UNCERTAINTIES ARISING FROM BREXIT IN RELATION TO INTERNATIONAL LITIGATION AND CORPORATE RESTRUCTURING AND INSOLVENCY MATTERS

1. Introduction

Article 50.2 of the Lisbon Treaty provides that a Member State which decides to withdraw from the European Union must notify the European Council of its intention. The Union will then negotiate and conclude an agreement with that State setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.

Additionally, the terms of article 50.3 determine that the Treaties will cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

Therefore, once the United Kingdom has officially notified the European Council of its decision to withdraw, the relevant negotiations will start and from the entry into force of the withdrawal agreement, or failing that, after two years (or after the end of the extended period if one has been decided), EU legislation will cease to apply between the Member States and the United Kingdom; in particular, for the purposes of this commentary, the existing instruments on judicial cooperation in civil matters[1].

Several different scenarios could unfold from this; for example: (i) in the withdrawal negotiations new instruments may be negotiated to replace the current EU instruments, the contents of which cannot be predicted at this stage; (ii) what may also happen is that no provisions will be laid down in this respect and regulatory gaps (lacunae) may arise with the associated cross-border problems of all types[2]; or (iii) the United Kingdom may accede to preexisting international instruments, such as the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, or the 2005 Hague Convention on choice of court agreements.

[1] Some examples of legislation that, in principle, will cease to apply are the European legislation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation 44/2001 –also known as Brussels I- and Regulation 1215/2012 –also known as Brussels I bis); the service of judicial and extrajudicial documents (Regulation 1393/2007); the taking of evidence (Regulation 1206/2001); European enforcement orders for uncontested claims (Regulation 805/2004); European order for payment procedures (Regulation 1896/2006), small claims procedures (Regulation 861/2007); or on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Regulation 2201/2003).

[2] In this case, in relation to the service of judicial documents the respective Hague Conventions of 1965 and 1970, which the United Kingdom ratified, might apply.

The aim of this commentary is to highlight some issues and uncertainties that will follow withdrawal in the absence of new instruments to replace them, focusing particularly on matters related to choice of court clauses, recognition and enforcement of judgments, choice of law and insolvency proceedings, which we will discuss below, followed by a brief reference to arbitration.

2. Choice of court agreements designating courts in the United Kingdom and recognition and enforcement of judgments rendered in this country

1.- After withdrawal has occurred, if there is no other legislation, the validity and enforceability of the choice of court agreements designating the courts of the United Kingdom, falling under Brussels I bis Regulation (1215/2012), will be subject to the provisions in the domestic law of the United Kingdom, because such regulation will no longer apply.

Even though non-exclusive and asymmetric choice of court clauses are valid under the domestic law of the United Kingdom, these types of clauses do not fall under the 2005 Hague Convention on choice of court agreements, which only applies to exclusive agreements.

Choice of court agreements designating the courts of the United Kingdom would not give entitlement either to any of the benefits under the Brussels I bis Regulation in cases of lis pendens, consisting of the designated court having priority to decide on its jurisdiction, regardless of whether the action had been brought first in another court (art. 31.2)[3].

The United Kingdom's exit from the European Union could also imply a return to anti-suit injunctions[4], to protect the validity of jurisdiction clauses designating UK courts (the Court of Justice of the European Union has denied the validity of these measures in other Member States because they go against the principle of mutual trust in the EU). The validity of these measures outside the United Kingdom is another matter. The existing mistrust in many Member States towards these injunctions brings serious doubts over their recognition in the States where they are sought to be enforced, because they ultimately affect the public policy of the State concerned (a defined ground for denying the recognition of a judgment), as well as potentially being able to trigger a denial of cooperation with the United Kingdom's authorities by the Member States (in the case of Spain, under article 3.2 of the Law on International Legal Cooperation).

Furthermore, some particularly troublesome issues could stem from jurisdiction clauses designating the courts of the United Kingdom in cases where an EU instrument imposes or gives preference to the courts of a Member State. An illustrative example is article 46.6 MiFIR (Regulation 600/2014 on markets in financial instruments) which provides that: "*Third-country firms providing services or performing activities in accordance with this Article shall, before providing any service or performing any activity in relation to a client established in the Union, offer to submit any disputes relating to those services or activities to the jurisdiction of a court or arbitral tribunal in a Member State*".

2.- On the subject of the recognition and enforcement of court judgements, and again, in the absence of any other legislation, judgments rendered in the United Kingdom will not be entitled to any of the benefits associated with abolishing the exequatur[5] procedure to be enforceable in the Member States (the "star" measure of the Brussels I bis Regulation).

[3] That measure was designed to strengthen choice of court agreements and to neutralize "torpedo action", which is the term used for bringing action at a court other than the chosen court with the aim to delay final determination.

[4] Briefly, anti-suit injunctions are penalty-bearing orders in which a court prevents a party from commencing or continuing a proceeding in the court of another State.

Accordingly, for the enforcement in Spain of judgments rendered in the United Kingdom, an exequatur procedure will have to be carried out, with all the attendant difficulties, delays and costs. This will happen irrespectively of whether the 2007 Lugano Convention or the domestic Spanish Law on International Legal Cooperation apply. Very importantly, this Spanish domestic law lays down for the recognition and enforcement in Spain of a foreign judgment that it must be final, and allow, generally, control of the jurisdiction of the State of origin (by contrast to what happens under the Brussels I and I bis Regulations).

3. Choice of law clause in favor of the law in the United Kingdom

The United Kingdom's departure from the European Union will cause the Rome I Regulation (the instrument generally governing the determination of the applicable law within the European Union) to cease to apply.

In the absence of any other legal instrument, the validity and enforceability of a choice of law clause will be determined in accordance with the domestic law of the United Kingdom.

For the Member States, given the universal application of the Rome I Regulation, its provisions will apply even where the law of the United Kingdom is the chosen law. Although the United Kingdom's exit will have an impact on the limits provided in the Regulation where the chosen law is that of a third State. Accordingly, under article 3.4 of that regulation, if the parties' choice of applicable law is other than the law of a Member State, and all the connections are linked to one or more Member States, the overriding mandatory provisions in EU legislation will apply.

4. Restructuring and Insolvency proceedings in the courts of the United Kingdom

The main consequence arising from the United Kingdom's exit from the EU will be the Regulation on Insolvency proceedings ceasing to apply (Regulation 1346/2000 is now in force, although on the date withdrawal is likely to take place, it will be the new Regulation 2015/848), which has rules on international jurisdiction, applicable law, coordination between insolvency proceedings and recognition of foreign judgments.

One of the most important consequences resulting from being unable to apply the Insolvency Regulation to insolvency proceedings commenced in the United Kingdom is that the provisions on automatic recognition of judgments (including those concerning the opening of proceedings) contemplated in the Regulation will not be available.

Unless there is an applicable convention (with Spain there is not), insolvency judgments adopted in the United Kingdom will have to be recognized under the domestic law of each State. In Spain, they will be recognized under the rules in articles 220-226 of the Spanish Insolvency Law (Ley Concursal), which, unlike the Regulation, requires the recognition on a primary basis of the foreign judgment opening the proceeding. In other words, for potential recognition and enforcement, an exequatur procedure must first be carried out, with all the attendant delays, complications and added costs.

The same may be said for other proceedings under English law, such as pre-pack administrations or company voluntary arrangements (CVA), which will cease to benefit from automatic recognition in the Member States under the Insolvency Regulation and, in the absence of any other legislation, will have to be governed by domestic law.

[5] The exequatur is the procedure that must be followed in the State in which the enforcement of a foreign judgment is sought for it to be enforceable in that State.

As for schemes of arrangement (SoA), these have fallen outside of both the Insolvency Regulation in force and the new regulation, and therefore could not benefit from the recognition rules provided in these instruments. Before Brexit won the vote, there were already very serious doubts over whether they could be recognized under other European instruments, such as the Brussels I bis Regulation or the Rome I Regulation. The United Kingdom's exit from the European Union would rule out those alternatives completely, which adds further complication to the validity of this restructuring tool in the Member States.

Another point to note is that the Insolvency Regulation ceasing to apply in the United Kingdom will prevent the provisions in that Regulation concerning coordination, rules on conflict of laws and international jurisdiction from applying to restructuring and insolvency proceedings conducted in that country. Notably, the creditors in restructuring and insolvency proceedings conducted in the United Kingdom will not be able to benefit from the safe harbors provided by the Insolvency Regulation in such important matters as security interest immunity against insolvency stays, or claw-back protection.

5. Arbitration

It remains to be mentioned, lastly, that the United Kingdom's withdrawal from the European Union will not affect the recognition and enforcement of arbitral awards made in the United Kingdom and with respect to which the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards will apply (not the Brussels I and Brussels I bis Regulations).

Its withdrawal could, however, affect the measures supporting arbitration proceedings, such as any preventive measures that an arbitration tribunal might adopt in relation to an arbitration proceeding, insofar as they are considered to be included within the Brussels I bis Regulation. Moreover, as discussed in relation to jurisdiction clauses, the United Kingdom's exit could have a particular impact on the choice of that country as the seat of arbitration proceedings in cases subject to the MiFIR regulation, in light of the provisions in article 46.6 of that regulation.

Lastly, insofar as the Regulation on the taking of evidence (Regulation 1206/2001) were applicable to evidentiary measures requested by state tribunals to support an arbitration proceeding, the taking of evidence in an arbitration proceeding would also be affected .

In short, the United Kingdom's exit from the European Union will require careful thought over the potential advantages and drawbacks associated with choice of the courts or law of the United Kingdom in each specific case, or with conducting a restructuring or insolvency proceeding in the United Kingdom, in light of the legal issues and severe uncertainties related to the matters described in this commentary, among others.

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