

CCBE UK delegation paper

UK - EU Future Relationship

The importance of agreed rules on cross-border jurisdiction, recognition & enforcement of civil and commercial judgments for EU and UK Citizens and Businesses

Introduction

1. The commercial, cultural and social ties between the EU and UK remain firm, despite the UK's departure from the EU. The EU has recognised that the "geographic proximity and economic interdependence and connectedness of the Union and the United Kingdom"¹ should lead to a bespoke trade agreement going further than other trade agreements, a shared ambition that is reflected in the breadth of issues covered in the ongoing EU-UK negotiations.

2. Against that background, the Bars and Law Societies of England and Wales, Scotland and Northern Ireland have been highlighting the legal challenges posed by UK withdrawal from the EU for the past several years. Prominent among our concerns are the consequences for individual citizens and (small) businesses, both EU and UK, of the loss of overarching rules on jurisdiction and recognition and enforcement of judgments in civil and commercial matters. Since the UK decision to leave the EU, the EU has, correctly, prioritised the rights of citizens, both EU and UK, who have made lifestyle changes as a result of UK membership, specifically by moving to the other territory. But as we seek to illustrate below, the loss of these agreed private international law rules will adversely affect millions of other individuals and businesses, both EU and UK. That is because these rules ensure that those involved in cross-border trade and transactions, or family or succession disputes, or who were, say, injured in a road traffic accident abroad, are protected and have access to justice regardless of their financial resources.

3. In the absence of an EU-UK agreement that provides for these protections, we call for the contracting parties to consent to UK accession to the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, concluded at Lugano on 30 October 2007 ("the Lugano Convention").

The challenge for individuals and businesses

4. Facilitating legal remedies and their enforcement is a horizontal matter that goes to the heart of providing access to justice for citizens and businesses, both EU and UK. The UK Bars and Law Societies have been making this point in various forms over the past several years, but it bears repeating. Individuals and (small) businesses, faced with the complexity of multiple suits or the uncertainty that would follow if enforcing their judgments becomes more complex, would actually need more legal support, not less. Many may not be able to afford the time nor have the necessary resources to pursue their claim, potentially leading to denial of justice.

¹ Draft text of the Agreement on the New Partnership between the European Union and the United Kingdom, Title III, 1.4

5. The closeness of the historical relationship, the existing integration of our markets, the increasing prevalence of online commerce and the geographical proximity all mean that the daily activities of thousands of businesses and millions of people in the UK and the EU are intrinsically tied to those in the other's jurisdiction(s). The UK's departure from the EU necessarily means that the nature of much of this interaction will change once the transition period comes to an end, but it will not cease. Indeed, the UK had the third largest e-commerce market in the world in 2016². By 2021, roughly 93 percent of UK internet users are expected to do online shopping, the highest online shopping penetration rate in Europe³. The high development of on-line consumers markets in UK means also that many European consumers make, or will make, their purchases from UK businesses, also helped by the common use of English.⁴ An internet-savvy consumer market such as that can only be an opportunity for EU-based ecommerce, and one which EU businesses should not be put off exploiting as a possible way through the expected post-Covid19 downturn.

6. Regardless of where they are based, when problems occur, as inevitably they do, those individuals and businesses must have access to an enforceable legal remedy. Coming to an agreement in this area ensures clarity over which court should be used by individuals seeking redress in a dispute with a cross-border element and provides reassurance for all involved that the resulting ruling will have effect where they need it to. Without such an agreement the enforcement of foreign judgments is a matter of national law, raising procedural obstacles for the parties and significantly inflating the cost, complexity and often, duration of litigation. Large companies with generous legal budgets can generally overcome such hurdles without undue difficulty. Small companies and individuals likely will not. For SMEs, as for consumers, a Europe-wide system of recognition and enforcement of judgments is a safety-net of fundamental importance: it allows for legal certainty and the confidence that any dispute will be solved in courts of law and enforced with minimum bureaucracy and expense.

7. Indeed, in the absence of agreed jurisdiction rules, two courts may consider themselves competent to hear a given case, with the added cost and complexity involved in parallel proceedings, potentially leading to irreconcilable judgments. Or, it may be that no court has jurisdiction to hear the case. In either event, especially for individuals and small businesses with limited means, the result may be denial of justice. An added complexity from the point of view of EU litigants facing parallel proceedings in England & Wales is the stringent in personam nature of certain aspects of English ancillary relief, such as maintenance or freezing orders, which may render them unenforceable. For better or worse, this is a feature of English litigation that risks being an additional and expensive complication for EU parties absent an agreed solution.

² <https://www.statista.com/statistics/274493/worldwide-largest-e-commerce-markets-forecast/>

³ <https://www.statista.com/statistics/221380/share-of-internet-users-shopping-online-in-2010-and-2015-by-european-country/>

⁴ 217 million European consumers make online purchases from abroad; after China, the UK is the most popular country where to purchase when buying from abroad, with the USA the third. file:///C:/Users/012659/OneDrive%20-%20The%20Law%20Society/e-handel_europamaster_0910-en_us_final.pdf

8. In our experience, disruption and uncertainty lead to a rise in litigation. The worldwide economic downturn that is expected to follow the Covid19 pandemic and measures taken to contain could increase the amount of cross-border litigation that will ensue, be it involving e.g. insurance claims, claims against airlines or hotels for cancelled holidays; or against suppliers where a chain has been disrupted, insolvencies and related redundancies, etc. Combining the effect of the COVID19 and Brexit disruptions, with confusion and a return to more archaic jurisdiction and enforcement rules may also cause problems not only to individuals, families and businesses, but to the court systems themselves. This is why it is also in the direct interests of the EU Member States to reach an agreement in this area.

9. The foregoing, supported by practical examples provided in the annex below, illustrate the importance for EU and UK citizens and businesses alike of having clear rules on jurisdiction and their being able, readily, to have judgments and decisions recognised and enforced in each other's jurisdictions. Moreover, for reasons explained below, it is essential that those rules are in place and effective immediately following the end of the transition period provided for in the Withdrawal Agreement.

The solution: UK accession to the Lugano Convention

10. We welcome the UK Government's formal application, submitted on 8 April 2020, to accede to the Lugano Convention. It has the advantage of being an existing international agreement that other states may join subject to the approval of the existing parties to the agreement. Accordingly, the Swiss Federal Council, in its capacity as Depositary, has invited the other Contracting Parties, namely the EU, Denmark, Iceland, Norway and Switzerland to notify the Depositary as soon as possible of their express consent. We welcome the indication made earlier this year by EFTA states⁵ that their consent would be forthcoming, further demonstrating the Convention's wider European reach.

14. If we reach the end of the transition period without an agreed EU-UK solution, the rules on jurisdiction, recognition and enforcement of cross-border judgments as between the UK and EU Member States could be changing three times: from the EU Brussels I system to national law and, once a long term solution is found, be it through UK participation in the Lugano Convention or other agreement, from national law to those rules. And, for the next few years there would be cases on-going in judicial systems which would need to be worked under various different rules, depending on when the cases arose. The avoidable complexity and cost is obvious.

15. These problems can be avoided through UK ratification of the Lugano Convention before the end of the transition period, so that it can apply from day 1 thereafter - 1 January 2021 unless transition is extended. Lugano is a stand-alone Convention, which does not give access to a wider range of EU instruments on private international law nor it is linked with the EEA or Swiss arrangements with the EU. Furthermore, as it is already in operation between the EU and the EFTA, it provides an existing and known solution on how to enforce judgments.

⁵ See e.g. <https://www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007>

16. We urge the contracting parties to grant their consent as soon as possible to allow time for UK accession to the Lugano Convention to be formally completed by the end of 2020 or the end of the transition period if extended.

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Annex

EXAMPLES of problems for EU and UK individuals and businesses

The examples provided below are but a fraction of the types of cases, enforcement of judgments in which can, quite literally, change individuals' lives and mean the difference between a small business remaining solvent or not.

INDIVIDUALS / CONSUMERS

Comment

The application of the Europe-wide system of allocating jurisdiction secured through the Lugano Convention would allow EU consumers to continue to challenge UK suppliers, not in UK courts, but in their own. The Convention adopts common rules on protecting consumers in that they must be sued in their own country. This means that the consumers are able to rely on their own courts, their own lawyers and ensure their rights in their own language.

Furthermore, consumers are protected with the knowledge that any judgment will be automatically enforced.

Examples

- Car insurance: under Lugano, if one has an accident while travelling it is possible to sue the other driver's insurers in home courts and enforce the judgment across Europe. The automaticity protects these groups as they would not have money to enforce the companies operating in other jurisdictions to comply.
- In civil claims, the Lugano Convention would make it possible to import foreign claims into the English courts, and vice versa, on the basis of the domicile of the Claimant when suing in relation to consumer claims, matters relating to e.g. insurance and employment.
- EU or UK consumer purchases goods online from the other jurisdiction. Sues and obtains judgment in local courts for non-delivery; item damaged in transit; item not as described / advertised; defective product; breach of after-sales service terms.
- EU or UK consumer purchases goods / digital content through online marketplace, either directly from marketplace or through third party supplier based in a different jurisdiction. Obtains compensation in home court for defect or other breach of contract but cannot enforce.
- EU or UK party wishing to sue a party abroad for professional negligence (e.g. architect, lawyer etc). (Comes up particularly in purchase of holiday homes - see instances where e.g. Spanish zoning laws have been wrongly advised to a purchaser).

Tourism⁶:

- EU traveller flies with UK-based airline (or vice versa). Flight delayed or cancelled. Traveller unable to enforce the awarded compensation.
- UK traveller flying with EU airline (or vice versa). Luggage lost. Compensation claim.
- EU / UK traveller arrives to find no accommodation at all / no adequate accommodation because e.g. building site.
- EU / UK traveller suffers food poisoning or other illness, or breaks leg falling on the edge of hotel pool;
- EU / UK traveller purchases goods and returns home, only to find defective or not as advertised once packaging opened.
- EU / UK traveller injured in a road traffic accident while in the other jurisdiction. Sues for compensation in home country.
- UK consumer is mis-sold a timeshare agreement by a Spanish provider in relation to a resort in Spain.
- EU / UK holiday home owner sues for non-payment of rent or other fees / or compensation for damage caused by holidaymaker.

Family Law^{7 8}

- A British husband is estranged from his Spanish wife who has returned to Spain. The non-breadwinner wants to enforce a maintenance order against the other. In such scenarios, Lugano would likely result in fewer opportunities to avoid recognition and enforcement of maintenance orders payable by a spouse or parent than would be the case were the claimant only to have recourse to the Hague Convention 2007.

⁶ Eurostat statistics for 2018 show that three EU countries, Spain, France & Italy, all of which welcome millions of UK visitors each year, receive over half of the EU's total "nights spent abroad" France and the UK each received over 140 million visitors in that year. https://ec.europa.eu/eurostat/statistics-explained/index.php/Tourism_statistics#Nights_spent_abroad_by_EU-27_residents:_Luxembourg_leads_in_nights_per_inhabitant

⁷ There are approximately one million British citizens living in other EU Member States and some three million EU citizens living in the UK. There are approximately 16 million cross-border disputes on family matters in the EU, including 140,000 international divorces. There are approximately 1,800 cases of child abduction within the EU each year. Statistics quoted by HM Government in *Providing a cross-border civil judicial cooperation framework: a future partnership paper* (August 2017), 5/12 – figures taken from ONS Jan 17 and Aug 16 respectively http://europa.eu/rapid/press-release_MEMO-16-2359_en.htm

⁸ The Lugano Convention applies to maintenance orders, but only to a limited extent as the EU and Norway have ratified the 2007 Hague Convention on Maintenance, which takes precedence over the Lugano Convention (Article 67). Yet, the 2007 Hague Convention has not been ratified by Switzerland and Iceland and Lugano would help here with the enforcement of maintenance claims.

CROSS-BORDER BUSINESS

Comment

For businesses the Lugano Convention provides for a wide variety of rules on where to pursue their rights and seek redress: this may be the court of the defendant, or where the contract has been agreed. To avoid complications, most businesses make a risk assessment of dispute settlement options available and choose to opt for a choice of court agreement, by which the parties choose which court has the right to hear their dispute.

The mechanisms developed in Europe, such as the Lugano Convention, provide certainty for businesses that their choice is respected. The Convention provides rules to be applied by the national court when assessing the validity of the agreement and also requiring other courts to respect this choice. Also, any ensuing judgment will be enforceable in all European courts.

The failure to agree on Lugano therefore would have a further impact for businesses that have reached a choice of court agreement under the European rules, since they would face uncertainty as to whether their agreement will be valid.⁹ Although the UK has decided to re-join the Hague Choice of Court Agreements Convention 2005, that will only provide limited redress as it is likely to apply only where the choice of court agreement has been agreed after the UK's entry into the Convention; and it only applies to exclusive choice of court agreements.

This then leads to direct costs to businesses with a choice of court agreement as they would need to rewrite the agreements to ensure that they fall under the Hague rules,¹⁰ or the businesses will need to take into account the national laws of the countries in question.

Some may point to the high volume of cross-border business transactions concluded all over the world despite a lack of common rules on recognition and enforcement of judgments. However, by and large only big business can afford such confidence, since they have the money and resources to solve complex cross-border disputes.

Such alternative channels are far less readily available to EU SMEs faced with a cross border problem involving the UK, absent the EU *acquis* and for the reasons described in the main paper.

Examples

Trade in Goods¹¹

- EU / UK manufacturer (be it large, like cars, farm machinery, or small like packaging) sues for non-delivery of raw materials / components from supplier in other jurisdiction.
- EU / UK supplier sues customer in other jurisdiction for non-payment of invoices.

⁹ Article 67 Withdrawal Agreement applies only where the litigation has already started.

¹⁰ This means re-dating the agreements so that they apply after the

¹¹ Eurostat statistics show that the UK has been a net importer of goods from the EU over the past 20 years.

Over 50 % of UK exports to the EU go to just three EU countries: NL, Germany and France.

UK is not the main EU export market for any EU Member State, but it is the second largest partner for Ireland and Cyprus, and the third for Denmark, Germany, and Poland.

https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Intra-EU_trade_in_goods_-_main_features#Intra-EU_trade_in_goods_balance

In increasing numbers of industries, these sorts of cases are made all the more complex and urgent because of “just-in-time” supply chains. A delay in enforcing a judgment could put a small company in such a situation out of business.

Insolvency

- Insolvency proceedings involving e.g. a UK registered company having established offices / factories in one or more EU Member States, each with local employees and creditors. Enforcing the, potentially competing, rights of both categories, as well as those of e.g. tax authorities to whom monies are owed by the parent company, will be complex and expensive.
- Likewise for an EU registered company having e.g. an office, factory in UK.

Intellectual Property

- Enforcement of IP rights
- Community registered trademarks, Community registered designs and Community unregistered designs would no longer be effective in the United Kingdom.
- The Trade Secrets Directive protecting UK and other businesses from theft or loss of trade secrets would no longer be effective in the United Kingdom.

Competition

- The European Commission publishes a Decision revealing the existence of pan-European anti-competitive behaviour, causing loss and damage to consumers in the United Kingdom. Attempts by UK victims to seek redress before the UK courts are undermined by early applications by the defendants in EU jurisdictions and/or by difficulties of enforcement abroad. And comparable actions in the other direction.
- EU company establishes in home court that its business has been harmed by anti-competitive practice of a UK company which has been ruled as such by European Commission. Unable to enforce. (and vice versa)

Superficially domestic cases

The need to be able to enforce a judgment in another jurisdiction can, and frequently does, arise in otherwise apparently pure “domestic” cases. Again, by way of example:

- UK cyclist injured in London by a delivery van registered and insured in an EU Member State, and / or with non-UK national driver. And vice versa.
- Only significant assets of a UK judgment debtor are in an EU Member State or vice versa.
- A contract between parties, neither of whom have any links to the UK, may nonetheless contain English choice of law and jurisdiction clauses. This frequently occurs in large commercial, shipping and similar contracts, but may also be the case for e.g. employment contracts, thereby having a very direct bearing on the livelihood of the individual concerned.