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Lugano: What Next for Cross-Border Commercial Disputes?

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As the EU and U.K. continue to wrangle over the implementation of the so-called “Northern Ireland Protocol”, uncertainty remains as to the post-Brexit process for enforcing court judgments across borders.

As a result of the silence in the EU-U.K. Trade and Cooperation Agreement (the “Brexit Deal”) on judicial cooperation in civil matters, the U.K. has lost the benefits that it previously enjoyed as a member of the EU (particularly when considering the Brussels Recast Regulation) regarding judicial cooperation in civil matters. In a bid to plug the gap following its departure from the EU, and the hole left by the Brussels Recast Regulation, the U.K. applied to join the 2007 Lugano Convention (which governs jurisdiction and the recognition and enforcement of judgments between the EU, Norway, Iceland, and Switzerland). However, on 4 May 2021 the European Commission (the “Commission”) recommended to the Council of the EU that the U.K.’s accession application should be refused. Although the Commission’s recommendation is not binding on the Council, what does this mean for commercial parties wishing to rely on English jurisdiction clauses or enforce English judgments—do they now face a “hard Brexit”?

As a partial solution, the U.K. can fall back on bilateral treaties with some key EU jurisdictions, and general principles of international comity, which mean that respect for, and enforcement of, clear jurisdiction agreements are the norm, even where no binding commitment to do so exists. The U.K. has also acceded to the 2005 Hague Convention on Choice of Court Agreements (the “Hague Convention”), which is designed to give effect to exclusive jurisdiction clauses, in particular by requiring that contracting states respect such clauses, and enforce judgments resulting from them. The Hague Convention will be helpful to those with exclusive English jurisdiction clauses in their contracts. It is not, however, a “one stop shop” solution. In particular, it is limited to exclusive jurisdiction clauses and is generally understood not to apply to asymmetrical clauses. There is also a question as to its application to any exclusive jurisdiction clauses concluded between the entry into force of the Hague Convention (on 1 October 2015) and the date the U.K. became a contracting party to the Hague Convention in its own right (2300 GMT on 31 December 2020). Although the U.K. has passed regulations which provide that the U.K. will apply the Hague Convention to any exclusive jurisdiction clauses concluded in that period, the Commission has indicated its belief that it will only apply to exclusive English jurisdiction clauses agreed after 2300 GMT on 31 December 2020.

Unless and until the U.K. is granted permission to accede to the Lugano Convention, deciding which country’s court has jurisdiction over a legal issue and whether a judgment will be recognised will often be more complex and less certain than prior to the U.K.’s exit from the EU, and there is a risk that disputing parties may “race” to be the first to issue proceedings in their preferred country to obtain a jurisdictional advantage over the other party.

If you are, or soon will be, party to commercial contracts involving parties based in EU and non-EU countries (the latter now including the U.K.), consideration should be given to whether any jurisdiction clauses are likely to be effective and, if not, what steps can be taken in response. That might include:

1. Restating any exclusive jurisdiction clauses entered into prior to 2300 GMT on 31 December 2020 (to ensure that EU member state courts apply the Hague Convention);
2. Reviewing and amending jurisdiction clauses to ensure that they are exclusive (which should engage the Hague Convention);
3. Including an arbitration agreement in international contracts (the New York Convention, which governs the recognition and enforcement of arbitral awards, continues to apply to the U.K. and EU member states); and/or
4. Commencing legal proceedings sooner than might otherwise have been intended.

If you have any questions regarding jurisdiction rules and enforcement of judgments, please contact a member of our litigation team.

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