

MOFO BREXIT BRIEFING

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BREXIT: RECOGNITION AND ENFORCEMENT OF JUDGMENTS

IMPLICATIONS FOR CONTRACTING PARTIES AND DISPUTES

By Jonathan Wheeler, Gemma Anderson and Westley Walker

The process of Brexit will take many years, and the implications for our clients' business will unfold over time. Our MoFo Brexit Task Force is coordinating Brexit-related legal analysis across all of our offices, and working with clients on key concerns and issues, now and in the coming weeks and months. We will also be providing MoFo Brexit Briefings on a range of key issues. We are here to support you in any and every way that we can.

From a commercial contracting and disputes perspective, Brexit has the potential to impact four key areas: jurisdiction; recognition and enforcement of judgments; service; and governing law. This note focuses on the second of these areas – recognition and enforcement of judgments. You can find our notes on the other three areas here:

- [Brexit: Jurisdiction \(30 June 2016\)](#)
- [Brexit: Service - Implications for Contracting Parties and Disputes \(30 June 2016\)](#)
- [Brexit: Governing Law - Implications for Contracting Parties and Disputes \(30 June 2016\)](#)

As with other areas, it is difficult to predict what the exact impact of Brexit will be on these matters until we know what post-Brexit model the UK will choose to adopt. In the meantime, there will be an inevitable period of uncertainty. That said, there are some practical steps that parties entering into or renegotiating contracts can take now to seek to protect themselves from the impact of Brexit and the intervening uncertainty.

Will you be able to enforce English court judgments in EU Member States (and vice versa) post-Brexit?

The recognition and enforcement of judgments obtained in the UK and EU Member States post-Brexit is likely to be an issue of significant importance for contracting parties. There is no point in

obtaining a judgment if you cannot enforce it in a jurisdiction (or jurisdictions) in which the defendant has assets.

The current regime

The recognition and enforcement of judgments on civil and commercial matters within the EU is currently governed by the *Recast Brussels Regulation*, which provides a robust and streamlined method of automatically recognising and enforcing judgments in civil and commercial matters across the EU.

Post-Brexit options

Post-Brexit, the Recast Brussels Regulation will cease to apply in the UK. Although it is theoretically possible for the UK and the EU to agree that the Recast Brussels Regulation will continue to apply, this is unlikely.

The more likely scenario under most of the potential post-exit models is that the UK accedes to the *2007 Lugano Convention* (whose signatories include the EU Member States, Iceland, Switzerland and Norway) or the *2005 Hague Convention on Choice of Court Agreements* (which came into force on 1 October 2015 in all EU Member States (except Denmark) and Mexico). Alternatively, the UK could seek to negotiate an individual treaty (or individual treaties) incorporating elements of one or more of the existing regimes.

Enforcement of final judgments

If the UK adopts the *Lugano Convention* or the *Hague Convention* (or some other international treaty), there should be a clear framework for the mutual recognition and enforcement of judgments across the UK and EU, as with the existing position under the *Recast Brussels Regulation*.

If the UK *does not enter into any international agreements*, the enforceability of English judgments within the EU will depend on the law of the EU Member State in which enforcement is being sought (and vice versa with respect to the enforcement of EU Member State judgments in England). This is likely to make enforcement of judgments across the EU a slower, more expensive and uncertain process.

Enforcement of interim remedies

A separate question is whether other forms of relief granted by English courts (such as injunctions, declarations and specific performance) will be recognised in EU Member State courts. Under the *Hague Convention*, for example, interim protective measures (such as interim injunctions or freezing orders) cannot be enforced, in contrast to the existing position under the *Recast Brussels Regulation*.

What you should do now

In light of the uncertainty regarding the enforceability of judgments and other remedies post-Brexit, it would be advisable for contracting parties to obtain local advice before entering into a contract in

any jurisdiction in which enforcement of interim protective measures or final judgments is likely to be sought.

Parties with existing or imminent litigation against EU parties may also wish to seek to accelerate any pending litigation, so as to take advantage of the automatic recognition and enforcement mechanism currently available under the Recast Brussels Regulation.

Will Brexit make the English courts a less desirable forum?

It's possible that the current uncertainty regarding the position with respect recognition and enforcement of judgments, and the potential difficulties that could arise if an equivalent regime to that currently in place is not agreed by the UK/EU, could make England a less desirable forum for litigation, and discourage commercial parties from agreeing to confer jurisdiction on the English courts, in the short-medium term.

Ultimately, however, Brexit is unlikely to detract from the primary reasons commercial parties choose the English courts, namely their reputation for speed, fairness, impartiality, and reasoned judgments from high-quality, experienced judges.

What about arbitration?

The EU rules on recognition and enforcement of judgments under the Recast Brussels Regulation do not extend to arbitration, and the enforcement of arbitral awards in most jurisdictions is straightforward thanks to the *New York Convention* (to which the UK will remain a party post-Brexit).

Brexit is therefore unlikely to have any adverse impact on arbitration, which could make arbitration an attractive option for contracting parties seeking to obtain certainty, at least until the post-Brexit position becomes clearer.

Please do not hesitate to call with any question or concern that you may have. We're here to help.

Jonathan Wheeler
(+44) 20 7920 4161
jwheeler@mofo.com

Gemma Anderson
(+44) 20 7920 4063
ganderson@mofo.com

Westley Walker
(+44) 20 7920 4056
wwalker@mofo.com

or

Brexit@mofo.com

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