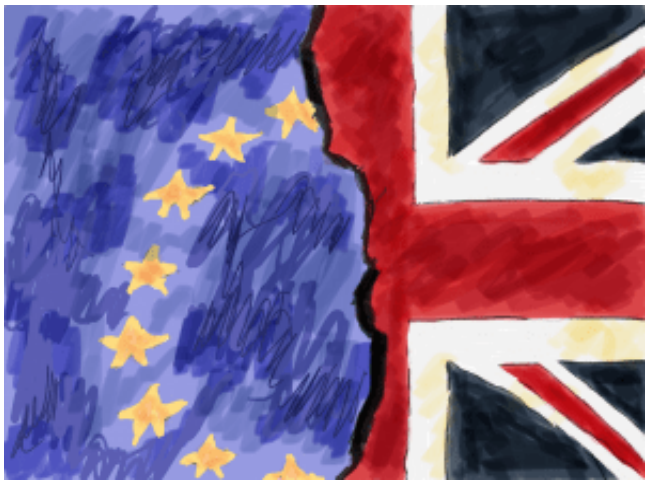
How to enforce civil and commercial judgments after Brexit?

As explained in our two previous articles relating to Brexit, "**How to protect your creative business after Brexit?**" and "**Brexit legal implications: the road less travelled**", the European Union ("EU") regulations and conventions on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, ceased to apply in the United Kingdom ("UK") once it no longer was a EU member-state. Therefore, since 1 January 2021 (the "Transition date"), no clear legal system is in place, to enforce civil and commercial

judgments after Brexit, in a EU member-state, or in the UK. Creative businesses now have to rely on domestic recognition regimes in the UK and each EU member-state, if in existence. This introduces additional procedural steps before a foreign judgment is recognised, which makes the enforcement of EU civil and commercial judgments in the UK, and of UK civil and commercial judgments in the EU, more time-consuming, complex and expensive.



1. How things worked before Brexit, with respect to the enforcement of civil and commercial judgments between the EU and the UK

a. The EU legal framework

Before the Transition date on which the UK ceased to be a EU member-state, there were, and there still are between the 27 remaining EU member-states, four main regimes that are

applicable to civil and commercial judgments obtained from EU member-states, depending on when, and where, the relevant proceedings were started.

Each regime applies to civil and commercial matters, and therefore excludes matters relating to revenue, customs and administrative law. There are also separate EU regimes applicable to matrimonial relationships, wills, successions, bankruptcy and social security.

The most recent enforcement regime applicable to civil and commercial judgments is EU regulation n. 1215/2012 of the European parliament and of the council dated 12 December 2012 on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "**Recast Brussels regulation**"). It applies to EU member-states' judgments handed down in proceedings started on or after 10 January 2015.

The original Council regulation n. 44/2001 dated 22 December 2000 on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "**Original Brussels regulation**"), although no longer in force upon the implementation of the Recast Brussels regulation on 9 January 2015, still applies to EU member-states' judgments handed down in proceedings started before 10 January 2015.

Moreover, the Brussels convention dated 27 September 1968 on the jurisdiction and the enforcement of judgments in civil and commercial matters (the "**Brussels convention**"), also continues to apply in relation to civil and commercial judgments between the 15 pre-2004 EU member-states and certain territories of EU member-states which are located outside the EU, such as Aruba, Caribbean Netherlands, Curacao, the French overseas territories and Mayotte. Before the Transition date, the Brussels convention also applied to judgments handed down in Gibraltar, a British overseas territory.

Finally, the Lugano convention dated 16 September 1988 on the jurisdiction and the enforcement of judgments in civil and commercial matters (the "**Lugano convention**"), which was replaced on 21 December 2007 by the Lugano convention dated 30 October 2007 on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "**2007 Lugano convention**"), govern the recognition and enforcement of civil and commercial judgments between the EU and certain member-states of the European Free Trade Association ("**EFTA**"), namely Iceland, Switzerland, Norway and Denmark but not Liechtenstein, which never signed the Lugano convention.

The 2007 Lugano convention was intended to replace both the Lugano convention and the Brussels convention. As such it was open to signature to both EFTA members-states and to EU member-states on behalf of their extra-EU territories. While the former purpose was achieved in 2010 with the ratification of the 2007 Lugano convention by all EFTA member-states (except Liechtenstein, as explained above), no EU member-state has yet acceded to the 2007 Lugano convention on behalf of its extra-EU territories.

The UK has applied to join the 2007 Lugano convention after the Transition date, as we will explain in more details in section 2 below.

b. Enforceability of remedies ordered by a EU court

Before Brexit, the Recast Brussels regulation, the Original Brussels regulation, the Brussels convention, the Lugano convention and the 2007 Lugano convention (together, the "**EU instruments**") provided, and still provide with respect to the 27 remaining EU member-states, for the enforcement of any judgment in a civil or commercial matter given by a court of tribunal of a EU member-state, whatever it is called by the original court. For example, article 2(a) of the Recast

Brussels regulation provides for the enforcement of any "*decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court*".

The Original Brussels regulation also extends to interim, provisional or protective relief (including injunctions), when ordered by a court which has jurisdiction by virtue of this regulation.

c. Competent courts

Before the Transition date, proceedings seeking recognition and enforcement of EU foreign judgments in the UK should be brought before the high court in England and Wales, the court of session in Scotland and the high court of Northern Ireland.

Article 32 of the Brussels convention provides that the proceedings seeking recognition and enforcement of EU foreign judgments in France should be brought before the president of the "*tribunal judiciaire*". Therefore, before the Transition date, a UK judgment had to be brought before such president, in order to be recognised and enforced in France.

d. Separation of recognition and enforcement

Before the Transition date, and for judgments that fell within the EU instruments other than the Recast Brussels regulation, the process for obtaining recognition of a EU judgment was set out in detail in Part 74 of the UK civil procedure rules ("**CPR**"). The process involved applying to a high court master with the support of written evidence. The application should include, among other things, a verified or certified copy of the EU judgment and a certified translation (if necessary). The judgment debtor then had an opportunity to oppose appeal registration on certain limited grounds. Assuming the judgment debtor did not successfully oppose appeal registration, the judgment creditor could then take steps to enforce the judgment.

Before the Transition date, and for judgments that fell within the Recast Brussels regulation, the position was different. Under article 36 of the Recast Brussels regulation, judgments from EU member-states are automatically recognised as if they were a judgment of a court in the state in which the judgment is being enforced; no special procedure is required for the judgment to be recognised. Therefore, prior to Brexit, all EU judgments that fell within the Recast Brussels regulation were automatically recognised as if they were UK judgments, by the high court in England and Wales, the court of session in Scotland and the high court of Northern Ireland. Similarly, all UK judgments that fell within the Recast Brussels regulation were automatically recognised as if they were French judgments, by the presidents of the French "*tribunal judiciaires*".

Under the EU instruments, any judgment handed down by a court or tribunal from a EU member-state can be recognised. There is no requirement that the judgment must be final and conclusive, and both monetary and non-monetary judgments are eligible to be recognised. Therefore, neither the UK courts, nor the French courts, are entitled to investigate the jurisdiction of the originating EU court. Such foreign judgments shall be recognised without any special procedures, subject to the grounds for non-recognition set out in article 45 of the Recast Brussels regulation, article 34 of the Original Brussels regulation and article 34 of the Lugano convention, as discussed in paragraph e. (Defences) below.

For the EU judgment to be enforced in the UK, prior to the Transition date, and pursuant to article 42 of the Recast Brussels regulation and Part 74.4A of the CPR, the applicant had to provide the documents set out in above-mentioned article 42 to the UK court, i.e.

- a copy of the judgment which satisfies the conditions necessary to establish its authenticity;

- the certificate issued pursuant to article 53 of the Recast Brussels regulation, certifying that the above-mentioned judgment is enforceable and containing an extract of the judgment as well as, where appropriate, relevant information on the recoverable costs of the proceedings and the calculation of interest, and
- if required by the court, a translation of the certificate and judgment.

It was incumbent on the party resisting enforcement to apply for refusal of recognition of the EU judgment, pursuant to article 45 of the Recast Brussels regulation.

Similarly, for UK judgments to be enforced in France, prior to the Transition date, the applicant had to provide the documents set out in above-mentioned article 42 to the French court, which would trigger the automatic enforcement of the UK judgment, in compliance with the principle of direct enforcement.

e. Defences

While a UK defendant may have raised merits-based defences to liability or to the scope of the award entered in the EU jurisdiction, the EU instruments contain express prohibitions on the review of the merits of a judgment from another EU member-state. Consequently, while a judgment debtor may have objected to the registration of a judgment under the EU instruments (or, in the case of the Recast Brussels regulation, which does not require such registration, appeal the recognition or enforcement of the foreign judgment), he or she could have done so only on strictly limited grounds.

In the case of the Recast Brussels regulation, there are set out in above-mentioned article 45 and include:

- if recognition of the judgment would be manifestly contrary to public policy;

- if the judgment debtor was not served with proceedings in time to enable the preparation of a proper defence, or
- if conflicting judgments exist in the UK or other EU member-states.

Equivalent defences are set out in articles 34 to 35 of the Original Brussels regulation and the 2007 Lugano convention, respectively. The court may not have refused a declaration of enforceability on any other grounds.

Another ground for challenging the recognition and enforcement of EU judgments is the breach of article 6 of the European Convention on Human Rights ("**ECHR**"), which is the right to a fair trial. However, since a fundamental objective underlying the EU regime is to facilitate the free movement of judgments by providing a simple and rapid procedure, and since it was established in Maronier v Larmer [2003] QB 620 that this objective would be frustrated if EU courts of an enforcing EU member-state could be required to carry out a detailed review of whether the procedures that resulted in the judgment had complied with article 6 of the ECHR, there is a strong presumption that the EU court procedures of other signatories of the ECHR are compliant with article 6. Nonetheless, the presumption can be rebutted, in which case it would be contrary to public policy to enforce the judgment.

To conclude, pre-Brexit, the EU regime (and, predominantly, the Recast Brussels regulation) was an integral part of the system of recognition and enforcement of judgments in the UK. However, after the Transition date, the UK left the EU regime as found in the Recast Brussels regulation, the Original Brussels regulation and the Brussels convention, since these instruments are only available to EU member-states.

So what happens now?

2. How things work after Brexit, with respect to the enforcement of civil and commercial judgments between the EU and the UK

In an attempt to prepare the inevitable, the EU commission published on 27 August 2020 a revised notice setting out its views on how various conflicts of laws issues will be determined post-Brexit, including jurisdiction and the enforcement of judgments (the "**EU notice**"), while the UK ministry of justice published on 30 September 2020 "*Cross-border civil and commercial legal cases: guidance for legal professionals from 1 January 2021*" (the "**MoJ guidance**").

a. The UK accessing the 2007 Lugano convention

As mentioned above, the UK applied to join the 2007 Lugano convention on 8 April 2020, as this is the UK's preferred regime for governing questions of jurisdiction and enforcement of judgments with the 27 remaining EU member-states, after the Transition date.

However, accessing the 2007 Lugano convention is a four-step process and the UK has not executed those four stages in full yet.

While step one was accomplished on 8 April 2020 when the UK applied to join, step two requires the EU (along with the other contracting parties, ie the EFTA member-states Iceland, Switzerland, Norway and Denmark) to approve the UK's application to join, followed in step three by the UK depositing the instrument of accession. Step four is a three-month period, during which the EU (or any other contracting state) may object, in which case the 2007 Lugano convention will not enter into force between the UK and that party. Only after that three-month period has expired, does the 2007 Lugano convention enter into force in the UK.

Therefore, in order for the 2007 Lugano convention to have entered into force by the Transition date, the UK had to have received the EU's approval and deposited its instrument of accession by 1 October 2020. Neither have occured.

Since the EU's negotiating position, throughout Brexit, has always been "*nothing is agreed until everything is agreed*", and in light of the recent collision course between the EU and the UK relating to trade in Northern Ireland, it is unlikely that the UK's request to join the 2007 Lugano convention will be approved by the EU any time soon.

b. The UK accessing the Hague convention

Without the 2007 Lugano convention, the default position after the Transition date is that jurisdiction and enforcement of judgments for new cases issued in the UK will be determined by the domestic law of each UK jurisdiction (i.e. the common law of England and Wales, the common law of Scotland and the common law of Northern Ireland), supplemented by the Hague convention dated 30 June 2005 on choice of court agreements ("**The Hague convention**").

I. At common law rules

The common law relating to recognition and enforcement of judgments applies where the jurisdiction from which the judgment relates does not have an applicable treaty in place with the UK, or in the absence of any applicable UK statute. Prominent examples include judgments of the courts of the United States, China, Russia and Brazil. And now of the EU and its 27 remaining EU member-states.

At common law, a foreign judgment is not directly enforceable in the UK, but instead will be treated as if it creates a contract debt between the parties. The foreign judgment must be final and conclusive, as well as for a specific monetary sum, and on the merits of the action. The creditor will then need to bring an action in the relevant UK jurisdiction for a

simple debt, to obtain judicial recognition in accordance with Part 7 CPR, and an English judgment.

Once the judgment creditor has obtained an English judgment in respect of the foreign judgment, that English judgment will be enforceable in the same way as any other judgment of a court in England.

However, courts in the UK will not give judgment on such a debt, where the original court lacked jurisdiction according to the relevant UK conflict of law rules, if it was obtained by fraud, or is contrary to public policy or the requirements of natural justice.

With such blurry and vague contours to the UK common law rules, no wonder that many lawyers and legal academics, on both sides of the Channel, decry the "mess" and "legal void" left by Brexit, as far as the enforcement and recognition of civil and commercial judgments in the UK are concerned.

II. The Hague convention

As mentioned above, from the Transition date onwards, the jurisdiction and enforcement of judgments for new cases issued in England and Wales will be determined by its common law, supplemented by the Hague convention.

The Hague convention gives effect to exclusive choice of court clauses, and provides for judgments given by courts that are designated by such clauses to be recognised and enforced in other contracting states. The contracting states include the EU, Singapore, Mexico and Montenegro. The USA, China and Ukraine have signed the Hague convention but not ratified or acceded to it, and it therefore does not currently apply in those countries.

Prior to the Transition date, the UK was a contracting party to the Hague convention because it continued to benefit from the EU's status as a contracting party. The EU acceded on 1

October 2015. By re-depositing the instrument of accession on 28 September 2020, the UK acceded in its own right to the Hague convention on 1 January 2021, thereby ensuring that the Hague convention would continue to apply seamlessly from 1 January 2021.

As far as types of enforceable orders are concerned, under the Hague convention, the convention applies to final decisions on the merits, but not interim, provisional or protective relief (article 7). Under article 8(3) of the Hague convention, if a foreign judgment is enforceable in the country of origin, it may be enforced in England. However, article 8(3) of the Hague convention allows an English court to postpone or refuse recognition if the foreign judgment is subject to appeal in the country of origin.

However, there are two major contentious issues with regards to the material and temporal scope of the Hague convention, and the EU's and UK's positions differ on those issues. They are likely to provoke litigation in the near future.

The first area of contention relates to the material scope of the Hague convention: more specifically, what is an "*exclusive choice of court agreement*"?

Article 1 of the Hague convention provides that the convention only applies to exclusive choice of courts agreements, so the issue of whether a choice of court agreement is "exclusive" or not is critical as to whether such convention applies.

Exclusive choice of court agreements are defined in article 3(a) of the Hague convention as those that designate "*for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of* ***one*** *Contracting state or one or more specific courts of* ***one*** *Contracting state, to the exclusion of the jurisdiction of any other courts*".

Non-exclusive choice of court agreements are defined in

article 22(1) of the The Hague convention as choice of court agreements which designate "*a court or courts of one **or more** Contracting states*".

Although this is a fairly clear distinction for "simple" choice of court agreements, "asymmetric" or "unilateral" agreements are not so easily categorised. These types of jurisdiction agreements are a common feature of English law-governed finance documents, such as the Loan Market Association standard forms. They generally give one contracting party (the lender) the choice of a range of courts in which to sue, while limiting the other party (the borrower) to the courts of a single state (usually, the lender's home state).

There are divergent views as to whether asymmetric choice of court agreements are exclusive or non-exclusive for the purposes of the Hague convention. While two English high court judges have expressed the view that choice of court agreements should be regarded as exclusive, within the scope of the Hague convention, the explanatory report accompanying the Hague convention, case law in EU member-states and academic commentary all suggest the opposite.

This issue will probably be resolved in court, if and when the time comes to decide whether asymmetric or unilateral agreements are deemed to be exclusive choice of court agreements, susceptible to fall within the remit of the Hague convention.

The second area of contention relates to the temporal scope of the Hague convention: more specifically, when did the Hague convention "*enter into force*" in the UK?

Pursuant to article 16 of the Hague convention, such convention only applies to exclusive choice of court agreements concluded "*after its entry into force, for the State of the chosen court*".

There is a difference of opinion as to the application of the Hague convention to exclusive jurisdiction clauses in favour of UK courts entered into between 1 October 2015 and 1 January 2021, when the UK was a party to the Hague convention by virtue of its EU membership.

Indeed, while the EU notice states that the Hague convention will only apply between the EU and UK to exclusive choice of court agreements "*concluded after the convention enters into force in the UK as a party in its own right to the convention*" – i.e. from the Transition date; the MoJ guidance sets out that the Hague convention "will continue to apply to the UK (without interruption) from its original entry into force date of 1 October 2015", which is when the EU became a signatory to the convention, at which time the convention also entered into force in the UK by virtue of the UK being a EU member-state.

To conclude, the new regime of enforcement and recognition of EU judgments in the UK, and vice versa, is uncertain and fraught with possible litigation with respect to the scope of application of the Hague convention, at best.

Therefore, and since these legal issues relating to how to enforce civil and commercial judgments after Brexit are here to stay for the medium term, it is high time for the creative industries to ensure that any dispute arising out of their new contractual agreements are resolved through arbitration.

Indeed, as explained in our article "*Alternative dispute resolution in the creative industries*", arbitral awards are recognised and enforced by the Convention on the recognition and enforcement of foreign arbitral awards 1958 (the "**New York convention**"). Such convention is unaffected by Brexit and London, the UK capital, is one of the most popular and trusted arbitral seats in the world.

Until the dust settles, with respect to the recognition and

enforcement of EU judgments in the UK, and vice versa, it is wise to resolve any civil or commercial dispute by way of arbitration, to obtain swift, time-effective and cost-effective resolution of matters, while preserving the cross-border relationships, established with your trade partners, between the UK and the European continent.

Crefovi regularly updates its social media channels, such as Linkedin, Twitter, Instagram, YouTube and Facebook. Check our latest news there!

Your name (required)

Your email (required)

Subject

Your message

Send

TKNF