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Post BREXIT: How will EU-Judgments be enforced in the UK?

Among the many not yet answered questions related to the Brexit, one is of particular importance for businesses: how will judgments of other EU countries be enforced in the UK, and vice versa, after March 2019.

Today, the UK and 27 other countries within the European Union have a very sophisticated and efficient system of mutual recognition and enforcement of foreign judgments in place, laid down in the Recast Brussels Regulation (EU 1215/2012). Judgments handed down by a court of one member state which has competence according to the provisions on international jurisdiction will automatically be enforced by the judicial authorities of any other EU member state. No specific recognition proceedings are necessary. The Recast Brussels Regulation also contains extensive rules on the determination of the competent courts and ways to choose the venue in a contract. Similarly, the EU-Regulation 1896/2006 provides a simplified procedure for obtaining a European Order for Payment between companies in different member states of the EU. It is applicable to undisputed amounts owed by a company located in a member state different from the creditor's country (EU-Regulation 1896/2006 is not applicable in Denmark, though).

With the Brexit taking effect end of March 2019, the UK will, however, automatically leave these systems and a solution for this situation will have to be negotiated between the UK and the European Union. But what happens if a "hard" Brexit happens with no negotiated solution?

In the event that the UK and the EU do not reach any compromise on the matter, the national rules in each of the European member states on the recognition of foreign judgments will apply, just the same way as if the applicant were an overseas company (e.g., from the US). The statutory provisions for such exequatur procedures vary from country to country but, for example, in Germany and France they consist of a test of international regularity which will be the case if (a) the judgment was handed down by a judge who had jurisdiction over the dispute and (2) it does not contravene the public order of the country where it is to be enforced. There may be more requirements for recognition of foreign judgments in other countries. All criteria for recognition are determined by the national laws of the country where recognition is sought for.

The UK might look out for alternative solutions which do not require the unanimous consent of the remaining countries of the European Union. In 2005, the EU and – so far Mexico and Singapore – agreed on the Hague Convention on choice-of-court agreements. The UK is currently not an autonomous member of this Convention but only as part of the EU. However, after leaving the European Union, the UK might apply for acceding the

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Hague Convention directly and thus benefit from the regulations of this Convention which is, however, only applicable to contracts where the contractual parties chose an exclusive place of jurisdiction of one of the Contracting States.

The UK could also become a member of the Lugano Convention on the recognition and enforcement of judgments from one member state in another member state. The Lugano Convention is applicable between the EFTA-states (European Free Trade Association) and can be considered as a predecessor of the Brussels Convention. However, adhesion to either EFTA or the Lugano Convention directly will require the consent of the other members, mainly identical with the members with the countries of the European Union. Thus, the UK will only be able to make use of this alternative by way of negotiations.

It goes without saying that any result achieved through negotiations between the "parties" (UK and EU) is better than no agreement at all. The EU Council already made a proposal suggesting that at least all judgments handed down before the UK's withdrawal (end of March 2019) shall continue to be enforceable in accordance with the current rules (Directives of the EU Council on the Brexit-negotiations, published on 11 May 2017). But, again, also this small achievement is subject to mutual consent.

Mutual recognition and enforceability of judgments is of high value for businesses in a globalized world. Indirectly, it even determines payment behaviors of companies and individuals. Thus, this topic should be given some priority in the Brexit negotiations.

As a practical advice, existing contracts between EU companies and UK companies should be reviewed in due course with regard to jurisdiction and choice-of-law clauses. Obviously, it is too early to determine effective jurisdiction clauses under the post-Brexit regime. However, parties to existing and new business contracts should consider arbitration clauses as an alternative to jurisdiction before public courts. Recognition and enforcement of arbitral awards is not related to the membership to the European Union. It is governed by the New York Arbitration Convention. The vast majority of the member countries of the United Nations (154 out of 193 member countries) have adopted the New York Arbitration Convention, including the UK and all other EU member states. Thus, the UK's withdrawal from the EU will have no impact on the enforceability of arbitral awards.

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