AmCham.Pl
QUARTERLY
The official magazine of the American Chamber of Commerce in Poland
1/2021
30 YEARS IN POLAND
VOL IV, No. 1 • ISSN 2545-322X

EXPERT

Jan Ciaptacz, Associate at Łaszczuk & Partners, explains how the legal framework for resolution of cross-border disputes between the UK and the EU in civil and commercial matters changed post-Brexit.

EVER SINCE ITS INCEPTION 31 YEARS AGO, ONE OF THE MOST FUNDAMENTAL FUNCTIONS OF AMCHAM HAS BEEN TO MAINTAIN PLATFORMS FOR SHARING PROFESSIONAL KNOWLEDGE AND EXPERIENCE BETWEEN ITS MEMBERS. THERE ARE SEVERAL SUCH PLATFORMS, INCLUDING AMCHAM MONTHLY MEETINGS, THE AMCHAM COMMITTEES, AND THE EXPERT SECTION OF THE CHAMBER'S MAGAZINE.

EXPERT Business with the UK

THIRD-PARTY CONUNDRUM

Jurisdiction and enforcement of foreign judgments after Brexit

By **Jan Ciaptacz**, *Associate at Łaszczuk & Partners*

On December 31, 2020, the transition period expired, after the United Kingdom had left the European Union on January 31, 2020. Although the EU-UK Trade and Cooperation Agreement was finally concluded, preventing a "no-deal" Brexit, no rules on jurisdiction and enforcement of foreign judgments were part of the agreement. Therefore, it is important to note how the legal framework for resolving cross-border disputes in civil and commercial matters has changed post-Brexit.
The changes will inevitably affect both cases related to the UK decided in Poland and cases involving Polish elements resolved in the UK.

THE BRUSSELS REGIME

These changes do not affect cases commenced before the end of the transition period. In proceedings instituted before January 1, 2021, the UK courts and the courts of EU member states in cases involving the UK shall apply the rules on international jurisdiction provided for in the Brussels I bis Regulation (Art. 67(1) of the Withdrawal Agreement).
Also, the recognition and enforcement of foreign judgments between the UK and the EU shall be governed by the Brussels regime, provided that the judgment was given in proceedings instituted before the end of the transition period (Art. 67(2) of the Withdrawal Agreement).

THE ISSUE OF RECOGNITION

The main consequence of Brexit in this area is that the UK is no longer part of the Brussels regime and is considered to be a "third state" pursuant to the Brussels I bis Regulation. Consequently, the UK courts no longer apply the Brussels I bis Regulation when deciding on international jurisdiction or enforcing foreign judgments. Similarly, the courts of EU member states do not apply the rules on jurisdiction provided for under Brussels I bis Regulation to cases with defendants domiciled in the UK. Exceptions, however, include provisions concerning consumers' and employees' claims (Art. 18(1) and 21(2) of the Brussels I bis Regulation), exclusive jurisdiction (Art. 24), and choice-of-court agreements (Art. 25).
Moreover, judgments rendered by the UK courts no longer benefit from automatic recognition and enforcement in the EU, and the same applies to judgments made in the EU that are to be recognized and enforced in the UK. Instead, such matters are governed by either international treaties or the domestic laws of the forum state. For instance, absent any applicable international rules, a Polish court will apply Part IV of the Polish Civil Procedure Code to determine its international jurisdiction or recognize and enforce foreign judgments.
It should be kept in mind that in those matters, the UK courts will also apply domestic law, which may result in the use of legal instruments that were deemed impermissible under the Brussels regime, such as the doctrine of forum non conveniens or anti-suit injunctions.

CHOICE OF COURT

Unlike some other EU member states, there are no "pre-Brussels" bilateral agreements in force between Poland and the UK pertaining to these matters. However, there is a multilateral treaty that sets forth rules on jurisdiction and enforcement of foreign judgments applicable after Brexit. On September 28, 2020, the UK deposited its instrument of accession to the 2005 Hague Convention on Choice of Court Agreements (to which the EU is a contracting party) in its own right. Thereby the UK made sure that the convention continues to apply to and in the UK after the end of the transition period. According to the convention, the court of a contracting state designated in an exclusive choice-of-court agreement shall have jurisdiction to hear the case (Art. 5), and a court not designated therein shall suspend or dismiss proceedings covered by the agreement (Art. 6). Furthermore, a judgment rendered by a court designated in an exclusive choice-of-court agreement shall be recognized and enforced in other contracting states, except for situations outlined in Art. 9 of the convention. However, the parties must remember that those benefits may be afforded only if the choice-of-court agreement is exclusive. This means that it designates the courts of one contracting state or one or more specific courts of one contracting state to the exclusion of the jurisdiction of any other courts. It is also important to note that certain matters, such as consumer and employment contracts, are excluded from the scope of the convention (Art. 2).

THE "ALMOST" STATUS QUO

Although the current legal landscape, consisting of the Hague Convention and domestic laws, may last for some time, it may also prove temporary due to the UK's attempt to rejoin the 2007 Lugano Convention in 2020. The UK's accession depends on the unanimous consent of the contracting parties and has so far been supported by Iceland, Norway, and Switzerland, but not by the EU or Denmark. The UK's rejoining the Lugano Convention would create a similar legal framework to the one existing before Brexit. In the field of international jurisdiction, the Lugano Convention, like the Brussels regime, provides for comparable heads of jurisdiction based on general principles of party autonomy, predictability, certainty, and mutual trust. However, the Lugano Convention is not fully compatible with the recast of the Brussels I Regulation, i.e., it does not include major amendments as to the rules on lis pendens, or choice-of-court agreements. Even more importantly, the rules on enforcement of foreign judgments differ in that the Lugano Convention, unlike the Brussels I bis Regulation, requires a formal declaration of enforceability before a judgment can be enforced. Nonetheless, the Lugano scenario would bring cooperation in civil and commercial matters closer to the previous system. But there are also other conceivable developments in that respect, for instance, future accession of both the EU and the UK to the 2019 Hague Judgments Convention. Indeed, the legal framework regarding jurisdiction and enforcement of foreign judgments between the EU and the UK will require further attention in the years to come.