The latest view: Enforcement of judgments post-Brexit in the event of a No Deal Scenario

Both the EU and UK have (to varying extents) clarified their respective positions on civil judicial cooperation in the event of a No Deal Scenario. Given this clarification, our flowchart helps you to navigate the permutations of enforcing judgments post-Brexit.

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1. This flowchart covers only judgments received in “civil and commercial matters” currently covered by the Recast Brussels Regulation – (for example, it does not include criminal matters).

2. Prior to exit day, the Recast Brussels Regulation will apply in the English courts and the English courts will still be courts of a Member State. As such it will be possible to enforce a judgment under the Recast Brussels Regulation up to and including exit day. The system and co-operation enjoyed under the Recast Brussels Regime enables the easy and speedy enforcement of foreign judgments in the courts of another Member State. The Recast Brussels Regime provides that:

“A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member State without any declaration of enforceability being required.”

There is a wide definition of ‘judgment’ – as well as common money judgments (including costs orders), it covers the enforcement of non-money judgments such as injunctions, interim orders such as freezing orders, and in certain instances, default judgments.

3. The UK Parliament recently passed the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (the “UK CJJ Regulations”). The UK CJJ Regulations provide that the Recast Brussels Regulation will continue to apply in the English courts to a judgment of an EU27 court where the EU27 court was seised (i.e. it is an asserted jurisdiction – in the English courts, for example, this would be when the claim form is issued) prior to exit day.

Under the RBR, all that is required to enforce an EU27 judgment in the English courts is that the judgment creditor must:

(a) obtain a certificate from the court that issued the underlying judgment, detailing its substance and certifying that it is enforceable; and

(b) serve the certificate and judgment on the judgment debtor.

Following this, a judgment creditor can apply for the full range of enforcement orders available in the English courts. For example, a judgment creditor could:

- apply to take control of the judgment debtor’s assets;
- apply for a charging order; or
- apply for an attachment of earnings order or apply for a receivership to be imposed.

4. On 28 December 2018, the UK deposited its instrument of accession to the Hague Convention, and has sought to delay the entry into force of the Hague Convention until after exit day. The Hague Convention states that where there is an exclusive jurisdiction agreement (an “EJA”) between the parties to the dispute, all the Contracting States (after the UK’s independent accession, the EU27, the UK, Montenegro, Mexico and Singapore) are required to enforce any judgment made by the specified court. However, the scope of the Hague Convention is more limited than the Recast Brussels Regulation. It is therefore necessary to ask the following questions:

(a) Is there an underlying EJA in favour of the EU27 court? The Hague Convention applies only where there is a pre-existing EJA in place between the litigants.

(b) When was the EJA entered into? If the EJA was entered into prior to 1 October 2015, then the Hague Convention does not apply.

Further, there is uncertainty as to whether the Hague Convention will apply where the EJA was entered into prior to exit day, when the UK was only a Contracting State by virtue of it being a Member State, and a coverage gap has occurred in the Hague Convention’s application in the UK (from exit day to the UK’s independent accession). In order to address this issue, the UK has passed the Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018 (the “Hague Convention Regulations”). However, the application of the Hague Convention Regulations to EJAs in favour of an EU27 court in the period between 1 October 2015 and exit day is uncertain. The Hague Convention Regulations do make clear though that if an EJA is entered into between the UK and another Contracting State by virtue of the Hague Convention Regulations, then the Hague Convention shall apply in the English courts, as if the UK had remained a Contracting State without interruption.

The further scenario that has not been clearly addressed by the Hague Convention Regulations or the UK CJJ Regulations is where an EJA in favour of an EU27 court is entered into prior to exit day, but the EU27 court is not seised of proceedings until after exit day. In this situation, it is currently unclear whether the Hague Convention will apply or not and whether a judgment creditor would be able to enforce in the English courts using the Hague Convention or not.

(c) Are you trying to enforce a money judgment or a final injunction? If you are, then this is covered by the Hague Convention, however, the Hague Convention does not cover interim protective measures such as freezing orders.

(d) Is it an excluded matter? The Hague Convention lists specific substantive exclusions to its scope, including, insolventy, arbitration, consumer, employment and antitrust matters, as well as other niche matters. The Hague Convention is not drafted through that in the UK, the Hague Convention will only apply to insurance contracts in certain limited circumstances.

5. The Hague Convention states that the enforcement of the judgment can only be refused by the English court on very limited grounds and provides that a review of the merits of the judgment given by the court of origin. However, it is still necessary to comply with the English domestic procedures for recognition and enforcement of the enforcing EU27 state (CPR74, sets out a three stage procedure for the enforcement of a judgment that the Hague Convention applies to).

6. A judgment creditor who seeks to enforce an EU27 judgment not covered by the Hague Convention in the English courts would have to institute fresh legal proceedings in the form of a debt claim. The foreign judgment can be added as evidence in support of such an action, although it will need to be:

(a) final and conclusive;

(b) for a sum of money; and

(c) on the merits.

This means that foreign injunctions or interim orders cannot be enforced under English domestic law. Further, the requirement that a judgment be on the merits could provide an additional obstacle for enforcement of an EU27 judgment. The English courts impose a further requirement that the original judgment court must have had jurisdiction according to the rules which English law applies in such cases. The distinction between the Hague Convention’s rules of English and Wales, Northern Ireland and Scotland are well developed, and are well understood by practitioners and courts because they have continued to apply to cross-border matters where the Brussels regime does not apply. In short, this is an existing, tried and tested regime of private international law rules already applied in the courts for non-Brussels regime cases.

7. On 18 January 2019, the EU published a “Notice to Stakeholders (the “Notice”). The Notice does not have any legal force, nevertheless clarifies the EU’s position on the issue of civil judicial cooperation. The EU Notice takes a different stance to the UK CJJ Regulations (there is a slight asymmetry here) – it indicates that the EU27 courts will not apply the Recast Brussels Regulation to:

(a) any English judgment obtained prior to exit day;

(b) any proceedings pending before exit day, including an enforcement action; or

(c) proceedings instituted after exit day.

This would mean that even if you have commenced (but not concluded) an enforcement action in an EU27 state pre-Brexit, the Recast Brussels Regulation will no longer apply to that, and it may be necessary to recommence enforcement proceedings in the EU27 state pursuant to its domestic enforcement provisions (such as the ejecutario process in civilian legal systems). This position was reiterated in a Q&A document dated 11 April 2019, produced by the European Commission (the “EUQ&A”).

As a result, we would therefore advise that a judgment creditor seeks to wrap up an enforcement prior to exit day.

8. Similar to the enforcement of an EU27 judgment in the UK, in deciding whether the Hague Convention applies to an English judgment in the EU27, it is necessary to ask the questions set out at note 4 above.

In relation to question 4(b), the EU’s Q&A stated that, “according to the article 16(1) of the Hague Convention, it will only apply to exclusive choice of court agreements concluded after its entry into force for the UK i.e. after the UK has become a “party to the Convention”. Although this is not entirely clear, it seems to suggest that the Commission’s view is that the Hague Convention would not apply to an EJA concluded prior to (currently) the 1 November 2019 on the basis that at that point the UK was only a Contracting State by virtue of it being a Member State, and the Hague Convention only entered into force in the UK in its own right on 1 November 2019. In other words, the protection afforded to EJAs entered into prior to 1 November 2019 could be lost when the UK leaves the EU and this protection may not be revived by the UK’s independent accession to the Hague Convention. The Commission’s view, although instructive, is not conclusive of what the EU27, or the CJEU, may decide.

9. The benefit of enforcement pursuant to the Hague Convention is that enforcement of the judgment can only be refused by the EU27 court on very limited grounds and there cannot be a review of the merits of the judgment given by the court of origin. However, in comparison to the Recast Brussels Regulation, it is still necessary to comply with the domestic procedures for recognition and enforcement of the enforcing EU27 state.

10. A judgment creditor who seeks to enforce an English judgment not covered by the Hague Convention in an EU27 state must have to rely on the enforcement regime relating to private international law applicable in the EU27 State. Domestic law in relation to the enforcement of foreign judgments is well developed in each of the EU27. Given this, and the long-standing existence of cooperation, it is unlikely that the EU27 courts will restrict the enforcement of an English judgment post-Brexit. Nevertheless, as is the case before the English Courts, litigants looking to enforce an English judgment in the EU27 will likely be required to initiate fresh proceedings in that jurisdiction, and there will undoubtedly be additional, jurisdiction-specific, procedural steps that will need to be taken. As such, any enforcement action of an English judgment in the EU27 courts post-Brexit is likely to be more time-consuming and expensive. In many civil legal systems, for example, a declaration of enforceability must be obtained through competent proceedings before enforcement action can be brought.