



THE IMPACT OF BREXIT ON THE ENFORCEMENT OF ENGLISH JUDGMENTS IN SWITZERLAND

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The 2007 Lugano Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters currently forms the basis for the reciprocal enforcement of judgments between the member states of the European Union and three countries of the European Free Trade Association (EFTA) (Switzerland, Norway and Iceland). The Lugano Convention is in essence the equivalent of the Brussels I Regulation of 2001.

It is important to note that the United Kingdom has not ratified the Lugano Convention itself but is bound by it due to it being a member of the EU. As a consequence of leaving the EU at the end of March 2019, the UK will no longer be bound by the Lugano Convention. Therefore, even the potential execution of a withdrawal agreement with the EU would not prevent the UK's exclusion from the Lugano Convention.

Switzerland and the United Kingdom have recently signed a number of agreements with the aim to regulate their bilateral relations post Brexit but none of the agreements cover the judicial realm in general and the reciprocal enforcement of judgments in particular.¹ The United Kingdom has also deposited its Instrument of Accession to the 2005 Hague Convention on Choice of Court Agreements which will enter into effect on 1 April 2019, but as Switzerland is not a party to the Convention the solution to any difficulty in enforcing an English judgment in EU member states would not be available in Switzerland.

This means that in the event that the UK does not re-join the Lugano Convention post Brexit, English judgments would after Brexit be treated in Switzerland like judgements of any other third party state, as a result of which the Swiss exequatur procedure will apply: Swiss courts will apply Swiss domestic conflict of law rules to the recognition and enforcement of an English judgment, namely the Federal Act on Private International Law (the "PILA").

The enforcement process for judgments under the PILA is longer and not as simple as under the Lugano Convention and may have negative consequences for claimants and defendants alike. For claimants wishing to enforce their court decision in Switzerland, the grounds for resisting recognition of a foreign judgment are wider under the PILA than under the Lugano Convention. Under the Lugano Convention Swiss courts are generally not entitled to review whether the court of a member state had jurisdiction over the defendant. According to the PILA, foreign judgments may only be recognised and enforced if the foreign court had jurisdiction over the dispute pursuant to the rules set out in the PILA. Furthermore,

¹ To this date Switzerland and the UK have signed an agreement on citizens' rights, a Trade Agreement, an Insurance Agreement, a Road Transport Agreement and an Air Transport Agreement.

under the PILA a judgment must be final to be enforceable which means that foreign preliminary decisions (i.e. subject to appeal) are generally not enforceable under the PILA. The situation is different under the Lugano Convention which does not limit the remedies that can be enforced. Further, defendants will no longer benefit from the improved defence available under the Lugano Convention against so-called torpedo claims. In order to avoid a court proceeding in English courts, a quick acting party could successfully initiate court proceedings outside the United Kingdom and seek a negative declaratory judgment simply to prevent the other party from filing its intended claim in England. In the past, courts have granted interim orders against such torpedo claims but this possibility would likely cease to apply under the PILA.

As regards to timing, the Lugano Convention will likely continue to apply to the enforcement of English judgments rendered on or before 29 March 2019. The enforcement of English judgments rendered after this date, even if the proceedings were initiated before, will be governed by Swiss domestic law, i.e. the PILA.

The UK government has previously indicated that it will seek to re-join the Lugano Convention after Brexit, including in a "no-deal" Brexit scenario. However, the UK will need to apply and will only be invited to become a party to the Lugano Convention if the other contracting parties, including the EU, unanimously agree or if the UK becomes a member of the EFTA. In the event of a "no-deal" Brexit it is unlikely that a conclusion will be reached and delays and complications with regards to the enforcement of an English judgment in Switzerland post Brexit are to be expected. In any event, litigators are advised to verify the enforceability of an English judgment before commencing litigation in a case with an Anglo-Swiss element, in particular the validity of a jurisdiction clause.

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