Lugano Convention Post-Brexit

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For those of us practising in the field of cross-border litigation, one of the myriad questions often asked, subsequent to the decision by the UK electorate to secede from membership of the European Union, is the question of what is going to happen to claims currently brought before the courts of England and Wales against parties domiciled out of the jurisdiction, in other EU Member States.

Providing any sort of accurate response to that question amidst the chaos of rebel MPs, the prorogation of Parliament and General Elections has been a near impossible task, but embryonic shoots of clarity appear to be sprouting. The UK Government this week confirmed that the UK had received statements of support from Norway, Iceland and Switzerland, for the UK's intent to accede to the Lugano Convention 2007 with effect from the end of the transition period (currently 31 December 2020, a date 'set in stone' by Boris Johnson).

The core wording of the Lugano Convention closely follows that of the original Brussels Regulation and provides for the essential provisions contained within Brussels on jurisdiction, pendency, and recognition and enforcement. On the face of it, therefore, accession to Lugano would appear to be a panacea to an otherwise judicially isolated post-Brexit Britain. In reality, broadly speaking, it will allow for claims to be brought, negotiated and settled where appropriate, much the same as they are now.

Crucially, however, signatories to Lugano, not being Member States of the European Union, do not recognise the supreme jurisdiction of the Court of Justice of the European Union. Indeed, to do so would run contrary to the ideal of 'sovereignty' much craved by some of the UK electorate and thus accession to Lugano would, in the views of some, betray the task with which the UK government has been bestowed. Instead, Article 1 of Protocol No. 2, appended to the Lugano Convention, provides that the courts of each Contracting State shall 'pay due account' to CJEU case law. In short, this means that CJEU case law will not be binding upon the courts of the UK and, given the divergence between civil and common law systems (an issue often resolved, albeit imperfectly, by the CJEU), there will be an inevitable greater uncertainty as to how the English courts will determine questions of jurisdiction before them. An increase in satellite litigation until our own post-Brexit jurisprudence is established is to be expected.

In the short term, the terms of Brussels Recast continue to apply. If, as anticipated, the Withdrawal Agreement is approved by both the European Parliament and European Council, it will do so until the end of the transition period, and beyond, for claims brought before that period ends. We have seen that 'set in stone' does not necessarily have the same meaning as it once did, so there is every possibility that the dates of application of the regimes may vary. Whatever your views on Brexit, there is some comfort to be taken that some glimmers of certainty as to our future, at least in this small area of practice, are showing.

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