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Enforcement of EU judgments post Brexit: an exclusivity conundrum

It is a striking feature of the UK's and EU's Trade and Cooperation Agreement of 30 December 2020, which governs their future relationship from 1 January 2021, that there is no mention of future arrangements in relation to judicial cooperation in civil and commercial matters. This may be contrasted with the detailed arrangements in relation to criminal matters.

It is true that the issue of the rules relating to the **choice of governing law** in contractual and non-contractual matters has, in practice, been resolved in England and Wales by substantially transposing the Rome I and Rome II regulations as part of the body of retained EU law, and in the EU by the operation of the regulations in the member states.

However, as regards **jurisdiction, enforcement of judgments and the mechanics of judicial co-operation** such as the service of documents and the taking of evidence, this is, certainly for the present, the hardest of Brexits. Both the recast Brussels Regulation 1215/2012 ("**the recast Brussels Regulation**") and the Lugano Convention 2007 ("**the Lugano Convention**") are no more (other than for pending actions). There is no indication that the subject will be on the agenda of any of the many committees and working parties contemplated by the agreement. The UK has, with the support of Switzerland, Norway and Iceland, applied to join the Lugano Convention in its own right, but there is no sign as yet of agreement by the EU and Denmark to this. It *is* the case that the Hague Choice of Court Convention 2005 ("**the 2005 Hague Convention**") will apply, post 1 January 2021, as between the UK and the EU where there are applicable exclusive jurisdiction clauses in relevant contracts providing for the jurisdiction of the UK or EU courts but, even so, there is a difference of view as to whether it applies to jurisdiction clauses entered into on or after 15 October 2015 (the UK's position) or only to those entered into on or after 1 January 2021 (the European Commission's position).

It may be that there will be steps taken on other levels to address these issues. However, for the present, disputes lawyers will have to address the position as it currently stands in relation to advising on jurisdiction and judgments. One of the issues will be the enforceability in England and Wales of judgments from the EU and the Lugano Convention states. This will need to be considered not only where there is a judgment, or prospective judgment, in sight in a particular dispute. Not infrequently, law firms are asked to advise or to give a legal opinion on a dispute resolution provision in a contract which an English company is entering into, which contains a jurisdiction clause stipulating a court in another jurisdiction, and the enforceability in England of any judgment which may be obtained in that court.

Enforcement of non-UK judgments prior to 1 January 2021

Prior to 1 January 2021 the overall structure of the provisions relating to the enforcement of non-UK judgments in civil and commercial matters was generally relatively straightforward.

For judgments from the EU, one turned to the recast Brussels Regulation.

For judgments from Switzerland, Norway and Iceland, one turned to the Lugano Convention.

For judgments from jurisdictions where there are reciprocal enforcement treaties or other arrangements (notably Australia, Canada (apart from Quebec), India, Pakistan, Bangladesh, Israel, Guernsey, Jersey and the Isle of Man), one turned to the Foreign Proceedings (Reciprocal Enforcement) Act 1933 ("**the 1933 Act**") and the relevant treaty or other arrangement.

For judgments from most other Commonwealth states and dependencies (though excluding among others South Africa and Gibraltar), one turned in practice to Part II of the Administration of Justice Act 1920 ("**the 1920 Act**"), notwithstanding the theoretical alternative of suing on the judgment at common law.

For judgments from Singapore, Mexico and Montenegro, one turned to the 2005 Hague Convention where the contract was of a type falling within the Convention and contained an exclusive jurisdiction clause.

For judgments from any other country not covered by these statutory regimes, one turned to the common law principles for the recognition and enforcement of foreign judgments, as set out in *Dicey.*[1]

Each of the statutory regimes provided procedures for registration of the foreign judgment using a summary (and significantly cheaper)[2] procedure which did not require commencing a new action in the English courts for the enforcement of the foreign judgment. It is true that there would be instances where judgments from those jurisdictions would not fall within the terms of the statutory regimes but, apart from the special cases of certain consumer, employment and insurance contracts, and the separate subject of the enforcement of arbitration awards, these generally related to niche areas.

Enforcement of EU and former Lugano state judgments from 1 January 2021

For judgments in proceedings commenced in the EU and the former Lugano states on and after 1 January 2021, registration pursuant to the Brussels and Lugano regimes will no longer apply (unless and until some different regime is put in place). The 2005 Hague Convention will apply in some cases: where the incoming judgment is in proceedings in an EU state pursuant to an exclusive jurisdiction clause in a relevant contract entered into on or after 15 October 2015. However, in other cases it will not simply be a matter of reverting to enforcement at common law. There are two particular issues.

The first is the combined effect of section 6 of the 1933 Act and section 34 of the Civil Jurisdiction and Judgments Act 1982 ("**the 1982 Act**").

Section 6 of the 1933 Act provides that:

"No proceedings for the recovery of a sum payable under a foreign judgment, being a judgment to which this Part of this Act applies, other than ***proceedings by way of registration of the judgment*** *[emphasis added], shall be entertained by any court in the United Kingdom*.".

Section 34 of the 1982 Act provides that:

"No proceedings may be brought by a person in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a court in another part of the United Kingdom or in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England and Wales or, as the case may be, in Northern Ireland."

These provisions have attracted relatively little attention in the cases. However their effect is stated in *Dicey* as follows:

"The various schemes which provide for the enforcement of qualifying judgments to be undertaken by registration also have the effect that the alternative of proceeding by action at common law is not available".[3]

So, as matters now stand, if the enforcement of a foreign judgment might fall within the 1933 Act or the 2005 Hague Convention then a claimant **must** adopt the appropriate statutory registration procedure and cannot sue on the judgment at common law.

The second issue is the question of what jurisdiction clauses are covered by the 2005 Hague Convention regime and, in particular, whether so-called asymmetric clauses (which provide for the exclusive jurisdiction of one court but give one party in effect the option of suing in **any** court which might have jurisdiction) are indeed "exclusive jurisdiction clauses" for the purposes of the Convention. Two first instance decisions stated *obiter* that they were, but in a very recent decision of the Court of Appeal in *Etihad Airways v Flöther*[4] Henderson LJ said, again *obiter*, that although he was not deciding the point he accepted that it was "probable" that they were not, citing in particular the report by Professors Hartley and Dogauchi on the interpretation of the Convention.

These matters therefore give rise to real uncertainty in the post Brussels and Lugano era. Thus, is an asymmetric clause outside or within the 2005 Hague Convention? If it is outside the Convention then enforcement in England of a judgment from the EU based on such a clause must be by action on the judgment at common law or possibly, in some cases,

[1] Dicey, Morris & Collins; The Conflict of Laws.
[2] The standard issue fee on a registration application is £66 whereas that for a claim form is 5% of the amount claimed, with a cap of £10,000.
[3] Paragraph 45-051 of the 15th Edition. It should be qualified by noting that the 1920 Act permits, as an alternative to registration, the option of an action at common law but generally there are adverse costs consequences of doing so.
[4] https://www.bailii.org/ew/cases/EWCA/Civ/2020/1707.html

by registration under the 1933 Act or the 1920 Act – see below. If it is within the Convention then it must be by registration, in this case under the 1982 Act. Unless and until the issue has been finally decided (possibly by the Supreme Court) must a claimant do both?

A similar point arises in relation to judgments from the EU and Lugano countries with which the UK has existing bilateral treaties for the reciprocal enforcement of judgments, which pre-dated the EU wide regimes and the Lugano Convention. These countries are Austria, Belgium, France, Germany, Italy, The Netherlands and Norway. On the face of it, it seems well arguable that judgments from these countries will again be enforceable under the 1933 Act and the relevant treaty. This view is supported by the commentary in *Dicey* and the notes by the editors of the White Book. Indeed, arrangements in relation to the application of the 1933 Act to the 1961 treaty with Norway have been implemented by the Reciprocal Enforcement of Foreign Judgments (Norway) (Amendment) (England and Wales and Northern Ireland) Order 2020/1338 which came into force at 11pm on 31 December 2020.

The Order refers to an agreement between UK and Norway made on 13 October 2020 regarding the continuing application of the 1961 treaty, pending the hoped-for re-entry of the UK into the Lugano Convention, but its language is essentially no more than that of updating obsolete references in the treaty (such as referring to the UK Supreme Court in place of the House of Lords). Accordingly, now that the Order is in force, money judgments from recognised courts in Norway will have to be enforced by registration and not by action at common law.

The question, therefore, is whether judgments from the other EU countries which are parties to pre-existing reciprocal enforcement treaties must now be enforced by registration under the 1933 Act and not at common law, even in the absence of a specific further agreement with those countries.

For completeness, there is also a question as to whether money judgments from Cyprus and Malta can be enforced under the 1920 Act. The editors of the White Book seem to suggest that this might be the case.

It will be apparent from the above that advising on how judgments from the EU are to be enforced in England and Wales (even where the judgment is pursuant to a jurisdiction clause specifying that EU court) will now become far more uncertain in the sense that there appear to be substantial procedural traps for judgment creditors seeking to do so, unless and until either the courts or Parliament provide clearer guidance. Historically, English law has been receptive to the enforcement of money judgments given by foreign courts if the judgment debtor was present in that country when the action was brought, participated in the action there or had previously agreed to the jurisdiction of its courts, and provided things had not gone badly wrong in the foreign court process. The various statutory regimes which have been introduced since 1920 for registration of foreign judgments are designed to assist that process, not to obstruct it. It is ironic therefore that, as matters stand, things may have taken a backward step in this regard.

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