the chosen court is exclusive, the agreement will be deemed to be an exclusive agreement for the purposes of the Convention.

COMMENTARY

Both Brexit and the termination of the applicability of the Recast Brussels Regulation will certainly affect the ease and speed with which Irish judgments were routinely enforced in the UK (and vice versa).

Although there are a number of issues yet to be clarified, given the more limited application and scope of the Hague Convention, litigants should be prepared to spend more time and costs when taking steps to enforce Irish judgments in the UK (and vice versa).

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