Is it negligent to fail to advise of the post-Brexit enforcement risks for a UK judgment throughout the EU?

It goes without saying that Brexit outcomes are uncertain. Nonetheless, many Brexit risks are known and reasonably understood. One of the more obvious future risks is in relation to the enforcement of UK judgments in the remaining EU Member States. With that risk in mind, what are the responsibilities of a lawyer advising on contracts with an exclusive jurisdiction clause for some part of the UK, if enforcement is likely to be sought in another EU Member State?

The duty to advise on known risks

A useful general statement of the law regarding a solicitor’s duty and risk is contained in the Irish case of ACC Bank Plc v Johnson [2010] 4 IR 605, where Clarke J stated:

“Professionals should not expose their clients to unnecessary risk without, at a minimum, advising their clients of the risk involved and inviting their client’s instructions.”

In the context of jurisdiction clauses, the recent English decision in Wright v Lewis Silkin [2016] EWCA Civ 1308 is also particularly instructive. In that case, Mr Wright’s solicitors failed to include a jurisdiction clause in a contract with an Indian employer. When a dispute ensued, jurisdiction was contested and by the time it had been resolved and judgment rendered, the counterparties appeared to be insolvent. Mr Wright then sought to sue his solicitors. In the High Court, the solicitors’ firm was held liable for the costs of various motions contesting jurisdiction and also for the loss of chance of recovery of damages due to the consequent delay in obtaining judgment. On appeal, the first instance finding in respect of loss of chance was reversed on remoteness grounds but the liability for the costs of the jurisdictional challenges was upheld.

So it is clear that a solicitor can be held liable for not drawing a known risk to a client’s attention and it is also clear that such a risk can relate to a failure to properly advise regarding jurisdiction clauses in contracts.

The existing enforcement regimes

Absent a political solution, what are the potential enforcement options? It is reasonably clear that the Brussels Recast Regulation will not apply once the United Kingdom leaves the European Union. There is a stateable argument that the Brussels Convention, which has not been formally abrogated and is an international instrument independent of the EU, could then be used to enforce UK judgments in some of the remaining Member States (but not all because not all of the current Member States are parties to the Brussels Convention).

However, that argument depends on a strained interpretation of both the Recast Regulation and its predecessor, the Brussels Regulation, and runs contrary to the provision in both the Recast Regulation and the Brussels Regulation that they “supersede” the Brussels Convention, except in relation to some overseas territories. So any party seeking to argue the applicability of the Brussels Convention as a vehicle for enforcement of UK judgments would likely face a difficult and uncertain argument on interpretation in the Member State in which it was seeking to enforce a UK judgment. Ultimately, that dispute on interpretation may fail to be resolved by the CJEU. Moreover, the ambit of the Brussels Convention is not as great as that of the Recast Regulation and the streamlined processes in the Recast Regulation are not available under the Brussels Convention.

A second possibility is that a party holding a UK judgment could have recourse to the new Lugano Convention of 2007 which came into effect in 2010. However, the UK is not a party to the new Lugano Convention. Rather, the European Community is a party to the new Lugano Convention (it is signed and ratified by the European Community on behalf of all Member States except Denmark). So at present it seems the UK can only resort to the Lugano Convention as an EU Member State.
Accordingly, if the UK leaves the EU without some provision for the continuation of its participation in the Lugano Convention, it would appear that the UK would fall outside its scope. The UK could then seek to accede to the Lugano Convention but such accession is subject to similar political risks as any Brexit-related agreement regarding the mutual enforceability of judgments. This is because any state looking to accede to the Lugano Convention can only do so if it has obtained the unanimous agreement of the existing contracting parties.

A third option would be to seek to rely on the Hague Convention on Choice of Court Agreements 2005. This convention has been adopted by the EU, Mexico and Singapore but, if the political appetite existed, it would be an option for the UK to look to accede to this convention post Brexit. In contrast with Lugano, there is no option for existing contracting parties to refuse to admit a new state but certain declarations can be made limiting the ambit of the convention in certain situations.

For example, there is a possibility that enforcement might be refused in the following scenarios:

- where there is no connection between the state chosen and the dispute, except the choice of law clause; or
- where all the parties and the cause of the dispute are all located in the state in which it is sought to enforce judgment in (in other words, a wholly local issue has been determined abroad and enforcement is then sought locally).

Moreover, the enforcement process is not uniform across all jurisdictions as it is subject to the law of the state of enforcement.

If recourse is not available to any of the above options, enforcement would then be a matter for the domestic law of each Member State, meaning that the law and practice will vary widely from state to state. Even in Ireland, which is a fairly compatible common law jurisdiction, only final judgments for monetary amounts would be enforceable and the process is not straightforward or streamlined. Judgment involving declarations or adjustments to rights would not be enforceable.

Given these circumstances, a party to a contract with EU dimensions who accepts the exclusive jurisdiction of England and Wales (or Scotland or Northern Ireland) will likely be faced with significant difficulties in enforcing any judgment ultimately obtained from those courts unless there is a political resolution which effectively continues mutual enforceability. This is now a known risk and a failure by a solicitor to draw a client's attention to it could be regarded as negligence depending on the circumstances of the case. The risk of a finding of negligence is potentially amplified because of the multiple alternatives available in any contract negotiation.

**Dealing with those risks in a contract negotiation**

First, depending on the negotiating power of the parties, the party who would most likely need to enforce the judgment in another Member State could seek to have an exclusive jurisdiction clause in favour of that Member State. Second, a party could be given a choice so that it could commence proceedings either in specified courts of the United Kingdom or in the specified courts of another Member State. That choice could be available to one, some or all of the parties to the agreement depending on the likely enforcement scenarios. Third, the parties could agree to give the courts of the relevant part of the United Kingdom exclusive jurisdiction if, but only if, the judgments of those courts were enforceable in a manner analogous to the current regime of enforceability under the Recast Regulation (or the Lugano Convention or whatever alternative the parties might choose) and failing that, the courts of another Member State would be given exclusive jurisdiction. Such clauses would be more cumbersome than a simple iteration of exclusivity but are plainly capable of being drafted.

**Choice of law mismatches**
It follows that there may be a mismatch between governing law and the chosen forum if parties choose the laws of England and Wales to govern their contract but choose a different exclusive forum or adopt one of the hybrid suggestions regarding the choice of forum outlined above. These mismatches can of course be managed in litigation by the provision of expert evidence regarding the governing law to the courts of the chosen forum. That is achievable although it adds a layer of complexity to any litigation. However, it is better to have complexity than to have no enforceable remedy.

**Mitigating the risks**

The risk of a disorderly Brexit means that there is a real possibility that any judgments of UK courts (England and Wales or Scotland or Northern Ireland) would not be easily enforced in other EU Member States. Yes, there is a chance, and probably a good chance, that a political solution will be found so that judgments will remain enforceable in other Member States. However, there also exists a very real chance that this will not happen particularly given that any such agreement would almost certainly have to involve the UK accepting some involvement by the Court of Justice for the European Union - a difficult principle for Brexiteers to accept.

Failure to highlight these risks and adequately provide for them in international contracts leaves lawyers open to allegations of negligence from impacted clients. To mitigate this exposure, lawyers should now comprehensively advise their clients of the enforcement risks of, and possible alternatives to, exclusive UK jurisdiction clauses.