

CROSS-CHANNEL ENFORCEMENT OF JUDGMENTS AFTER BREXIT

The recast Brussels Regulation, No.1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Recast), is now at an end in English law. In this note, Rupert Reece and Daniel Holman from Gide's International Dispute Resolution group in London summarise the changes this means for the recognition and enforcement in England and Wales of judgments rendered by courts in other countries, focusing on judgments of French courts in particular.

In short, we have taken a step backwards. The UK's departure from the EU throws up significant hurdles to the mutual recognition and enforcement of court decisions, hurdles which did not exist under the Brussels Recast.

The UK departure from the EU

The terms of the departure of the UK from the EU are set out in the *Agreement on the Withdrawal of the United Kingdom from the European Union* (Withdrawal Agreement) of October 2019 - which established and regulates the "Transition Period" (from 1 February to 31 December 2020) - and the *Trade and Cooperation Agreement between the European Union and United Kingdom* (Trade Agreement) of December 2020 which sets out the post-Brexit arrangements between the parties.

The Withdrawal Agreement provided that EU law (including the Brussels Recast) applied "*in respect of and in the United Kingdom*" during the Transition Period, i.e. until 31 December 2020. After that, as from 1 January 2021, matters are governed by the Trade Agreement. Importantly, although the Trade Agreement lays down the new rules for matters such as international trade, aviation, road transport and fisheries, through to social security and law enforcement, the Trade Agreement is silent on the question of judicial cooperation in cross-border civil and commercial matters. The result is that the "European regime" under the Brussels Recast (and its predecessors) is now at an end in English law.

To understand what replaces it, it is necessary first to recap the rules under the Brussels Recast itself.

The Brussels Recast regime

The main effect of the Brussels Recast (which applies to proceedings commenced from 10 January 2015) is that judgments from one Member State are, with limited exceptions, recognised and enforceable "automatically" in any other. In the words of the Brussels Recast itself, judgments "*shall be recognised ... without any special procedure*" and "*shall be enforceable ... without any declaration of enforceability*".¹

In practice, provided that the judgment debtor has been served with the judgment and a certificate from the issuing court giving details of the amounts awarded has been provided, the judgment creditor could proceed directly to enforcement through the English courts.

¹ Brussels Recast Articles 36(1) and 39.

If the judgment debtor wished to contest the process, it could apply for "refusal" of the recognition or to suspend enforcement on the basis of the (narrow) grounds set out in the Brussels Recast itself. In summary, these grounds were that it would be contrary to public policy, that the defendant received insufficient notice of the claim (prior to a default judgment), or that there were prior irreconcilable judgments. If none of these applied, the judgment creditor could continue with the enforcement.

The Transition Period

Under the Withdrawal Agreement, the "automatic" recognition and enforceability regime under the Brussels Recast largely continues provided that the proceedings in question were commenced before the end of the Transition Period (i.e. on or before 31 December 2020). Article 67 of the Withdrawal Agreement explains "*Regulation (EU) No 1215/2012 shall apply to the recognition and enforcement of judgments given in legal proceedings instituted before the end of the transition period.*"²

For a case commenced in the French courts on or before 31 December 2020, the Brussels Recast will therefore apply to any eventual enforcement of the judgment in England and Wales.

Post-Brexit: the 2005 Hague Convention, statutory and common law regimes

With no provision being made on civil judicial cooperation in the Trade Agreement, the Brussels Recast Regulation was "revoked" in English law with effect from 1 January 2021.³ For any proceedings commenced on or after 1 January 2021, English courts will therefore no longer apply the "automatic" recognition or enforceability rules under the Brussels Recast.

For judgments of French courts, there are three possible regimes which may replace the Brussels Recast for recognition and enforcement in England and Wales:

- First, the Hague Convention on Choice of Court Agreements 2005;
- Second, the Foreign Judgments (Reciprocal Enforcement) Act 1933; and
- Third, the common law.

The question of which regime applies depends on several factors. In summary, these are the nature and date of any jurisdiction clause, the subject matter of the dispute and the remedy awarded, the basis of jurisdiction of the foreign court and, whether the foreign court in question is designated for reciprocal recognition and enforcement by bilateral convention.

We consider each of these in the context of the three regimes further below.

(1) The 2005 Hague Convention

The Hague Convention of 30 June 2005 on Choice of Court Agreements (Hague Convention) is currently in force in the UK, the EU27, Mexico, Montenegro and Singapore.⁴

² Withdrawal Agreement Article 67(2)(a).

³ Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, r.89; European Union (Withdrawal Agreement) Act 2020, Schedule 5 paragraph 1.

⁴ China, Israel, North Macedonia, Ukraine and the United States are also signatories though have not yet put the Hague Convention into force.

Like the Brussels Recast, the Hague Convention provides a framework for the mutual recognition and enforcement of judgments across its contracting states. It prescribes basic procedures for recognition and enforcement and the grounds for which the judgment debtor may contest it.

Conditions of application

There are several important preconditions to the applicability of the Hague Convention:

- First, the Hague Convention applies only where the judgment is given by a court of a contracting state designated in an exclusive choice of court agreement. Judgments issued pursuant to non-exclusive or asymmetric jurisdiction clauses, as often used in financial transactions, are not covered.
- Second, the list of excluded subject-matters is wider under the Hague Convention than under the Brussels Recast. The Hague Convention, for instance, does not apply to consumer or employment contracts nor to several company-related issues.
- Third, in order to apply, the Hague Convention must be in force both (1) in the country of the court which issues the judgment (e.g. France) before the choice of court agreement (designating the court of that country) is concluded, and (2) in the country of enforcement (e.g. UK) before the enforcement proceedings commence. The UK considers that the Hague Convention entered into force for the UK as from the date of the EU's accession to the convention on 1 October 2015 (at a time when the UK was still a member of the EU).⁵

Procedure for recognition and enforcement

The Hague Convention rules on these points present some general similarities with the Brussels Recast. For example:

- When applying for recognition or enforcement, the Hague Convention requires the judgment creditor to provide, in addition to the judgment, a copy of the jurisdiction agreement, proof of service (in the case of default judgment), and evidence of enforceability in the state of origin (as compared with the judgment plus certificate under the Brussels Recast).
- Grounds to contest recognition or enforcement under the Hague Convention include the validity of the jurisdiction agreement and capacity of the judgment debtor, proper service of process, fraud, public policy and inconsistent judgments (as compared with the public policy, notice prior to default judgments, and conflicting judgments grounds under the Brussels Recast).

⁵ The UK considers that the Hague Convention has continued in force uninterrupted since 1 October 2015, when it entered into force generally among EU Member States - which included the UK at the time. The European Commission however has indicated that it considers the Hague Convention entered into force in the UK only on 1 January 2021 when the UK joined in its own right following departure from the Union. Whatever the position, this should have little bearing on enforcing French judgments in England and Wales as there is no debate as to when the Hague Convention entered into force in France (1 October 2015) and French judgments in proceedings commenced before 1 January 2021 would be enforceable under the Brussels Recast. As to how Member State courts will treat the reverse position (i.e. enforcement of an English judgment where the choice of court agreement was concluded during the transition period) remains to be seen.

This broad comparison with the Brussels Recast in these areas is, however, as far as the Hague Convention goes. There is no "automatic" recognition or enforceability under the Hague Convention in the same way that there is under the Brussels Recast.

In England and Wales, the process under the Hague Convention is that the judgment creditor applies (without notice) for "registration" of the judgment in the High Court. Provided that the court receives the required documents and evidence (set out in the Hague Convention and CPR Part 74), it will usually grant the registration. Once registered, the judgment takes effect as if issued by the English court. The judgment creditor must then serve the registration order upon the judgment debtor.

If the debtor contests the registration, it can appeal (on the grounds above). Enforcement cannot proceed until either the time to appeal is expired (usually one or two months, depending upon whether the judgment debtor is served inside or out of England and Wales), or the appeal itself is resolved.

The important point to stress is that the process under the Hague Convention is in two steps: first, the application for registration and, second, enforcement - rather than the direct recourse to enforcement available under the Brussels Recast. The Hague Convention regime also prescribes a period specifically in which the judgment debtor may appeal against the registration. Under the Brussels Recast regime on the other hand, the judgment creditor proceeds direct to enforcement and it is for the judgment debtor to apply to the court to prevent or suspend it.

Though the Hague Convention rules therefore provide some welcome uniformity and certainty, the regime itself is nevertheless more cumbersome for the judgment creditor than under the Brussels Recast.

Where the Hague Convention is not applicable for any reason, enforcement of a French judgment in England and Wales may nevertheless be possible under either the Foreign Judgments (Reciprocal Enforcement) Act 1933 (Judgments Act) or at common law.

(2) The Foreign Judgments (Reciprocal Enforcement) Act 1933

With the Brussels Recast (and its predecessors) now "revoked", historical regimes in English law for recognition and enforcement over which it took precedence may - though the point is yet to be tested - now once again apply. For French judgments, this means that the Foreign Judgments Act is again relevant.

Conditions of application

In 1934, the UK and France agreed a *Convention between the United Kingdom and the French Republic providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters*. The effect of the Convention was to bring judgments of certain senior French courts - the Court of Cassation, Court of Appeal, Tribunal of First Instance, Tribunal of Commerce - within the scope of the Judgments Act.⁶

⁶ Several other European countries (Austria, Belgium, France, Italy, Netherlands, Norway) are also covered by the Judgments Act. The relevant courts will need to be checked in the implementing legislation in each case.

Although the Judgments Act had little or no application while the European regime continued, the legislation however remains in force and now, in the absence of the European regime, may once again apply.

One important qualification of the Judgments Act regime is that it allows enforcement only of judgments for payment of money (or interim orders for payment of money). Judgments providing for non-monetary remedies are not enforceable, though the Judgments Act provides for English courts to recognise the judgments in any proceedings founded on the same cause of action.

Procedure for recognition and enforcement

Similarly to the Hague Convention, the Judgments Act sets out procedures for enforcement of judgments of designated foreign courts, and the grounds upon which the judgment debtor may contest it. The process under the Judgments Act is as follows (in summary):

- The judgment creditor applies (without notice) for registration of the judgment in the English court. Provided that the court receives the required documents and evidence (listed in CPR 74), it will grant the registration, giving the judgment the same force and effect as if issued by the English court. The judgment creditor then serves the registration order on the judgment debtor.
- It is then for the judgment debtor, if it wishes to contest enforcement, to apply to set aside the registration. The Judgments Act specifies the grounds. These include insufficient notice of process, fraud, public policy, conflicting judgments and, finally, lack of jurisdiction of the original court.

The most important of these grounds is the question of jurisdiction: the foreign court must have jurisdiction on the grounds set out in the Judgments Act (section 4). Jurisdiction on the basis of the foreign court's own rules (only) is insufficient. Grounds for jurisdiction under the Judgments Act include submission or prior agreement to the proceedings; residence or principal place of business in the jurisdiction; land, property, or a transaction conducted through the offices of the judgment debtor in the jurisdiction; or jurisdiction otherwise on the basis of English common law rules.

It is only once any set aside application is decided, or the time to make the application is expired, that the judgment creditor may proceed with the enforcement of the registered judgment.

Although the Judgments Act therefore has its own restrictions (e.g. money judgments of designated courts with jurisdiction under English rules), the regime is nevertheless likely to be of importance.

(3) Common law

Where neither the Hague Convention nor the Judgments Act are applicable (e.g. judgement of a court outside the Judgments Act chosen in a non-exclusive choice of court agreement) there is, finally, the common law regime.

English common law, like the Judgments Act, allows enforcement only of final judgments for payment of money. The claimant must also show that the foreign court had jurisdiction on the basis of English rules.

The procedure at common law is for the judgment creditor to start a fresh claim in the English court to recover the foreign judgment as a debt from the judgment debtor. The judgment creditor may apply for summary judgment on the basis that the judgment debtor has no real prospect of defending the claim or, if the debtor does not reply to the claim, for judgment in default.

To contest enforcement, the judgment debtor must defend the claim by showing grounds to impeach the original judgment. These grounds, which broadly reflect those also found under the Hague Convention and the Judgments Act, include public policy, fraud, natural justice, inconsistent judgments, or breach of a jurisdiction or arbitration clause.

If no defence is made out, the judgment creditor will ordinarily obtain a judgment from the English court for payment of the judgment amount which it may then enforce against the judgment debtor.

The future: back to Lugano?

The other main instrument under the European regime for cross-border recognition and enforcement is the 2007 Lugano Convention.⁷ The contracting parties to the Lugano Convention are the EU Member States (including the UK while it remained a member), Switzerland, Iceland and Norway.

Under the Withdrawal Agreement, the Lugano Convention, like the Brussels Recast, will apply in cases commenced before the end of the Transition Period.⁸

Following its departure from the EU, in April 2020 the UK applied to (re) join the Lugano Convention in its own right. If the UK is able to re-join, this would present some solution to the difficulties with the above regimes. The Lugano Convention, for example, covers non-money judgments - unlike the Judgments Act or common law - as well as judgments based on non-exclusive choice of court agreements - unlike the Hague Convention. The grounds for contesting enforcement under the Lugano Convention also replicate the narrow grounds under the Brussels Recast, rather than the broader bases available under the Hague Convention, the Judgments Act or at common law.

The Lugano Convention notably, however, provides only for the automatic recognition of judgments. It does not provide for automatic enforceability. Judgment creditors would therefore still need to apply (by a procedure similar to that under the Hague Convention) for registration of the judgment before enforcement. Given the broad scope of judgments covered - and narrower grounds for resisting enforcement - the Lugano Convention would nevertheless present a welcome regime for judgment creditors.

At the time of writing however, the application of the UK remains pending. Recent reports indicate that the European Commission opposes the application.⁹ The final position of the Member States however remains to be seen.

⁷ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters done at Lugano 30 October 2007.

⁸ See Withdrawal Agreement Article 129(1).

⁹ "Brussels opposes UK bid to join legal pact, splitting EU states", Financial Times, 12 April 2021.

Conclusion

In the immediate term and in the absence of any new agreement between the UK and the EU, the practical advice to parties considering cross-border jurisdiction clauses for contracts where enforcement might one day be sought in the UK, is: either (1) make sure the jurisdiction clause complies with the conditions of application of the Hague Convention (i.e. exclusive jurisdiction only); or (2) refer disputes to arbitration. In the current context, arbitration becomes an increasingly attractive option, since arbitration awards rendered in the UK will be readily enforceable in a large number of countries (and vice versa) under the regime of the New York Convention 1958.

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