

Cross-Border Litigation in the Post-Brexit World: A View from London and Brussels

Introduction

Following the UK's exit from the EU on 31 January 2020 and the end of the transition period under the Withdrawal Agreement, unless proceedings were issued on or before 31 December 2020, the Brussels Recast Regulation¹ no longer applies to questions of jurisdiction and the enforcement of court judgments between the UK and EU Member States. Nothing in the EU-UK Trade and Co-operation Agreement (EU-UK TCA) changes this position.

Since the UK has not yet acceded to the 2007 Lugano Convention², issues relating to jurisdiction and the enforcement of judgments as between the UK and EU Member States will be governed by the 2005 Hague Convention on Choice of Court Agreements³ or, where not applicable, by domestic law (including any relevant bilateral conventions which have been incorporated into domestic law).

This Client Alert provides an overview of the new rules applicable to post Brexit cross-border litigation with a particular focus on the impact of such changes in England and in Belgium.⁴ It also raises some practical considerations for clients to consider in thinking about cross-border litigation involving the UK and EU Member States. For the benefit of certainty, arbitration may be an attractive option for clients concerned about potential cross-border litigation as between UK and EU parties.

¹ [Regulation \(EU\) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters](#) (Brussels Recast Regulation).

² [2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters](#) (2007 Lugano Convention). The 2007 Lugano Convention extends the rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters within the EU to cross-border litigation with countries outside of the EU (such as Iceland, Norway and Switzerland). On 8 April 2020, the UK applied to accede to the 2007 Lugano Convention in accordance with Articles 70 and 72.

³ [2005 Hague Convention on Choice of Court Agreements](#) (2005 Hague Convention or the Convention).

⁴ This Client Alert focuses on the implications of Brexit on issues of jurisdiction and the enforcement of judgments. However, Brexit also has implications in relation to other aspects of judicial co-operation in the context of cross-border litigation.

The Post Brexit Regime in the UK

Although the UK applied to accede to the 2007 Lugano Convention on 8 April 2020, the contracting parties are yet to consent to such accession. Pending such consent, and since the Brussels Recast Regulation no longer applies to new cases issued on or after 1 January 2021, from 1 January 2021 in the UK a new regime governs issues of jurisdiction and the enforcement of court judgments as between the UK and EU Member States.

Where there is an exclusive jurisdiction clause entered into after the 2005 Hague Convention came into force with respect to the contracting state whose courts are chosen, that Convention will apply to issues of jurisdiction and enforcement. Under the Convention, the courts of contracting states are required to recognise exclusive jurisdiction agreements in favour of the courts of another contracting state. Similarly, the courts of contracting states are required to recognise and enforce judgments issued by courts of other contracting states.

Thus, in respect of contracts entered into from 1 January 2021, parties can be certain that an exclusive jurisdiction agreement in favour of the English courts will be respected by courts in EU Member States and that an English court judgment will be widely enforceable in the courts of EU Member States, subject only to limited grounds of refusal.⁵

Yet, the 2005 Hague Convention will not be applicable in all circumstances. In particular, there must be an exclusive jurisdiction clause for the 2005 Hague Convention to apply. The Convention will not apply where there is only a non-exclusive jurisdiction clause, or potentially where there is an asymmetric or unilateral clause. There is also some uncertainty as to whether courts in EU Member States will treat the 2005 Hague Convention as applicable only where the relevant English exclusive jurisdiction clause was entered into on or after 1 January 2021 or whether they will also accept jurisdiction clauses concluded on or after 1 October 2015 when the Convention came into force for the EU and for the UK (as a Member of the EU at that time).⁶

In cases where the Hague Convention is not applicable, the relevant regime will be based on applicable domestic law in each EU Member State including whether there are any

⁵ Similarly, on the same basis, exclusive jurisdiction clauses in favour of the courts of EU Member States (such as Belgium) and court judgments of the courts of EU Member States (such as Belgian court judgments) will be recognized and enforced in England.

⁶ In its [Notice to Stakeholders – Withdrawal of the United Kingdom and EU rules in the field of civil justice and private international law](#) (p. 9), the European Commission has already emphasised that it considers that the 2005 Hague Convention will only apply with respect to exclusive choice of court agreements concluded after 1 January 2021.

prior bilateral treaties between the UK and the relevant EU Member States.⁷ In England, where no such treaties apply, English common law rules will apply.

Under common law rules, while the English courts will usually respect the parties' choice of court, the courts do retain discretion as to whether to exercise jurisdiction based on the question of the appropriate forum. For example, a defendant served in England could seek to challenge the jurisdiction of the English courts on the basis that there is another forum available which is more appropriate (under the *forum non conveniens* principle).

Similarly, where the 2005 Hague Convention is not applicable and no bilateral agreements are in place, English common law rules will apply to the recognition and enforcement of foreign court judgments and will require a fresh action to be issued. The English courts will usually recognise such judgments subject to the fulfilment of certain conditions including whether the foreign court had jurisdiction to issue the judgment.

The Post Brexit Regime in Belgium

Brexit will have implications for cross border litigation not only in the UK but also in all EU Member States including Belgium. Brexit raises questions as to how the Belgian courts will view jurisdiction agreements in favour of the English courts and whether they will enforce English court judgments.

Since, like all EU Member States, Belgium is a party to the 2005 Hague Convention (by extension of the EU's accession to the Convention), the Belgian courts will apply the Convention's rules when considering issues of jurisdiction and would recognise an exclusive jurisdiction agreement in favour of the English courts concluded on or after 1 January 2021. Similarly, a judgment handed down by an English court (as designated by an exclusive jurisdiction agreement entered into on or after 1 January 2021 and which falls within the scope of the 2005 Hague Convention) will be recognised and enforced in Belgium pursuant to the 2005 Hague Convention.

However, when a case involving a UK defendant is initiated in Belgium⁸ (and the 2005 Hague Convention is not applicable), the Belgian courts will follow the rules on cross-

⁷ In England, any applicable bilateral agreements in relation to the enforcement of foreign judgments are given effect by the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933. In addition to the 1934 UK-Belgium Convention, bilateral treaties were also made between the UK and France (1934), Germany (1961), Austria (1962), Italy (1964) and the Netherlands (1969). As discussed below, there is however some uncertainty as to whether these treaties survived the parties' accession to the Brussels Convention.

⁸ If the case involves a defendant domiciled in the EU, Belgian courts (like all the domestic courts in other EU Member States) will be required to apply the jurisdictional rules provided for in the Brussels Recast Regulation. Thus, where a UK domiciled party brings a claim against a Belgian party in the

border disputes contained in Articles 6 to 14 of the Belgian Code of Private International Law (the **Belgian PIL Code**) which are applicable in the non-EU context. In particular, Article 7 of the Belgian PIL Code provides that when – despite the existence of a choice of court agreement designating the court of a third State – a claim is brought in Belgium before the Belgian courts, the Belgian court should stay its proceedings in favour of the court designated in the choice of court agreement unless it can anticipate that the foreign judgment will not be amenable to recognition and enforcement in Belgium.

Where the 2005 Hague Convention does not apply, the recognition and enforcement of an English court judgments in Belgium will be conducted in accordance with Articles 22ff of the Belgian PIL Code.⁹ Although a foreign court judgment (such as an English court judgment) can be enforced in Belgium, Article 25 of the Belgian PIL Code provides a list of grounds allowing a Belgian court to refuse the recognition and enforcement of foreign judgments in certain circumstances.

Practical Implications of the Post Brexit Regime for Clients

In the absence of any provisions dealing with cross-border litigation in the EU-UK TCA, and until the UK can accede to the 2007 Lugano Convention, there are still various uncertainties in relation to cross-border litigation involving the UK and EU Member States.

In order to be confident that an English jurisdiction clause will be respected by courts in EU Member States and / or that an English court judgment will be enforceable in the EU, parties should carefully consider whether to insert an exclusive jurisdiction clause (rather than a non-exclusive clause) in any new agreements negotiated and entered into after 1 January 2021. Further in light of uncertainty as to the temporal scope of the Hague Convention, for contracts entered into before 31 December 2020, parties may also want to consider the possibility of entering into new agreements to restate any agreement as to jurisdiction. This, however, must all be balanced against the loss of flexibility inherent in signing up to an exclusive jurisdiction clause.

To deal with the uncertainties raised by the Post Brexit regime, parties may also wish to consider international arbitration as an alternative option, which has remained unchanged.

Belgian Courts and the 2005 Hague Convention does not apply, the Court will still decide jurisdictional issues in accordance with the Brussels Recast Regulation.

⁹ The UK and Belgium signed a 1934 bilateral treaty providing a framework for the recognition and enforcement of judgments (the **1934 UK-Belgium Convention**). Despite the accession of the UK to the EU, this treaty has never been terminated which means that even if it became inoperative when the UK was a member of the EU, it could arguably be re-activated following the UK's withdrawal from the EU. This treaty may, therefore, provide an additional basis for the recognition and enforcement of English court judgments in Belgium (and Belgian court judgments in the UK).

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Brexit has virtually no impact on arbitration which falls outside of the scope of the Brussels Recast Regulation. Since the UK and all EU Member States are parties to the 1958 New York Convention, arbitral awards issued in England will be enforceable in the EU just as awards issued in any EU Member State will be enforceable in England. Parties may therefore wish to consider including arbitration agreements within any new contracts negotiated or even re-stating existing contracts to provide for arbitration.

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