



# ICLG

The International Comparative Legal Guide to:

## **Enforcement of Foreign Judgments 2018**

### **3rd Edition**

A practical cross-border insight into the enforcement of foreign judgments

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## EDITORIAL

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Welcome to the third edition of *The International Comparative Legal Guide to: Enforcement of Foreign Judgments*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations relating to the enforcement of foreign judgments.

It is divided into two main sections:

Two general chapters. These chapters are designed to provide readers with a comprehensive overview of key issues affecting the enforcement of foreign judgments, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in the enforcement of foreign judgments in 36 jurisdictions.

All chapters are written by leading lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Louise Freeman and Chiz Nwokonkor of Covington & Burling LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at [www.iclg.com](http://www.iclg.com).

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# Beyond Brexit: Recognition and Enforcement of Judgments between the UK and the EU

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The mechanism for recognising and enforcing judgments after the UK's departure from the EU is an important aspect of the negotiations around a future agreement between the UK and the EU. The outcome of these discussions could have a material impact on the availability of effective legal redress on a cross-border basis for UK and EU citizens. The framework the parties arrive at will have consequences for the enforcement of English judgments in EU Member State courts, as well as for the enforcement of judgments of EU Member State courts in England. If these processes were to become slower, more complicated and more expensive, this could have a detrimental effect upon cross-border commerce, as well as consumer redress and interpersonal relationships that rely upon a legal framework that can take effect throughout Europe.

Continued uncertainty as to the future enforcement of judgments into and out of the UK is, naturally, unsatisfactory for business and consumers alike. Fortunately, both sides appear to recognise the value of maintaining a system whereby judgments and orders can be recognised and enforced easily across borders notwithstanding the UK's departure, and there are indications that going forward, cross-border enforcement of judgments will continue to be conducted in an orderly and efficient manner.

### Current Framework

It is important to briefly consider the current regime, before looking at what the future may hold. The principal elements of the current European enforcement framework are summarised below and detailed further in Chapter 2.

### Brussels Recast Regulation

As an EU Member State, the UK currently benefits from (and is obliged to comply with) the enforcement mechanisms under Council Regulation 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the "Brussels Recast Regulation"). The Brussels Recast Regulation seeks to give effect to the overarching principle that, once a judgment is obtained in any Member State court, it must be readily recognised and enforced throughout the Union.

Under this instrument, a judgment creditor can go to the enforcement authority in another Member State (for example, where the debtor has assets) without any intermediary procedure being required, to enforce his judgment. Article 42(1) of the Brussels Recast Regulation requires the beneficiary of a judgment delivered in one

EU Member State, wishing to enforce it in another, simply to provide the competent enforcement authority with a copy of the judgment and a standard form certificate and it can then begin the enforcement process. Further, the Brussels Recast Regulation provides that if the judgment being enforced contains measures which are not known in the Member State of enforcement, the enforcing court can adapt them to a measure known to that Member State (Article 54).

There is a high bar for refusal of recognition and enforcement under the Brussels Recast Regulation, which means that in general, a judgment creditor can be reasonably confident of enforcing a judgment delivered in one Member State against an opponent in another.

This system therefore currently allows free movement of Member State judgments within the EU. It will, however, fall away in respect of the enforcement of English<sup>1</sup> judgments in EU Member State courts, as well as for the enforcement of judgments of EU Member State courts in England, once the UK leaves the EU. As it is based on reciprocity, it is not a system that can be reinstated or replicated unilaterally by the UK, which will have to find another means to replace it (see below).

### Brussels Regulation<sup>2</sup>

This predecessor instrument to the Brussels Recast Regulation continues to apply to the enforcement of judgments of courts in the EU given in proceedings commenced before 10 January 2015<sup>3</sup> (and therefore has a long "tail" of relevance). This regulation provides for a more involved enforcement procedure than that under the Brussels Recast Regulation. Specifically, the courts of the enforcing State must first declare the judgment to be enforceable. Procedures for doing so differ from State to State and are governed by local law.

Post-Brexit, the Brussels Regulation will also fall away in respect of the enforcement of English judgments in EU Member State courts, as well as for the enforcement of judgments of EU Member State courts in England.

### Brussels Convention

This Convention on civil jurisdiction and enforcement of judgments was acceded by the UK in 1978 and took effect under English law by way of the Civil Jurisdiction and Judgment Act 1982. Although this has been largely superseded by the two Brussels Regulations, it still applies to the enforcement in England and Wales of judgments from Gibraltar and certain dependent territories of EU Member States.

It will not fall away as a result of Brexit and may in fact acquire greater significance post-Brexit – see below.

### 2007 Lugano Convention

The 2007 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters applies to the enforcement of judgments as between EU Member States and the EFTA (European Free Trade Association) States of Iceland, Norway, and Switzerland. It is modelled on the Brussels Regulation and therefore extends the Brussels regime for jurisdiction and judgments to those States. The UK is not an individual State party to the Convention, but is a party by virtue of its membership of the EU.

This will therefore also fall away in respect of the enforcement of English judgments in EFTA State courts, as well as for the enforcement of judgments of EFTA State courts in England, once the UK leaves the EU.

### Negotiating Positions

Both the EU and the UK have an interest in finding an effective solution to protect post-Brexit judgment creditors seeking to enforce a domestic judgment either from courts in the EU against assets in the UK or *vice versa* and this has been reflected in negotiations to date.

The European Commission's Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 Treaty of the European Union, published a position paper on 12 July 2017 on the subject of "Judicial Cooperation in Civil and Commercial Matters". In this brief document, the Commission outlined its intention that the Withdrawal Agreement should address the respective positions in relation to the Brussels Recast Regulation and the Brussels Regulation. In addition, it made clear that the mechanisms applicable on recognition and enforcement of judicial decisions on the withdrawal date should continue to govern all judicial decisions given before the withdrawal date. This paper offers no substance as to what arrangements should apply prospectively, since any such arrangements will form part of phase two of the negotiations, alongside negotiation of any free trade agreement.

In its response, published in August 2017<sup>4</sup>, the UK Government was slightly more explicit in its tone and substance. The paper was published as one of a series of "Future Partnership" documents, which are described as a series of papers setting out key issues that form part of the Government's vision for the future deep and special partnership between the UK and the EU (so, looking beyond the withdrawal date, unlike the European Commission's position paper). In summary, this document indicates the following:

- The UK will seek to continue to participate in the Lugano Convention in relation to enforcement *vis-à-vis* those EFTA States to which it applies. If the UK were to become a member of EFTA, it could join the Lugano Convention as of right. If not, the UK would need the unanimous consent of the other parties to the Convention, including the EU<sup>5</sup>.
- In the absence of a separate agreement with the EU, the Lugano Convention could then also govern enforcement between the UK and the EU.
- Whilst no specific proposals are put forward in relation to enforcement between the UK and the EU, the paper suggests that the UK will endeavour to secure a separate agreement with the EU that more closely mirrors the Brussels Recast Regulation model, stating:

*"The UK will therefore seek an agreement with the EU that allows for close and comprehensive cross-border civil*

*judicial cooperation on a reciprocal basis, which reflects closely the substantive principles of cooperation under the current EU framework"*.

- The UK also responded to the transitional arrangements to apply on its exit, stating that the existing EU rules should continue to apply to judicial decisions given before the withdrawal date and also decisions given after the withdrawal date in proceedings which were instituted before that date. This is a broader proposed continued application of current EU rules than proposed in the EU position paper (which only proposed continued application to judgments given before the withdrawal date).

The outcome of the withdrawal stage of the negotiations (at the time of writing, prior to any Withdrawal Agreement being prepared) is the Joint Report from the negotiators of the European Union and the UK Government<sup>6</sup>. This report does not give any clear indication as to the likely conclusion on enforcement of judgments, merely recording a general intention to work something out later:

*"On cooperation in civil and commercial matters there is a need to provide legal certainty and clarity... There was also agreement to provide legal certainty as to the circumstances under which Union law on jurisdiction, recognition and enforcement of judgements will continue to apply, and that judicial cooperation procedures should be finalised"*.

### Alternative Models

Whilst it is useful for legal practitioners and other interested parties to have sight of these early proposals, the end result is entirely a matter for negotiation and so remains uncertain. It is therefore important to be aware of, and prepared for, the various possible outcomes, which we consider below.

#### Option 1: The UK concludes an entirely bespoke agreement

The UK is likely to seek to negotiate a new multilateral agreement to effect reciprocal enforcement with the EU<sup>7</sup>. Any such agreement would likely seek to remove the jurisdiction of the Court of Justice of the European Union ("CJEU") going forward. The UK Government's stated position is that, when the UK leaves the EU, there will be an end to the direct jurisdiction of the CJEU, and that the English courts will not be required to consider the jurisprudence of the CJEU after Brexit. That being said, it is envisaged under the draft UK Withdrawal Bill that EU case law from before the UK's departure will form part of the law in the UK. In addition, the Bill provides that any question as to the meaning of EU-derived law will be determined in the UK's courts by reference to the CJEU's case law as it exists at the point of the UK's departure.

Whilst an entirely bespoke agreement would be a desirable option from the UK's perspective, it would seem challenging to achieve an agreement on an entirely new basis within the period currently envisaged and where the status of the CJEU is likely to be contentious.

#### Option 2: Remain bound by Brussels Recast Regulation with the concurrence of the EU with a bespoke bilateral agreement

This option would require a treaty to be agreed between the EU and the UK, which would provide that the UK continues to be treated as a Member State for the purposes of the Brussels Recast Regulation. A similar approach was adopted for the benefit of Denmark, which is not bound by the Brussels Recast Regulation by virtue of its Maastricht Treaty opt out provisions. Denmark has a treaty

in place<sup>7</sup> with the EU, which makes provision for Denmark to be bound by the Brussels Recast Regulation as a matter of international law and to all revisions to the Regulation. Under this agreement, Denmark must accept the jurisdiction of the CJEU to interpret the agreement and the Danish courts are obliged to refer questions on the agreement's interpretation to the CJEU<sup>8</sup>.

Following this precedent would be very helpful from the perspective of legal certainty and continuity. However, the negotiating parties would need to reach a compromise on what role, if any, the CJEU would play in such an arrangement given the UK's Brexit policy on the CJEU.

### Option 3: Join the Lugano Convention independently

As discussed above, this is currently envisaged by the UK, but primarily as it applies to civil judicial cooperation with Switzerland, Norway and Iceland. Whilst the UK could, in principle, join the Lugano Convention with a view to that convention also governing enforcement of judgments between the UK and the EU, there are difficulties with, and disadvantages to, this. First, the process of joining the Lugano Convention is complex: the UK must either re-join EFTA or apply to join as a non-member and then obtain the consent of all signatories, including the EU27. Should the UK successfully join, however, as the Lugano Convention is modelled on the Brussels Regulation, it would be a credible basis for enforcement in future. The enforcement regime has, however, been significantly enhanced since the enactment of the Brussels Regulation and the Lugano Convention, by operation of the Brussels Recast Regulation, and so the enforcement procedure would lack the ease of enforcing a judgment provided by the Brussels Recast Regulation.

It should also be noted that the Lugano Convention requires non-EU Member States to “pay due account to” decisions of the CJEU<sup>9</sup>, which would again likely be controversial.

### Option 4: Join the Hague Convention on Choice of Court Agreements 2005

It is open to the UK to become a party to the Hague Convention in its own right, once it ceases to apply to the UK by virtue of its EU membership, upon Brexit. This can be done unilaterally and does not require the consent of the EU or other contracting States. Indeed, it is the UK Government's stated policy to become a party to the Hague Convention in its own right, upon Brexit. The value of the Hague Convention in this context is that it requires any judgment granted by a court designated in an exclusive choice of court agreement to be recognised and enforced in other contracting States.

However, the impact of the Hague is limited, as only judgments resulting from exclusive jurisdiction clauses are recognised and enforced. Moreover, it is unlikely to apply to “asymmetric” jurisdiction agreements. Moreover, like Lugano, the Hague Convention does not benefit from the expedited procedure in Brussels Recast.

It should also be noted that the Hague Convention will only apply to exclusive jurisdiction agreements that are concluded after the Convention “comes into force” in the UK<sup>10</sup>. It is unclear in the case of the UK whether this would be the date the Convention came into force as a result of the UK's membership of the EU, or whether it would be the date on which the UK joins in its own right. The former is the preferred and logical answer and one which the UK Government is, we understand, seeking to achieve.

### Option 5: Withdrawal with no agreement on enforcement – English Common Law

It seems the EU may be considering this scenario, at least as a negotiating tactic. In the recent Notice to Stakeholders published by the European Commission<sup>11</sup>, it states that as of the withdrawal date “judgments issued in the United Kingdom are no longer recognised and enforced in EU Member States under the rules of the EU instruments in the area of civil and commercial law...”. This document only envisages a role for national law in this regard, and makes no reference to the possibility of continuing reciprocity under any of the models or pre-existing agreements discussed above.

In this case, it is likely that the current rules (principally under the Brussels Recast Regulation) would apply to judgments given before the withdrawal date and possibly to those delivered after that date in proceedings commenced before withdrawal. At the date of withdrawal, the near-automatic reciprocity afforded by that Regulation would cease: the Brussels Recast Regulation would no longer apply and the courts of England and Wales would revert to the application of common law rules of recognition and enforcement (for details of the common law rules, refer to chapter 13). It should also be noted that the grounds for refusing to recognise a foreign judgment under common law are wider than those under the Brussels Recast Regulation, and fresh legal proceedings would have to be commenced to enforce a judgment. Whilst these requirements would in most cases be met by judgments from EU27 courts, the enforcement process would likely lengthen and become more costly.

Enforcement of English judgments across the EU would be subject to the national laws of each Member State, which vary widely and may prove more cumbersome than the streamlined procedure under the Brussels Recast Regulation. Nevertheless, those courts ultimately are likely to enforce English judgments.

### Option 5b: Withdrawal with no agreement on enforcement – Brussels Convention

Some commentators have suggested that, as the UK is currently a signatory to the Brussels Convention (since it was never repealed), that could be utilised to support an enforcement action in Europe. This possibility is also envisaged by the European Parliament<sup>12</sup>, which notes that although there is some disagreement as to whether a third State can remain a Brussels Convention State, there are persuasive arguments in favour of this Convention's revival within the UK's territory. If the Brussels Convention does apply (which is subject to some debate and is not considered in the UK Government's position paper) and although more unwieldy than the Brussels Recast Regulation, it could be a helpful basis for reciprocal enforcement with those members of the EU27 that had ratified the Brussels Convention prior to the Brussels Regulation coming into effect, namely: Belgium, Germany, France, Denmark, Ireland, Italy, Luxembourg and the Netherlands.

## Some Practical Conclusions

1. It is clear that the EU27 and the UK Government will continue to carefully examine the potential routes to reciprocal enforcement. It would seem that, given the range of options available to the parties, some form of reciprocal agreement on future enforcement of judgments is likely. Even if this is not achieved, and England falls back on the common law position, English judgments would be very likely to continue to be enforced in the EU and EU Member State court judgments would be very likely to continue to be enforced

- in England, albeit by way of more complex procedures. As such, choices of courts in England or the EU27 that may need to be enforced post-Brexit seem to remain safe choices.
2. Parties to such contracts will nonetheless want to consider the options open to them.
  3. It is advisable that commercial parties ensure, going forward, that choice of court clauses make the choice exclusive and not asymmetric, so that such agreements should be enforceable through the Hague Convention process (which the UK can join without the need for agreement by the EU27).
  4. If parties remain nervous about choice of court clauses post-Brexit, they could choose arbitration, which will be unaffected by Brexit.
  3. Article 66(2) the Brussels Recast Regulation.
  4. Providing a cross-border civil judicial cooperation framework, published 22 August 2017, HM Government.
  5. Lugano Convention, Article 72(3).
  6. Joint report on progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the EU, published 8 December 2017, HM Government.
  7. Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2005].
  8. *Ibid*, Article 6.
  9. Lugano Convention, Protocol 2, Article 1(1).
  10. Hague Convention 2005, Article 16.
  11. European Commission Directorate-General for Justice and Consumers: Notice to Stakeholders Withdrawal of the United Kingdom and EU Rules in the Field of Civil Justice and Private International Law, 21 November 2017.
  12. Directorate General for Internal Policies: Policy Department A – Economic and Scientific Policy, Legal Implications of Brexit, August 2017.

## Endnotes

1. We focus on the impact of Brexit on enforcement of English judgments (encompassing Welsh judgments for these purposes) in this article, but similar issues will arise in respect of Scottish and Northern Irish judgments.
2. Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

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