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Enforcement of Judgments 2021

Ireland

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Law and Practice

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1. IDENTIFYING ASSETS IN THE JURISDICTION

1.1 Options to Identify Another Party's Asset Position

It is important that an assessment of an opposing party's asset position is an ongoing process and is carried out prior to, during and after proceedings have concluded. The opposing party's asset position will often inform both litigation strategy and the enforcement options most likely to yield a return for the judgment holder. In addition, even where acting for a defendant, it is important to consider a plaintiff's financial position. Where concerns arise about a plaintiff's ability to discharge a defendant's costs should the plaintiff's claim be unsuccessful, a defendant may apply to court for an order for security for costs against that plaintiff. If an order for security for costs is made, the plaintiff will be required to lodge a sum of money into the court to meet the costs of the defendant in the proceedings if the defendant is successful.

There are a number of steps that a party can take to assist in identifying an opposing party's asset position.

Information that Is Publicly Available

The asset position of an opposing party may be publicly available in some instances, including the following.

- The Irish Land Registry – the Irish Land Registry sets out the ownership of land or property, and confirms whether any charges are registered over the land or property.
- The Companies Registration Office (CRO) – the CRO provides details about a company's directors, shareholders and registered charges relating to a company. The CRO also confirms the status of the company and provides the date on which a company has gone into liquidation, the date on which a receiver

has been appointed, or whether the company has been dissolved.

- Tracing agent – a tracing agent can carry out an investigation into the asset position of another party. For example, a tracing agent might establish the details reflecting the actual property of the debtor, or establish whether the debtor has any offshore property and assets.
- The Aircraft Register – the Irish Aviation Authority, which is the sole authority for the registration of civil aircraft in Ireland, provides a register of civil aircraft registered within the state.
- The Personal Bankruptcy Register – the Personal Bankruptcy Register contains details of bankruptcies declared by the High Court of Ireland, and is kept in the Examiner's Office of the High Court. While this Register will not provide exact details on the asset position of another party, it will give information as to whether a party has been adjudicated bankrupt.
- The Register of Personal Insolvencies – the Register of Personal Insolvencies is subject to statutory instrument S.I. No 334 of 2002, the European Communities (Personal Insolvency) Regulations 2002. It contains details of personal insolvencies declared by the courts of the other member states of the European Union. While this Register will not provide exact details on the asset position of another party, it will give information as to whether a party has entered a personal insolvency arrangement.

Interim Options to Identify the Asset Position of Another Party

Where a judgment holder has identified the assets of a judgment debtor within the jurisdiction, they can then consider obtaining a court order to freeze the judgment debtor's assets, or to identify the judgment debtor's assets. The following orders may be obtained.

- Mareva injunction – this is a freezing order, which is granted to prevent a debtor from dissipating or removing assets before or after a judgment, and will allow for the creditor to recover the debt owed. A creditor may apply to the High Court for a Mareva injunction.
- Asset disclosure orders – this type of order is usually ancillary to Mareva injunctions, and is a means to compel a debtor to disclose the full extent and location of their assets.
- Anton Piller order – this order is granted where there are concerns that a party might move assets or conceal evidence; search orders may also be granted to search a premises.
- Court order – a creditor may obtain an order to compel the judgment debtor to disclose the location, identify assets or reveal the extent to which funds are available.
- European account preservation orders (EAPOs) – these orders can be granted in Irish courts pursuant to Regulation (EU) 655/2014. An EAPO will prevent the transfer or withdrawal of funds held by a debtor in a bank account located in another member state. In order for such an order to be granted, the creditor must establish that there is a real and urgent risk that the subsequent enforcement of the creditor's claim against the debtor will be impeded or made substantially more difficult if the order is not granted.

Post-judgment Options to Identify the Asset Position of Another Party

Pursuant to Order 42 of the Rules of the Superior Courts, a judgment holder may apply to the court for discovery in aid of execution. The purpose of this is to examine the judgment debtor's asset and financial position to assist in the execution of the judgment debt. This process applies to both money and non-money judgment.

Where a party has obtained judgment, they may also determine the asset position of the

judgment debtor by commencing examination proceedings in the District Court, pursuant to Order 53 of the District Court Rules and the Enforcement of Court Orders Act, 1926, as amended. The court may also consider granting an instalment order against the judgment debtor in the amount in which the debtor can afford to pay. This is discussed in more detail in **2.4 Post-judgment Procedures for Determining Defendants' Assets**.

2. DOMESTIC JUDGMENTS

2.1 Types of Domestic Judgments

The types of judgments that may be obtained in Ireland are wide ranging. A money judgment, whereby the defendant is ordered by the court to pay a sum of money to the plaintiff, is the most common form of judgment. A money judgment may arise in the form of an order to pay a specific sum in damages, or where the proceedings are to recover a debt or liquidated sum.

In addition, judgment may take the form of:

- declaratory relief, whereby the court will determine the legal relationship between the parties;
- an order of specific performance of an agreement or contract;
- an order for possession of property; or
- an injunction either prohibiting a party from taking a particular action or requiring a party to perform a particular action.

There are various other specific types of judgments/orders that may be obtained depending on the type of reliefs sought in the proceedings; for example, in judicial review proceedings, an order quashing a decision of a public body.

Broadly speaking, judgment may be granted in one of the following manners.

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- Judgments can be granted in default; for example, where a defendant has failed to enter an appearance, or has failed to deliver its defence within the timeframe prescribed in the Rules of the Superior Courts.
- An interim or interlocutory order is typically one that relates to matters in the proceedings that are procedural in nature, with final determination to be made at the substantive hearing of the matter. This could include an interim injunction ordering or prohibiting the performance of certain acts, or freezing a person's assets so they are available to a plaintiff to enforce against if judgment is ultimately obtained.
- A final judgment may be obtained and a full trial on the merits. This will determine the rights between the parties and will dispose of the proceedings, or a part of the proceedings (for example, an application for discovery), subject to any right of appeal.
- A summary judgment may be obtained where the proceedings relate to a debt or liquidated sum. The summary judgment procedure is a simplified and (ordinarily) quicker means of obtaining judgment. In such proceedings, the matter is heard and determined on affidavit evidence only; however, summary judgment will only be awarded where the court is satisfied that the claim against the judgment debtor is easily quantifiable, and the defendant has no bona fide defence to the claim.

2.2 Enforcement of Domestic Judgments

The procedures adopted when enforcing a domestic judgment are dependent on the nature of the judgment. The following methods can be used to enforce a domestic monetary judgment.

- Enforce the execution against goods – a plaintiff with a monetary judgment can obtain an execution order against goods, which is sent to the sheriff or county registrar to enforce. The sheriff may seize and sell the goods and property of a judgment debtor to discharge the judgment debt. Once issued, execution orders are generally valid for one year and may then be renewed.
- A judgment mortgage can be registered against the property of the judgment debtor. Once registered, this judgment remains a charge on the title for a period of 12 years, and the debtor cannot deal with the property within that period unless the debt is discharged.
- Where a judgment mortgage has been registered against the property, the creditor may make an application for a well-charging order and an order for sale to compel the sale of the property, the proceeds of which would go towards discharging the debt owed to the creditor.
- A garnishee order can be obtained where the debtor has no assets but there is money due and owing from a third party. The court may order that the third party pay the creditor directly. This type of judgment is only used in cases where there are no goods to be seized to satisfy the judgment.
- Bankruptcy proceedings may be brought against the judgment debtor in the High Court. During this process, the property and assets of the debtor are transferred to the official assignee in bankruptcy to be sold by them for the benefit of those to whom the individual owes debts. A debtor will be discharged from bankruptcy after a year.
- Make a petition to wind up the judgment debtor's company pursuant to the Companies Act, 2014. Where the court finds that the company is deemed unable to pay its debts (or where the court is of the belief that it is just and equitable to do so), it will grant an order to wind up the company. If the order is granted, an official liquidator will be appointed. The role of the official liquidator is to take possession of the company's property, sell

the company's assets, list the debt owed by the company, and pay the debts owed to creditors in order of the list of preferential creditors.

- Apply to the court to appoint a receiver over the judgment debtor's assets by way of equitable execution. This procedure involves the appointment of a receiver by the court over, for example, proceeds of the sale of an asset by the debtor with a view to satisfying the debt. The decision to appoint a receiver is at the court's discretion, and this type of application can be made by way of an ex parte application, without notice to the judgment debtor.
- Registering the judgment will not automatically enforce it, but is a means of encouraging the debtor to seek to discharge the judgment debt.

Where the court has granted injunctive or declaratory relief against the judgment debtor, or has granted an order for specific performance to enforce a judgment, and should the debtor fail or refuse to abide by an order of the court, the judgment holder may issue attachment and committal proceedings against the judgment debtor. This is set out in the Enforcement of Court Orders Act, 1926, as amended. With leave of the court, a writ of attachment is issued and directs the sheriff to attach the judgment debtor and bring them before the court.

The court may issue an order for attachment to be directed at the judgment debtor, to compel them to come before the court. An order for committal may be granted, resulting in the judgment debtor being imprisoned should they not comply with the court order. This is another method to enforce a judgment, the purpose of which is to compel the judgment debtor to comply with the directions of the court. However, this method should be used as a last resort, and the court will look to the ability of the judgment debtor

to pay, and the court will generally not grant an order for committal where the judgment debtor is unable to discharge the debt.

Section 53(1) of the Companies Act, 2014, as amended, provides for the enforcement of judgments against companies and their officers. This section operates by putting the officers of the company on notice that if the company fails to comply with an order or judgment of the court, then attachment and committal proceedings may be commenced by the judgment holder. Alternatively, the assets of the directors or company officials, or the assets of the company, may be sequestered. This section is coercive in nature, rather than punitive, and seeks to encourage compliance with orders and judgments of the court.

Section 53(2) of the Companies Act ensures that company officers are put on notice of the potential application for attachment, or sequestration of company property, by putting a penal endorsement on the order or judgment prior to service thereof. To successfully apply for an order for attachment and committal, or to apply to have the company's assets sequestered, penal endorsement must be included on the order or judgment. The court will require evidence of service of the order or judgment on the judgment debtor containing the penal endorsement.

2.3 Costs and Time Taken to Enforce Domestic Judgments

Generally, the cost and the length of time involved in enforcing a judgment will depend on the enforcement methods adopted, the complexity of a particular case, and the nature and value of the assets involved, as well as the extent of any challenge to the enforcement method.

For example, while it is relatively straightforward to issue an execution order and engage the sheriff to seek to levy execution, the procedures

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involved to issue and prosecute proceedings to obtain a well-charging order and sell the property of the judgment debtor on foot of a judgment mortgage is far more complex and itself may be defended, thus increasing the length of time and costs to enforce the judgment.

The Rules of the Superior Courts further provide that an execution order or an order of committal, if unexecuted, shall remain in force for one year only from its issue, unless renewed. The Rules also provide that a party must seek leave of court to enforce a judgment beyond six years from the date of judgment. Therefore, preliminary applications may be required, depending on the length of time that has passed, before any steps to have the judgment enforced are taken.

Court fees will also be incurred in stamp duty on court documents. Where the sheriff has been engaged to enforce a judgment, there may be additional fees payable as set out in the Sheriff's Fees and Expenses Order 2005, made under the Enforcement of Court Orders Act 1926. Sheriffs are self-employed and compensated on a commission basis known as poundage. The fee payable at the time of lodgement with the sheriff of an execution order will vary according to the contents of the execution order.

2.4 Post-judgment Procedures for Determining Defendants' Assets

A judgment holder may apply to the court to seek information as to the judgment debtor's assets, or their financial position generally. If successful, the court will then order the judgment debtor to disclose their financial position.

Discovery in Aid of Execution

The court has a wide discretion in respect of such an application, and it is not confined solely to the judgment holder; it may be made against any interested party. For example, where the assets of the judgment debtor are co-owned

by another party, the court may order against this other party. The application may be made ex parte grounded on an affidavit, and generally examination will take place before the master of the High Court, or in the Circuit Court. The court may make an order that the judgment debtor will attend for examination as to whether any debts are owed to the judgment holder, and what property or other means the debtor has of satisfying the judgment. The judgment debtor may also be required to produce books or documents relevant to those matters.

Examination in the District Court

The application should be made in the district court area in which the judgment debtor resides. A creditor may summon a judgment debtor to appear before the District Court. The District Court will direct that the debtor then deliver a statement of means, which sets out their assets and liabilities, as well as any other income and expenditure, or persons to whom the debtor is morally or legally obliged to support financially. The judgment debtor must then appear again before the District Court and can be cross-examined on the contents of the statement of means. Where the debtor is a company, any officer of the company may be examined.

Instalment Orders

At the examination, if it is concluded that the judgment debtor is able to pay their debts, but cannot pay the debt in a single instalment, the court may grant an instalment order whereby the debt will be discharged in a number of instalments as directed by the court. Such an order will not be made if it is determined that the debtor cannot pay the debt owed. Either the creditor or the debtor can make an application for an instalment order before the District Court, with a right of appeal to the Circuit Court against the making of the order.

2.5 Challenging Enforcement of Domestic Judgments

Issuing an Application to Set Aside a Judgment

A defendant may challenge the enforcement of a judgment by applying to set aside the judgment obtained against them. Such an application can be made under the following circumstances.

- Where a judgment or order was obtained following non-appearance at trial – Order 36, Rule 33 of the Rules of the Superior Courts sets out that where a judgment or order is obtained where one party does not appear, the judgment or order may be set aside by the court as it sees fit, once the application is made within six days of the trial. The court may set aside the judgment on the basis that in the interests of justice, the defendant should be given a chance to present their case, and also that the defendant has a good defence and a reasonable prospect of success. A defendant will generally have to show that there has been some irregularity or shortcoming in the judgment. Where the absence of the defendant was deliberate, the court will not set aside the judgment.
- Where a judgment or order does not correctly record the decision of the court – at common law, the courts have jurisdiction to amend a previous court order or judgment, even where it has been deemed final and has been perfected, so that it will correctly reflect the order that was made to ensure that the true and final decision of the court is carried out.
- Where a judgment or order was obtained fraudulently.
- Where there was bias on the part of the court – a judgment or order may be set aside where the defendant can establish that there was bias on the part of the court when granting the judgment. Such an application can only be made in exceptional circumstances involv-

ing a clear breach of constitutional rights or justice.

- Other special circumstances – the court has jurisdiction to set aside a judgment or order in special or unusual circumstances. The court may decide to set aside a judgment even where there has been no accidental slip in the judgment as it was drawn up, and it correctly states what the court decided and intended. This would only happen in very rare cases where it is deemed to be in the interests of justice to set aside the judgment or order.

Appealing the Judgment or Order

A judgment or order may also be appealed to a higher court that has jurisdiction to deal with the appeal. In civil matters, appeals are dealt with in the following ways.

- Appeals from the District Court are heard in the Circuit Court, and must be made within 12 days of the judgment or order.
- Appeals from the Circuit Court are heard in the High Court, and must be made within ten days of the judgment or order.
- Appeals from the Master's Court are made to the High Court within six days from the date of perfection of the order, or if the order was made ex parte, from notice of the said order, or if refused, from the date of such refusal.
- Appeals from the High Court are made in the Court of Appeal, either 10 or 28 days from the date of perfection of the order, depending on the nature of the case. The Court of Appeal may also rule on a question of law submitted to it by the Circuit Court.
- Appeals from the High Court or the Court of Appeal can also be made to the Supreme Court, either within 10 or 28 days from the date of perfection of the order, depending on the nature of the case.

Where a judgment is subject to appeal, this will not prevent it from being enforced, unless there

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has been a stay of execution placed on the judgment. The Irish courts have discretion to grant a stay on execution pending determination of an appeal.

In order for a domestic judgment to be enforced, it must have been validly obtained and served on the judgment debtor in accordance with Irish Law. Such a judgment must be final and conclusive to be enforceable, and cannot be subject to further consideration by a court. A defendant/judgment debtor may dispute that the court did not have jurisdiction to hear the matter, or a judgment debtor may also argue that the proceedings were not properly served on them.

2.6 Unenforceable Domestic Judgments

Generally, domestic judgments will be enforced, subject to the grounds to challenge enforcement set out in **2.5 Challenging Enforcement of Domestic Judgments**. However, certain judgments may not be enforced, such as:

- judgments where there is a stay of execution are not capable of being enforced until the stay has expired; and
- the Statute of Limitations, 1957 provides that no action can be brought on a judgment after the expiry of 12 years from the date on which it became enforceable.

2.7 Register of Domestic Judgments

Judgments may be registered in the Central Office Judgments Section of the High Court, and must be available for inspection to the public. All judgments – irrespective of whether they were obtained in the District, Circuit or High Court – are registered in the Judgments Section of the High Court. Lists of judgments that are available for public viewing may also be published by credit reference agencies. The name and address of the parties, together with details of the judgment amount, are published

in some newspapers and in commercial publications such as *Stubbs Gazette*. In addition, credit institutions record this information and an unpaid judgment may affect the debtor's borrowing powers.

Before registering a judgment, a creditor must inform the judgment debtor that it intends to register the judgment, and give the judgment debtor an opportunity to pay the debt.

A judgment debtor can apply to have the registration removed once the debt has been satisfied. In order to satisfy the judgment, a debtor is required to submit the following documents to the Central Office of the High Court:

- satisfaction piece – this is a document drawn up and executed by the creditor confirming that the debt has been satisfied; this document should be stamped with court stamp duty of EUR25; and
- a Certificate of Satisfaction.

The judgment can then be marked as “satisfied” on the Register. In order to do so, a debtor is required to submit the following:

- a Memorandum of Satisfaction on the Registration of a Judgment stamped with court duty of EUR25; and
- a Certificate of the Entry of a Memorandum of Satisfaction on the Registration of a Judgment.

As highlighted above, while registering a judgment will not automatically enforce the judgment, registration of itself will adversely affect a debtor's credit rating, and may prevent a debtor from borrowing further. This is a means of encouraging the debtor to seek to discharge the judgment debt.

3. FOREIGN JUDGMENTS

3.1 Legal Issues Concerning Enforcement of Foreign Judgments

Enforcement of judgments in Ireland is regulated by the following instruments:

- Regulation (EC) No 44/2001 (“Brussels I”);
- Regulation (EU) No 1215/2012 (the “Recast Regulation”);
- the Lugano Convention;
- the Hague Choice of Court Convention (the “Hague Convention”); and
- Common Law.

Brussels I, the Recast Regulation, the Lugano Convention and the Hague Convention are incorporated in Irish law under Order 42A of the Rules of the Superior Courts. Under the Recast Regulation, the Lugano Convention and the Hague Convention, a creditor can proceed with an application to recognise and enforce a foreign judgment without having to institute fresh proceedings in Ireland, although a creditor has the option to issue fresh proceedings should they wish to do so.

Brussels I and the Recast Regulation

The Recast Regulation replaced Brussels I and came into effect in January 2015 and now applies to all proceedings in EU member states commenced on or after that date. All judgments given prior to January 2015 remain subject to Brussels I.

The Recast Regulation provides that a foreign judgment to which the regulation applies – ie, a judgment issued in another member state – is enforceable in an Irish court. Judgments of other member states have the same force and effect as a judgment given by an Irish court. This proves to facilitate and simplify the process of recognising and enforcing judgments between member states, and requires member states to

act so as to prevent conflicting judgments from arising.

The following is required to make an application for enforcement under the Recast Regulation in Ireland:

- a copy of the judgment that is full and final, and was validly obtained in the foreign jurisdiction;
- a standard form certificate issued by the court in the foreign jurisdiction; and
- a certified copy of the judgment translated into English/Irish.

Such applications are made on an ex parte motion grounded on an affidavit, and made before the master of the High Court.

The Lugano Convention

The Lugano Convention is an international treaty, commonly described as the “Double Convention Treaty”, regulating both international jurisdiction (ie, the question of whether a court is competent to hear a cross-border case) and the recognition and enforcement of foreign judgments in civil and commercial matters between EU and European Free Trade Association (EFTA) states. In April 2020, the UK applied to accede to the Lugano Convention in its own right. The UK was previously a party to the Convention by virtue of its membership of the EU, but this is no longer the case post-Brexit.

The Lugano Convention has a similar framework to the Recast Regulation; the Recast Regulation ensures parties’ contractual choice of jurisdiction is enforced and that judgments from member states are recognisable and enforceable across the EU. While the non-EU parties have approved the UK’s application, in May 2021 the European Commission formally communicated to the European Parliament and the Council of the European Union that it opposes the UK’s

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application. This may have consequences for the recognition and enforcement of UK judgments in Ireland.

The Hague Convention

The Hague Convention applies in relation to disputes involving parties domiciled in countries that are signatories to the Hague Convention, which includes the EU, the UK, Australia and the USA. The Hague Judgments Convention was concluded in 2019, but has not yet come into force.

Common Law

Common law will govern the enforcement of foreign judgments where the regimes list above does not apply. For foreign judgments under common law, it is the court's discretion whether to recognise and enforce a foreign judgment. However, as a rule, the approach of the Irish courts to proceedings seeking recognition and enforcement is generally positive, provided the judgment is for a definite sum, is final and conclusive, and has been given by a court of competent jurisdiction.

3.2 Variations in Approach to Enforcement of Foreign Judgments

The approach to the enforcement of foreign judgments by the Irish courts will depend on the applicable regime.

The Approach to Enforcement of Foreign Judgments under the EU Regimes

Brussels I and the Recast Regulation have specific jurisdiction provisions depending on the subject matter of the judgment. The EU regimes define "judgment" broadly, and include any judgment given by a court or tribunal of a member state, and include a decree, order, decision or writ of execution, as well as a decision as to the determination of costs or expenses by the court. This includes non-monetary judgments and interim orders. A judgment debtor can apply for

recognition of a foreign judgment to be refused on the grounds that the foreign judgment was given in default of appearance by the judgment debtor. This may be done where the judgment debtor was not served with the document that issued the foreign proceedings in sufficient time and in such a way as to enable them to arrange for a defence. The judgment debtor will not have this option where they failed to commence proceedings to challenge the foreign judgment when it was possible to do so.

The Approach to Enforcement of Foreign Judgments under the Lugano Convention

The Lugano Convention also has specific jurisdiction provisions depending on the subject matter of the judgment. The Convention applies to the enforcement of judgments from EFTA member states. Similarly to the EU regime, a foreign judgment will not be recognised under the Lugano Convention where it was given in default of appearance. Also, a judgment includes a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by the court. This includes non-monetary judgments and interim orders.

The Approach to Enforcement of Foreign Judgments under the Hague Convention

The Hague Convention allows for the enforcement of monetary judgments, final injunctions and judgments in default of appearance. It does not allow for the enforcement of interim orders. The enforcement of non-monetary judgments will depend on the state dealing with the matter, while recognition and enforcement of a judgment may also be refused if the judgment awards exemplary or punitive damages that do not compensate a party for actual loss or harm suffered.

The Approach to Enforcement of Foreign Judgments under Common Law

Common law enforcement principles apply in respect of enforcement of judgments where the originating countries are neither EU nor EFTA member states. Common law allows for the enforcement of monetary judgments only, excluding those in relation to taxes, fines or penalties, or interim orders. Due to the fact that under common law a foreign judgment does not automatically have direct enforcement, the party enforcing the judgment must instead commence new proceedings in the Irish courts, and sue on the foreign judgment as a debt. In addition, a judgment may be unenforceable at common law where the foreign court did not have subject-matter jurisdiction.

3.3 Categories of Foreign Judgments Not Enforced

The categories of foreign judgments that are not enforced largely depend on the regime under which the judgment operates.

Interim Judgments

Interim judgments are generally enforceable under Brussels I and the Recast Regulation, but they will only be enforceable where the judgment debtor was given notice of the hearing at which the judgment was given, the judgment containing the order is served on the defendant before enforcement, and where the judgment debtor was given an opportunity to respond.

Judgments Given in Default of Appearance

Pursuant to Article 45 of the Recast Regulation, a judgment debtor can apply for recognition of a foreign judgment to be refused on the basis that the foreign judgment was given in default of appearance by the judgment debtor. There is an exception to this rule, whereby if the judgment debtor had an opportunity to commence proceedings to challenge the enforcement of the judgment, but failed to do so. The same provi-

sions in respect of a foreign judgment given in default are provided for in the Lugano Convention.

Circumstances where the Judgment Debtor Was Incorrectly Served

The Recast Regulation and the Lugano Convention provide that a foreign judgment should not be enforced in a domestic court where the judgment was not validly obtained or was not correctly served on the judgment debtor.

Circumstances under the Recast Regulation where a Foreign Judgment Will Not Be Enforced

Article 1 of the Recast Regulation sets out limits on the scope of its applicability. The Regulation does not apply to the following:

- revenue, customs or administrative matters;
- the liability of the state for acts and omissions in the exercise of state authority;
- family law matters;
- bankruptcy or insolvency matters; and
- arbitral awards.

Circumstances under the Lugano Convention where a Foreign Judgment Will Not Be Enforced

The Lugano Convention also sets out limits on the scope of its applicability. The Convention does not extend to the following:

- tax, customs and administrative matters;
- bankruptcy or insolvency matters;
- family law matters; and
- arbitral awards.

Circumstances under the Hague Convention where a Foreign Judgment Will Not Be Enforced

The Hague Convention also sets out limits on the scope of its applicability. The Convention does not extend to the following:

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- family law matters;
- insolvency; and
- arbitral awards.

Circumstances under Common Law where a Foreign Judgment Will Not Be Enforced

At common law, a foreign judgment will not be enforced where it is considered to be contrary to the principles of natural justice and public policy. A foreign judgment might not be deemed enforceable where it has not been properly served on the judgment debtor, where it has not been deemed final, where the judgment debtor has not been given the chance to defend the proceedings, or where the originating court did not have jurisdiction to deal with the matter.

3.4 Process of Enforcing Foreign Judgments

The Process of Enforcing a Judgment under the Recast Regulation

Under the Recast Regulation, judgments are automatically enforceable, and a judgment made in one member state will generally be recognised and enforceable in another member state. Under Brussels I, a declaration of enforceability was required for judgments to be issued in another member state. The Recast Regulation now provides that in most cases a judgment in any member state will be automatically recognised in another member state without the need for a declaration of enforceability.

The Process of Enforcing a Judgment under the Lugano Convention or under the Hague Convention

An application for recognition and enforcement of a foreign judgment pursuant to the Lugano Convention and the Hague Convention follows a similar process. Such an application is made on an ex parte basis before the master of the High Court. The judgment holder will require a document setting out the relief sought from the master, and a grounding affidavit will need

to be sworn by, or on behalf of, the judgment holder. This affidavit needs to exhibit the necessary proofs (ie, the foreign judgment or order) to enable the requisite order to be made regarding recognition and enforcement of the judgment.

The Process of Enforcing a Judgment under Common Law

There are certain requirements that a foreign judgment must satisfy before it can be recognised at common law and subsequently enforced in this jurisdiction. These requirements are that the judgment sought to be enforced:

- must be for a definite liquidated sum (ie, a judgment for a definite sum of money);
- must be a final, conclusive binding in its own jurisdiction; and
- must have been handed down by a court of competent jurisdiction, as determined by domestic common law rules of private international law.

An application for recognition and enforcement of a foreign judgment pursuant to common law is brought through the summary judgment procedure, where the party seeking to enforce the judgment is required to issue plenary proceedings seeking declaration that the foreign judgment is enforceable in Ireland. Along with a document setting out the relief sought from the master of the High Court, a grounding affidavit will need to be sworn by, or on behalf of, the judgment holder. This affidavit needs to exhibit the necessary proofs to enable the requisite order to be made regarding recognition and enforcement of the judgment. An affidavit of service may also be required to show that the proceedings were served on the judgment debtor.

The judgment is effectively treated as akin to a contact debt and, as such, the application must be brought within six years of the date on which the foreign judgment was given or made.

To recognise and enforce a foreign judgment, proceedings must be commenced in the High Court by way of originating summons. Notice of these proceedings should then be served on the judgment debtor.

3.5 Costs and Time Taken to Enforce Foreign Judgments

The Lugano Convention and the Hague Convention do not specifically provide a timeline within which a foreign judgment should be enforced in another jurisdiction. As a foreign judgment is treated with the same conditions as an Irish judgment, a foreign judgment remains in full force and effect for 12 years from the date on which it was given or made, subject to the requirement to make a court application where six years have passed since the date on which the judgment was given or made. This is discussed in more detail in **2.3 Costs and Time Taken to Enforce Domestic Judgments**.

Due to the fact that an application pursuant to the Lugano Convention or the Hague Convention is on an ex parte basis, the process to recognise and enforce a judgment is relatively straightforward, whereby once all proofs are in order, the foreign judgment should be recognised and deemed enforceable on the date the application is heard by the court.

Under Brussels I and the Recast Regulation, a foreign judgment to which the regulation applies is enforceable in Ireland without any declaration of enforceability being required from an Irish court. In addition, a foreign judgment will be enforced in Ireland under the same conditions as a judgment given by an Irish court. This means the length of time it would take to enforce a foreign judgment would be very similar to the length of time to enforce a domestic judgment. In the same way that is provided by the Irish court rules, foreign judgments remain in full force and effect for 12 years from the date on which

they were made, subject to the condition that no judgment may be executed after six years from the date on which it was given or made without the permission of the courts.

Where an application is being made pursuant to common law, it will take significantly longer to have the foreign judgment recognised and deemed enforceable, as the application is on notice to the judgment debtor, which must be served with the application documents. There can be significant delays in attempting to serve a judgment debtor who resides in, or does business outside, Ireland. Furthermore, once the judgment debtor has been served, it is possible that the application may be contested, or in some circumstances the matter might be adjourned, which would further increase the time for the judgment to be enforced.

The costs involved in enforcing a foreign judgment will depend on the particular case; there may be solicitors' and barristers' fees, as well as the costs incurred in bringing an application for recognition and enforcement pursuant to the Lugano Convention or the Hague Convention. As previously mentioned, due to the fact that under Brussels I and the Recast Regulation, a foreign judgment is enforced under the same conditions as a domestic judgment, the costs involved will be similar to the costs involved in a domestic judgment. See **2.3 Costs and Time Taken to Enforce Domestic Judgments**. With regard to bringing an application pursuant to common law, additional costs may be incurred in respect stamp duty fees, and serving court documents on the judgment debtor.

3.6 Challenging Enforcement of Foreign Judgments

Challenging a Judgment under the Recast Regulation

Where the judgment debtor challenges the recognition or enforcement of a judgment pursu-

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ant to the Recast Regulation, they may apply to court to:

- limit the enforcement proceedings to interim or protective measures;
- make enforcement conditional on the provision of security on the part of the debtor; or
- suspend the enforcement proceedings.

Challenging a Judgment under the Hague Convention

Under the Hague Convention, the judgment debtor may appeal the enforcement order within five weeks of service of the notice of enforcement. If the recognition and enforcement application pursuant to the Hague Convention is unsuccessful, the judgment holder can appeal the decision within five weeks of the order made refusing the application.

Challenging a Judgment under the Lugano Convention

When a foreign judgment is deemed enforceable pursuant to the Lugano Convention, the judgment debtor has one month from the date of service to lodge an appeal of the relevant order. However, where the judgment debtor is domiciled in a contracting state to the Lugano Convention other than Ireland, the timeframe for an appeal is extended to two months of service. The judgment debtor is to be given notice of its entitlement to appeal an order of the master of the High Court permitting recognition and enforcement, and it can bring an appeal to a judge of the High Court. Where an application for recognition and enforcement of a foreign judgment pursuant to the Lugano Convention is unsuccessful, the judgment holder can appeal the decision within five weeks of the order refusing the application.

Challenging a Judgment under Common Law

Under common law, a judgment debtor is required to be put on notice of the application for recognition and enforcement of the foreign

judgment, in order to allow for the judgment debtor to be present and contest the application, should they wish to do so. As the enforcement of a foreign judgment under common law is akin to the claim for a contract debt, the general principles applicable to the defence of a claim for such a debt apply. A decision of the High Court can be appealed within 28 days of the order being made. Under common law, the Irish courts may refuse jurisdiction on the grounds that Ireland is not the appropriate jurisdiction in which to seek enforcement. In respect of specific defences that may be raised by a judgment debtor to an application to recognise and enforce a foreign judgment, these may include the following:

- the judgment does not meet the criteria required under common law in order for the judgment to be recognised and deemed enforceable; eg, where the judgment is contrary to public policy or natural justice, or where the original court did not have personal jurisdiction consistent with Irish conflict of law rules requiring the defendant's submission to the foreign court's jurisdiction;
- the judgment was obtained fraudulently;
- the judgment might contradict an earlier judgment based on the same facts involving the same parties;
- the matter might be statute barred;
- as a matter of Irish law, for the court to assume jurisdiction to enforce a foreign judgment in Ireland, a "solid practical benefit" must accrue to the applicant in pursuing the proceedings in Ireland (*Albaniabeg Ambient Shpk v Enel SpA and Enelpower SpA* (High Court, 8 March 2016, McDermott J)); for example, the defendant must have assets in the jurisdiction against which to enforce.

4. ARBITRAL AWARDS

4.1 Legal Issues Concerning Enforcement of Arbitral Awards

Arbitration is a method of alternative dispute resolution. Arbitration in Ireland is governed by both the Arbitration Act 2010 (the "Arbitration Act") and the New York Convention on the Recognition and Enforcement of Arbitral Awards (the "New York Convention"). The Arbitration Act came into force on 8 June 2010 and now governs the law on arbitration in Ireland. It applies to both commercial international or foreign arbitral awards, and domestic arbitral awards. The Arbitration Act gives the force of law to the UNCITRAL Model Law on Commercial Arbitration (the "Model Law"), which applies to all arbitrations conducted in Ireland, whether domestic or international in nature. Order 56 of the Rules of the Superior Courts sets out the procedure for court applications in relation to arbitrations.

The Arbitration Act incorporates the following international agreements and conventions:

- the New York Convention;
- the Geneva Convention on the Execution of Foreign Arbitral Awards 1927;
- the Protocol on Arbitration Clauses 1923;
- the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States;
- the International Centre for Settlement of Investment Disputes (ICSID).

Jurisdiction of the Court

Jurisdiction must be held by the court before it can consider enforcing an arbitral award. Schedule 1, Chapter IV of the Arbitration Act gives provision to Article 16(1) of the Model Law, which sets out that an arbitrator/arbitral tribunal in Ireland can rule on their own jurisdiction, and an arbitration clause is treated as an agreement, independent of the other terms of a contract.

The High Court will determine whether a foreign arbitral award is enforceable, and, in doing so, will consider whether the subject matter of the arbitration must be arbitrable, and whether the arbitration agreement made between the parties must be valid and fully operable.

There is a right of appeal to the High Court for parties who dispute the arbitrator's determination of jurisdiction. The High Court is the relevant court to rule on a challenge to the arbitrator's determination on jurisdiction. For a domestic arbitral award, there are no grounds for disputing the recognition and enforceability of an award under the Arbitration Act, and instead a party must apply to the High Court to have the award set aside (as discussed below).

Arbitral Awards Cannot Be Appealed

Section 23 of the Arbitration Act provides that an arbitral award is enforceable in the same manner as a court order or judgment. As an arbitral award is final and binding, there is no appeal mechanism against such an award. The only recourse against an award is to apply to the High Court to have it set aside on one of the grounds set out in Article 34(2) of the Model Law. This application must be made within three months of receipt of the award. Article 34(2) sets out that an award may be set aside by the court only where the party making the application provides proof of the following:

- the arbitration agreement is not valid under the law of the originating state;
- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present their case;
- the arbitral award deals with a dispute that does not fall within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration;

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- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
- the subject matter of the dispute is not capable of settlement by arbitration under Irish law;
- the award is in conflict with public policy.

An application to have the award set aside must be made within three months of the applicant seeking to set aside, having received the award. Decisions of the High Court in relation to the enforcement of foreign arbitral awards cannot be appealed, which provides additional clarity to parties involved in the arbitral process.

An Arbitration Agreement Must Be in Writing

An arbitration agreement must be in writing, recorded in any form, including electronic communication. Article 7 of the Arbitration Act provides that any agreement must be in writing in order to be enforceable.

4.2 Variations in Approach to Enforcement of Arbitral Awards

The Arbitration Act provides for two methods of enforcement: by action or by leave of the High Court. The majority of awards tend to be enforced by leave of the High Court.

Enforcement by Action

The appropriate proceedings for enforcement by action are dictated by the nature and value of the claim. To enforce an arbitral award by action, the following proofs are required:

- the arbitration agreement;
- the arbitral award;
- that the arbitrator was duly appointed in accordance with the terms of the arbitration agreement;
- that the subject matter of the dispute between the parties was within the scope of the arbitration agreement; and

- that the unsuccessful party has defaulted in the obligations imposed upon them by the award.

Enforcement by Leave of the High Court

The application for leave of the High Court to enforce or enter judgment in respect of an arbitral award is set out in Section 23(1) of the Arbitration Act. Such an application can be made by originating motion and is returnable before the president of the High Court or a judge of the High Court nominated by the president, who will determine the outcome of the application. This is provided for under Order 56, Rule 6 of the Rules of the Superior Courts. An application can be made under Articles 34 and 36 of the Model Law to have an award set aside or to resist enforcement of an award, but this is done at the discretion of the High Court.

4.3 Categories of Arbitral Awards Not Enforced

Whether a dispute is enforceable will largely depend on the arbitration agreement itself, and the provisions of the Arbitration Act. The Arbitration Act does not apply to the following matters, therefore any awards made in respect of these matters will not be enforceable:

- disputes in relation to terms and conditions of employment, or remuneration arbitrations under Section 70 of the Industrial Relations Act, 1946;
- consumer disputes where the parties' contract in standard terms and the contract is valued under EUR5,000;
- arbitral awards provided for by a property arbitrator under the Property Values (Arbitration and Appeals), 1960.

4.4 Process of Enforcing Arbitral Awards

The Irish courts have shown a supportive approach to the enforcement of arbitral awards.

The High Court also specifically appoints a particular judge as the arbitration judge to hear all arbitration-related matters in the High Court. Currently, that is Mr Justice Barniville.

The vast majority of challenges to the award of an arbitrator are rejected, and the strong presumption in favour of upholding an arbitrator's award has been restated in a number of cases. Section 23(1) of the Arbitration Act provides that an arbitral award shall be enforceable in the state either by action or by leave of the High Court, in the same manner as a judgment or order of that court with the same effect. The Arbitration Act expressly excludes any possibility of an appeal in relation to the recognition and enforcement of an arbitral award, which further supports the approach to the enforcement of arbitral awards in Ireland.

The High Court in Ireland has jurisdiction to deal with arbitral awards, pursuant to the Arbitration Act. Arbitral awards are enforceable under Order 56 of the Rules of the Superior Courts, or under Article 23 of the Arbitration Act. An application for enforcement of a judgment is made by an originating notice of motion and a grounding affidavit on notice to the other party. The respondent to the motion can file a replying affidavit and the applicant can deliver a further response. A copy of the arbitral award must be presented to the court when making the application.

Under the Arbitration Act, an award made by an arbitral tribunal under an arbitration agreement will be enforceable in Ireland in the same manner as a judgment or order of that court with the same effect and where leave is given by the High Court.

The term "award" is defined under the Arbitration Act to include a partial award. This allows parties to enforce only part of an award.

4.5 Costs and Time Taken to Enforce Arbitral Awards

The length of time to enforce an arbitral award will depend on whether the award is disputed and an application is made to the High Court under the Arbitration Act, which will increase the time to enforce the award.

The costs involved when executing the arbitral award will depend on the complexity of the award and the amount of work involved. The cost of an application to set aside the award to the High Court will also have to be taken into account. Where enforcement proceedings are required, the general principle that costs follow the event will apply; the party seeking enforcement will generally be awarded the costs of the enforcement proceedings.

4.6 Challenging Enforcement of Arbitral Awards

Article 6 of the Model Law sets forth the court or authority that is to perform the functions of deciding on challenges to decisions of an arbitrator and to deciding upon applications to set aside an arbitral award. Article 9 of the Arbitration Act sets out that the High Court is the relevant court to consider such matters. The functions of the High Court are performed by the president or by such other judge of the High Court as may be nominated by the president.

The Preamble to the Arbitration Act gives the New York Convention, the Geneva Convention and the Geneva Protocol, and the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States force of law in Ireland.

Articles 35 and 36 of the Model Law provide for recognition and enforcement of foreign arbitral awards. Article 35 states that an arbitral award, irrespective of the country in which it was made (provided that country is a signatory of the New

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York Convention), must be recognised and enforced in Ireland, unless one of the grounds set out in the Model Law exists. Article 36 of the Model Law sets out the limited and exhaustive grounds under which a party can apply to challenge the enforcement or recognition of an arbitral award being enforced in Ireland:

- a party to the arbitration agreement did not have capacity to enter into the agreement, or the agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the law of the country where the award was made;
- the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitrator proceedings, or was otherwise unable to present their case;
- the award deals with a dispute not contemplated by, or not falling within, the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award that contains decisions on matters submitted to arbitration may be recognised and enforced;

- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.

In addition, under Article 36 of the Model Law, if the subject matter of the dispute is not capable of settlement by arbitration under the law in Ireland, or the recognition or enforcement of the award would be contrary to the public policy of the state, the recognition and enforcement of an award may be refused. It is up to the domestic state to determine the procedure for enforcing foreign arbitral awards.

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Trends and Developments

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Executive Summary

Membership of the EU provides a legislative framework that facilitates the enforcement of national judgments across the EU. This provides EU businesses with contractual certainty when trading with businesses in other member states as they know that if they obtain a judgment, it will be enforceable across the EU. Ireland's largest trading partner, the UK, is no longer part of the EU following Brexit. This now means that it is more difficult to enforce an Irish judgment in the UK, and similarly more difficult to enforce a UK judgment in Ireland.

However, Brexit also creates opportunities for Ireland and it is well positioned to benefit from this uncertainty and to become an international hub for dispute resolution. Ireland is now the largest common law jurisdiction in the EU. Ireland is also the only English-speaking member state.

Common law is favoured by many international companies, particularly US companies, for pan-European corporate contracts. This provides Dublin with a significant opportunity to become the go-to destination for the resolution of cross-border disputes. The Irish Commercial Court already provides the ideal fast-track framework favoured for the resolution of disputes by international businesses. A significant added advantage of litigating these disputes in Ireland, as opposed to in the UK post-Brexit, is that membership of the EU provides a legislative framework for the seamless issuing of proceedings and enforcement of judgments against other entities across the EU.

Separately, the uncertainty caused by Brexit in relation to the enforcement of judgments has meant that certain businesses have been increasingly turning to arbitration as an alternative method of resolving international disputes. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") provides a reliable enforcement regime of arbitral awards in the EU member states. Due to the fact that arbitration is not regulated by EU law, Brexit does not affect the recognition and enforcement of UK arbitral awards in EU member states or EU member state awards in the UK, which makes arbitration a more attractive approach when the dispute involves UK businesses.

Outlined below are the key procedural issues arising from Brexit and the international conventions that now operate to cover the enforcement of Irish judgments in the UK and UK judgments in Ireland.

Post-Brexit Issues and Enforcing UK Judgments in Ireland

The UK formally left the EU once the post-Brexit transition period expired on 31 December 2020. This means that the EU's legal framework no longer applies within the UK. As a result, the enforcement of new Irish and other EU member state judgments in the UK will be governed by the Hague Convention and domestic UK law.

The Withdrawal Agreement

The British government and the EU ratified the Withdrawal Agreement, which came into force in February 2020. The Withdrawal Agreement established the terms of the UK's withdrawal

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from the EU, in accordance with Article 50 of the Treaty of the European Union. The Withdrawal Agreement also addressed some separation issues, including a wind-down on ongoing procedures related to police and judicial co-operation in criminal matters, and other administrative and judicial procedures. During the post-Brexit transition period, most EU legislation continued to apply in the UK in the same manner as it did before 31 January 2020. The Withdrawal Agreement amended the European Union (Withdrawal) Act 2018 (EUWA) to save the effect of most of the European Communities Act 1972 (as amended) for the duration of the transition period, and created a new body of retained EU law (in modified form) at the end of the transition period, instead of on 31 January 2020.

The EU and the UK used the post-Brexit transition period to negotiate the EU–UK Trade and Cooperation Agreement, which provides for preferential arrangements in various areas, but which is silent on the topic of judicial co-operation in civil and commercial matters.

In addition, the Court of Justice of the European Union (CJEU) continued to have jurisdiction in the UK, and most references to EU member states in EU law included the UK. Under EU law, issues of enforcement and jurisdiction in member states are governed by Regulation (EU) No 1215/2012 (the “Brussels Recast Regulation”), which ensures that parties’ contractual choice of jurisdiction is enforced and that judgments from member states are recognisable and enforceable across the EU. By virtue of its membership with the EU, the UK was governed by the Brussels Recast Regulation, and the legal services sector in the UK gained significant benefits by facilitating the UK to be the venue for legal disputes. However, now that the UK has left the EU, the Brussels Recast Regulation no longer applies in matters with a UK dimension. This means that there is no automatic recognition

and enforcement of UK judgments on or after 31 December 2020 in the courts of EU member states. Similarly, parties will no longer have the benefit of direct recognition and enforcement of EU judgments in the UK.

The UK’s application to accede to the Lugano Convention

The Lugano Convention is an international treaty, commonly described as the “Double Convention Treaty”, which regulates both international jurisdiction (ie, the question of whether a court is competent to hear a cross-border case) and the recognition and enforcement of foreign judgments in civil and commercial matters between EU and European Free Trade Association (EFTA) states. The Lugano Convention has a similar framework to the Brussels Recast Regulation and, in effect, provides for relatively similar recognition and enforcement procedures between signatory states as currently apply under the Brussels Recast Regulation as between EU member states.

In April 2020, the UK applied to accede to the Lugano Convention in its own right. The UK was previously a party to the Convention by virtue of its membership of the EU. To become a party to the Lugano Convention, the UK would need unanimous agreement from the other contracting parties to the Convention; ie, the EU, Denmark (in its own right), Iceland, Switzerland and Norway (EFTA states). While the non-EU parties have approved the UK’s application, on 4 May 2021 the European Commission formally communicated to the European Parliament and the Council of the European Union that it opposes the UK’s application to accede to the Convention. This was somewhat of a surprise as it had been anticipated that the UK would be allowed to accede, thus resolving the majority of the recognition and enforcement issues arising post-Brexit.

The European Commission notes that although the Lugano Convention is open to accession by “any other State” upon invitation from the Depositary, and also upon unanimous agreement of the contracting parties, it is not aimed at all third countries. There is no third country other than EFTA/European Economic Agreement countries party to the Convention. Since January 2021, the UK is a third country with an “ordinary” free trade agreement facilitating trade but not including any fundamental freedoms and policies of the internal market. On the other hand, the Lugano Convention is based on a high level of mutual trust and reciprocity among the contracting parties and represents an essential feature of a common area of justice that corresponds with the high degree of economic interrelation based on the applicability of the four freedoms of EU law.

On 4 May 2021, the European Commission issued its Communication (the “Communication”) in respect of the UK’s application, and held that the European Council should block the accession of the UK to the Lugano Convention. However, the Communication is non-binding, and the ultimate decision lies with the majority of EU member states acting through the EU Council. If it is not approved, Ireland will look to the Hague Convention or common law rules to determine the recognition and enforceability of UK judgments.

The Communication provides that the EU’s long-standing approach is that the appropriate framework to promote co-operation with third countries in the field of judicial co-operation is the Hague Convention. The Communication further states that, as the UK is a third party without a special link to the internal market, the Commission considers that there is no reason to depart from the general approach to third countries in respect of the UK. As a consequence, the Commission concludes that the Hague Convention

should provide the framework for future co-operation between the EU and the UK in the field of civil judicial co-operation.

The UK’s reliance on international regimes

With the exit of the UK from the EU, the Brussels Recast Regulation no longer applies to the UK. Consequently, in the absence of an agreement between the UK and EU on judicial co-operation and enforcement of judgments, businesses are likely to experience significant disruptions to cross-border litigation with a UK dimension.

Furthermore, given that it currently appears that the UK may be refused accession to the Lugano Convention, the UK will have to rely on other international regimes in order to have judgments recognised and enforced; for example, the Hague Convention, to which the UK is a party in its own right. However, while the Hague Convention assists in ensuring jurisdiction clauses are followed and enables the enforcement of judgments within contracting states, there are some limitations within the Hague Convention in relation to non-exclusive jurisdiction clauses, and it has a much narrower scope than the Recast Regulation and the Lugano Convention. Also, while the UK intends to apply to the Hague Convention in relation to exclusive jurisdiction clauses, the European Commission has indicated its belief that the Hague Convention will only apply to exclusive English jurisdiction clauses agreed from 1 January 2021.

The issue of enforcement of judgments in the UK and Ireland is one of the many issues arising post-Brexit. Until now, the cross-border recognition and enforcement of judgments between Ireland and the UK has been governed by the Brussels Recast Regulation. The common law rules both in the UK and in Ireland allow for the enforcement of foreign judgments in the courts of the deciding jurisdiction. However, under common law, there are additional requirements

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to be met, and the scope is narrower than that of the Brussels Recast Regulation. For example, for a foreign judgment to be enforceable in common law:

- the judgment must be for a sum of money;
- the judgment must be final and conclusive; and
- the judgment must have been given by a court with the jurisdiction to do so.

Furthermore, should a party seek to enforce an Irish judgment in the UK (or vice versa), parties must commence fresh proceedings to apply for the recognition and enforcement of a judgment. Essentially, this will mean that in order to enforce an Irish judgment in the UK, a separate set of proceedings will now have to be issued in the UK in order to enforce it. In turn, this will increase legal costs, and will also increase the length of time taken overall to enforce a judgment. Parties can rely on the Hague Convention to enforce an Irish judgment in the UK, or a UK judgment in Ireland. However, this can only be done where the judgment is given on foot of an agreement that contains an exclusive choice of court agreement that falls within the Hague Convention, and therefore will not apply to all judgments.

Arbitration as an alternative in the UK

Whether the UK's litigation landscape will be heavily disrupted going forward will largely depend on the UK's application to accede to the Lugano Convention. Due to the fact that arbitration is not regulated by EU legislation, it has remained largely unaffected by Brexit; it does not affect the recognition and enforcement of UK arbitral awards in EU member states or EU member state awards in the UK. In the UK, arbitration

continues to be governed by the Arbitration Act 1996, and the Arbitration (Scotland) Act 2010, whereas international arbitration proceedings will continue to be governed by the New York Convention.

Regardless of the post-Brexit implications on litigation in the UK, arbitration is an appealing option to commercial parties, for reasons of flexibility, ease of enforcement of arbitral awards, party autonomy and privacy, and the limited grounds of appealing the arbitral process. However, in the post-Brexit arena, commercial parties have been increasingly turning to arbitration as an alternative method of resolving international disputes. The New York Convention provides a reliable enforcement regime of arbitral awards in the EU member states, which makes arbitration a more attractive alternative to litigation. The New York Convention also requires that contracting states treat arbitration agreements as final and valid, and recognise and enforce foreign arbitral awards. Currently, the New York Convention has 165 contracting state parties, including the 27 EU member states, which means that arbitral awards can be enforced almost universally.

Businesses trading in the EU and the UK need to give consideration to the dispute resolution mechanisms in their contractual documentation, particularly now, due to the possible enforcement barriers arising post-Brexit. In this regard, the inclusion of arbitration clauses may provide more certainty for parties in respect of choice of law and choice of seat in UK/EU disputes. Such clauses will also provide additional certainty in that arbitral awards will be recognised and enforced universally.

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organisations on complex disputes, with a particular focus on corporate disputes, and contentious intellectual property and insurance matters in the education, health, life science and TMT sectors. Mark has significant arbitration experience and is a member of the recently formed Ireland Chapter of the AIDA Reinsurance and Insurance Arbitration Society. Mark was also appointed by the European Commission, in March 2021, as a member of its Expert Group against SLAPP (Strategic Lawsuits Against Public Participation).

IRELAND TRENDS AND DEVELOPMENTS

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Mona Costelloe is a partner in the Litigation and Dispute Resolution Department at ByrneWallace LLP and is regarded as a leading litigator. She advises on a wide range of

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Robert McDermott is a senior associate in the Litigation and Dispute Resolution Department at ByrneWallace LLP and has wide-ranging commercial litigation experience acting for

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