OCTOBER 11, 2018

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No Deal Brexit: Impact on Cross-Border Civil and Commercial Litigation

On 13 September 2018, the UK Government published a guidance note setting out the implications that a "no deal" Brexit would have on civil and commercial disputes and cross-border insolvencies in England and Wales.

CIVIL AND COMMERCIAL JUDICIAL COOPERATION

In the event of a no deal Brexit, there would be no agreed framework between England and Wales and the EU regarding ongoing civil judicial cooperation. Under the current framework, the following common issues in civil and commercial disputes are amongst those determined by reference to EU law:

- which country's court are the appropriate forum for cases which raise cross-border issues with other EU countries;
- whether an order or judgment obtained in the English courts could be readily enforced in another EU country; and
- how evidence (whether documents or witnesses) located in another EU country could be obtained and utilised in English proceedings.

Each of the above laws is dependent on reciprocity between EU member states. If the UK exits the EU without a deal, those laws would be repealed.

Under the current regime, once a judgment is obtained in England and Wales, it is automatically recognisable and enforceable in any other EU country. The recognition of each other's judgment operates on a strictly reciprocal basis between EU member states under the Recast Brussels Regulation 1215/2012, which regulation would be repealed in the event of a no deal Brexit. In addition, the UK would no longer be a member of the Lugano Convention, which provides for the mutual recognition and enforcement of judgments from Iceland, Norway and Switzerland with the EU.

The government has indicated its intention to apply to re-join the Lugano Convention and the Hague Convention on Choice of Court agreements in its own right. Currently, the UK is a party to both by virtue of its EU membership. As and when the UK's membership of those conventions are ratified, UK judgments would once again be recognised and enforceable in the EU courts, and vice versa. In the interim, the UK would have to revert to existing common law and statutory rules to govern its recognition and enforcement regime with EU member states (and Iceland, Norway and Switzerland).

The guidance anticipates that the UK would re-join the Hague Convention and it would come into force by 1 April 2019, which means that there would be a coverage 'gap' between the date of Brexit (29 March 2019) and the Hague Convention coming into force (1 April 2019). In order to avoid a costly jurisdiction dispute further down the line, it would therefore be prudent for businesses to refrain from entering into contracts with exclusive English jurisdiction clauses on 30 or 31 March 2018.

The uncertainty of the enforceability of English court judgments throughout the EU may prove beneficial to the London arbitration market. English seated arbitral awards are enforceable throughout the world via the New York Convention, which does not depend on the UK's EU membership. It is possible, therefore, that a no deal Brexit would lead to a rise in parties including arbitration clauses in their contracts.

Certain EU Regulations governing matters of the Court's jurisdiction do not require reciprocity. In particular, the government has confirmed that the Rome I and Rome II Regulations would remain in force in all parts of the UK. The Rome Regulations determine what substantive law will be applied by courts when resolving contractual and non-contractual obligations with a connection to multiple jurisdictions respectively.

CROSS-BORDER INSOLVENCY COOPERATION

The guidance also gives a brief overview as to how the UK will manage cross-border insolvency matters if no deal is reached. Currently, the Recast Regulation on Insolvency applies to insolvency procedures in the UK. The majority of the Recast Regulation would be repealed in all parts of the UK in the case of no deal, but the government has confirmed that the rules conferring jurisdiction onto UK courts where a company or an individual is based in the UK would remain.

Those provisions which are repealed, however, would mean that creditors seeking to enforce UK insolvency orders against debtors would need to apply under each EU country's domestic law to have the UK order recognised in that country. It is possible that some EU countries would choose not to recognise UK insolvency proceedings, which would then prevent creditors from enforcing against assets held in that country.

Insolvency proceedings and judgments from within the EU would no longer be recognisable in the UK under the Insolvency Regulation, but may be recognised under the Cross-Border Insolvency Regulations 2006, which already forms part of UK domestic law.

Given the additional hurdles that creditors would have to take in order to enforce insolvency judgments abroad, and in light of the guidance's recommendation that insolvency practitioners "take professional advice" on the prospects of other EU countries recognising UK judgments, it is clear that cross-border insolvencies originating in the UK may become more complex and expensive if no deal is agreed.

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