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Enforcement of Judgments 2021

Ireland

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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.

ByrneWallace LLP is one of Ireland's leading full-service law firms, with a team of close to 300 professionals that includes 45 experienced partners. A forward-thinking Irish law firm, it focuses on securing the best possible outcomes for clients and is dedicated to the protection and promotion of clients' interests through the provision of expert legal services. The award-winning Litigation and Dispute Resolution team

is composed of expert problem solvers skilled in managing disputes within court or through alternative dispute resolution. As one of Ireland's largest litigation teams, it has the capacity and breadth of expertise to advise across all key industry sectors, handling complex and high-profile litigation and large-scale enforcement projects, both within and outside Ireland.

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IRELAND TRENDS AND DEVELOPMENTS

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