The limits of post-Brexit judicial co-operation

In the absence of new post-Brexit legal instruments, cross-border civil and commercial litigation between EU member states and the UK is likely to be less predictable, more time consuming and more costly.

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Since January 1, 2021, European Union (EU) law has no longer applied to the United Kingdom (UK). The legal instruments that affect cross-border civil and commercial matters that have ceased to have effect include, *inter alia*: Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Recast); Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I); and, Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II). Equally, the Lugano Convention 2007, to which the UK was party only through its membership of the EU, has ceased to apply to the UK and the UK's application to accede to Lugano has not yet been approved by the EU.

The Trade and Cooperation Agreement (TCA) agreed in principle between the EU and the UK, which came into effect provisionally on January 1, 2021, contains no provisions providing for a framework of judicial co-operation in civil and commercial matters. Litigation between parties in EU member states and the UK going forward largely falls to be determined by the laws on private international law that apply in each jurisdiction, except in limited situations where the Hague Choice of Courts Convention 2005 applies. The loss of the legal instruments determining jurisdiction and providing for enforcement of judgments will inevitably make cross-border litigation between EU member states and the UK less predictable, more time consuming and more costly.

Background

On January 31, 2020, the UK left the EU. On January 24, 2020, the two parties had signed the Withdrawal Agreement, which provided for a transition period during which EU law would continue to apply in the UK. On December 31, 2020, at 11.00pm GMT, the transition period came to an end. Despite fears that no agreement on a future relationship would be reached before this point, on December 24, 2020, the UK and the EU agreed in principle on the terms of the TCA, which came into effect provisionally on January 1, 2021.[1]

The Withdrawal Agreement (which remains in force, albeit that some of its provisions as to the transition period now have no application) contains specific provision for the continuance of judicial co-operation procedures between the UK and EU member states during the transition period, including in respect of proceedings commenced but not concluded before the end of the transition period. In contrast, there are no provisions for permanent co-operation in this sphere in the TCA.

Jurisdiction/choice-of-court clauses

Brussels I Recast

In brief, Brussels I Recast sets out the rules that apply between member states as to which state has jurisdiction over a dispute. The overarching principle of Brussels I Recast is that a defendant should be sued in the place of domicile, but there are a number of special jurisdictional provisions, including the provision in Article 7(1)(a) that in matters relating to a contract, the courts that are competent to hear the dispute are those of "the place of performance of the obligation in question". Article 25 provides that:

"If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise".

In some cases involving the UK courts, Brussels I Recast will still apply. Article 67(1) of the Withdrawal Agreement provides that the provisions of Brussels I Recast still apply in respect of "legal proceedings instituted before the end of the transition period and in respect of proceedings or actions that are related to such legal proceedings".

There is no definitive interpretation available as to whether or not proceedings need to be served rather than simply issued in order to have been "instituted", but the Bar Council of England and Wales notes that interpreting being instituted as meaning the "issuance'' of proceedings would be consistent with the rules in Article 32 of Brussels I Recast as to when a court is seised.[2]

The Commission's Notice to Stakeholders of August 27, 2020, makes clear that the reference to "related proceedings" is to "proceedings involving the same cause of action and between the same parties are brought in the courts of a Member State and the United Kingdom (*lis pendens*) before and after the end of the transition period respectively (or vice-versa)". In other words, where there are parallel proceedings in being in the UK and an EU member state, so long as at least one of the actions was instituted before the end of the transition period, Brussels I Recast still applies.

Articles 33 and 34 of Brussels I Recast continue to apply to EU member states (but not to the UK) and set out limited circumstances in which a court should stay its proceedings even where it has jurisdiction under the Brussels regime.

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The Lugano Convention 2007

In the vast majority of cases where the jurisdiction of the UK courts is in issue, Brussels I Recast will not apply. The UK's stated preference is to accede to the Lugano Convention 2007, which is based on Regulation (EC) No. 44/2001, i.e., the original Brussels I Regulation. The current contracting parties are the EU,[3] Iceland, Norway and Switzerland. On April 8, 2020, the UK applied to join. Article 72(3) of the Lugano Convention provides that the unanimous agreement of the contracting parties is required for a new state to accede, unless that state is a member of European Free Trade Association (EFTA) or an EU member state is acting on behalf of its non-European territories. It further provides that the contracting parties "shall endeavour to give their consent at the latest within one year". Iceland, Norway and Switzerland have already stated that they support the UK's application,[4] but the EU has, at the date of writing, not yet consented. The Lugano Convention falls within EU rather than member state competence, as was made clear in Opinion 1/03.[5] It would appear that the Commission views access to the Brussels/Lugano regime as a benefit of the single market that cannot be cherry-picked. All the current signatories to Lugano are in the single market, whether due to their status as EU member states, via the Agreement on the European Economic Area with the EFTA states other than Switzerland or, in the case of Switzerland, via bilateral agreements. It remains to be seen whether the UK will be permitted to join (and it should be noted that even once approved, there will be a waiting period of up to three months).[6]

Lugano merits some consideration as, if the UK is allowed to accede, this will be the instrument governing judicial co-operation on jurisdiction and enforcement between the UK jurisdictions and Ireland. It mirrors the defects of the original Brussels I Regulation. Notably, Lugano does not address the problem of the "Italian torpedo" by which litigants can commence proceedings in a jurisdiction other than that named in a choice-of-court clause, usually one where litigation moves slowly, in order to frustrate the proceedings in the chosen jurisdiction. Under Lugano, even where there is an exclusive jurisdiction clause, the court first seised decides if it has jurisdiction and can determine that the chosen court has to decline jurisdiction. Brussels I Recast remedied this problem by providing that a chosen court has priority even where it is not the first court seised. Lugano also lacks any provisions equivalent to Articles 33 and 34 of Brussels I Recast, which provide for quasi-*forum non conveniens* decisions.

Hague Choice of Court Convention 2005

If the UK does not accede to Lugano (and certainly in the interim), the only international convention on jurisdiction that is of application to the UK is the Hague Choice of Court Convention 2005. The scope of the Hague Convention is somewhat narrow as it only applies where there is an exclusive jurisdiction clause (and it appears that this does not encompass

so-called asymmetric jurisdiction clauses).[7] Many areas of law are also excluded from its scope, including consumer and employment contracts, intellectual property and competition claims, among others. Furthermore, Hague only applies to agreements entered into after it has entered into force in the relevant state (Article 16(1)). Where the Hague Convention does apply, it is effective and generally prevents parallel proceedings in courts other than the chosen court.

There is disagreement as to the date from which the Hague Convention has been in force in the UK. The EU acceded on October 1, 2015. The UK acceded to Hague in its own right on January 1, 2021. The UK's position is that Hague has been in force continuously and has provided in primary legislation that: "the date on which the 2005 Hague Convention entered into force for the United Kingdom is October 1, 2015, and accordingly references in the Convention to a Contracting State are to be read as including, without interruption from that date, the United Kingdom".[8] In contrast, in its Notice to Stakeholders, the Commission has stated that: "The Convention will apply between the EU and the United Kingdom to exclusive choice of court agreements concluded after the Convention enters into force in the United Kingdom as party in its own right to the Convention". The Hague Conference appears to support the UK's position.[9] This is evidently of importance as it will affect whether choice-of-court clauses in favour of UK courts entered into between October 1, 2015, and December 31, 2020, bring disputes within the scope of the Hague Convention or not.

It is also noteworthy that if what is in issue is a choice-of-court clause nominating the English courts but the parties to the dispute are all domiciled in EU member states, Article 26(6) of Hague provides that in such a situation the Hague Convention shall not affect the application of an instrument such as Brussels I Recast ("the rules of a Regional Economic Integration Organisation that is a Party to this Convention"). So notwithstanding an exclusive jurisdiction clause in favour of the English courts, in such a situation, an Irish court would determine jurisdiction under the rules in Brussels I Recast. Given that the English courts have often been the chosen jurisdiction for international commercial agreements in the past, even where there are no UK-domiciled parties involved, this scenario is not an unlikely one.

Where the Hague Convention does not apply, then national laws concerning private international law will govern situations where it is contended in a member state court that the UK courts have jurisdiction. In Ireland, this means that the common law principles on private international law will apply.

Choice-of-law clauses

The ending of the transition period should have no effect on the approach taken in the EU member states or in the UK as to choice-of-law clauses. In the first place, Article 66 of the Withdrawal Agreement provides that Rome I continues to apply to the UK "in respect of contracts concluded before the end of the transition period" and that Rome II continues to apply "in respect of events giving rise to damage, where such events occurred before the end of the transition period". Further, the provisions of Rome I and Rome II will continue to bind the EU member states regardless, as the application of the two Regulations is not based on reciprocity. Finally, the UK has incorporated equivalent provisions into its national law, forming part of what is commonly now being referred to in the UK as "retained EU law".[10]

Where proceedings need to be served on a UK defendant, unless the procedures provided for in the Hague Service Convention are used, service will need to be effected in accordance with the law as it then stands in the relevant UK jurisdiction (i.e., England and Wales, Scotland or Northern Ireland) if the plaintiff is likely to be seeking to enforce the judgment in the same jurisdiction at a later stage.

Service

Two principal issues arise in relation to service. First, as the UK is now no longer able to avail of Brussels I Recast and is not (yet) party to the Lugano Convention, leave of the court is now required to issue and serve proceedings on a UK defendant. The usual test for leave to serve out of the jurisdiction will apply.

Once leave of the court has been obtained and the proceedings have been issued, the mechanics of serving documents abroad is also now more complex. The streamlined procedure under Regulation (EC) 1393/2007 (the Service Regulation) can no longer be used in respect of UK defendants, although Article 68(a) of the Withdrawal Agreement provides that it applies to documents that were received for the purposes of service before the end of the transition period by a receiving agency, a central body of the State where service is to be effected, or by competent persons (within the meaning of Article 15 of the Service Regulation).

The UK is a party to the Hague Service Convention 1965 in its own right. Service pursuant to the Hague Service Convention is provided for in Order 11E RSC. The main method of service facilitated by the Hague Service Convention is through the designated central authority in the state (which, in Ireland's case, is the Master of the High Court). Article 19 provides that other methods of service are compatible with the Convention providing that they are allowed under the receiving state's law. Notably, there are no time limits imposed under the Hague Service Convention, in contrast with Article 7(2) of the Service Regulation, which provides that a receiving agency shall serve a document as soon as possible and, in any event, within one month of receipt.

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Enforcement of judgments

The provisions of Brussels I Recast will continue to apply to the enforcement of judgments where the proceedings were instituted before the end of the transition period. The Commission Notice to Stakeholders of August 27, 2020, provides that this covers situations where: proceedings were in being before the end of the transition period but the judgment was only handed down afterwards; a judgment had been handed down but not yet enforced by the end of the transition period; and, a judgment had been exequatured but not yet enforced by the end of the transition period.

The advantages of being able to enforce a judgment under Brussels rules are readily apparent. Under Brussels I Recast, the exequatur procedure was abolished (although it still exists under Lugano rules), so there is no need for a judgment creditor to obtain a declaration of enforceability from the courts of the jurisdiction in which the judgment needs to be enforced. Under Brussels I Recast, it is also possible to enforce interim judgments such as freezing orders, which may be highly important if a litigant wishes to ensure that there will still be assets in the jurisdiction when there is a final judgment to enforce. It appears that the enforcement of interim judgments is also possible under Lugano.[11]

If the Hague Convention applied to the proceedings as to jurisdiction, then the judgment can also be enforced under the Hague provisions,[12] although this is not as straightforward a process as under the Brussels/Lugano regime. Hague also only allows for enforcement of final judgements and allows for enforcement to be refused in a number of different circumstances (see Article 9). The Hague Conference has produced a more comprehensive convention on judgments, the Hague Judgments Convention 2019, but currently the only signatories are Israel, Ukraine and Uruguay. The EU appears to be considering signing and the Commission launched a public consultation to obtain stakeholder views in 2020, but the UK's position is unclear. Regardless, it would likely be a matter of years rather than months even were both the EU and the UK to become signatories.

Absent the UK's accession to the Lugano Convention, the applicable law in most cases involving the UK will be the law of the jurisdiction in which the judgment is sought to be enforced. Where a UK judgment needs to be enforced in Ireland, common law principles will apply. Where an Irish judgment needs to be enforced in one of the UK jurisdictions, this will depend on the precise rules in place as to the enforcement of foreign judgments in England and Wales, Scotland and Northern Ireland.

Conclusion

Unless the UK is allowed to accede to Lugano, or some other judicial co-operation framework is established between the EU and the UK, cross-border litigants will, by comparison with recent years, face greater procedural complexity, delay and costs, and greater uncertainty as to whether a judgment can ultimately be enforced. It remains to be seen whether deteriorating political relations around the TCA in general will prevent any progress on these issues.

References

1. The UK Parliament passed the European Union (Future Relationship) Act 2020 on December 30, 2020. On December 29, 2020, the Council adopted Decision (EU) No. 2020/2252 to the effect that the TCA would be signed and would come into effect provisionally subject to the consent of the European Parliament (which, at time of writing, has yet to be given, with the period for the TCA's provisional application now extended until April 30, 2021).
2. https://www.barcouncil.org.uk/uploads/assets/f044e7e9-c041-482e-892d1a216b01b6c7/7d8e40df-ae8a-4128-a66b2be43d09c124/Transition-FAQs-Part-III-Civil-Justice-Jurisdiction.pdf.
3. Denmark is a separate contracting party to the Lugano Convention as it fully opted out of Brussels I.
4. https://www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007.
5. Opinion of the Court 1/03 [2006] ECR I-1145.
6. On April 12, 2021, just as this article was going to press, there were reports in the media that the European Commission was likely to change its position and recommend that the EU should approve the UK's application to accede to Lugano. It remains to be seen whether or not the UK will in fact accede during 2021.
7. See Hartley, T., and Dogauchi, M. *Explanatory Report to the Hague Convention*, §32.
8. Private International Law (Implementation of Agreements) Act 2020, Schedule 5, s.7.
9. On its website (https://www.hcch.net/en/instruments/conventions/status-table/?cid=98), the Hague Conference lists the date of entry into force for the UK as October 1, 2015, notwithstanding that the date of ratification is given as September 28, 2020, when the UK deposited its instrument.
10. Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/834).
11. Pocar, F. *Explanatory Report on the Lugano Convention*, §130.
12. See Order 42D RSC.