BRIEFING

European Parliament

The United Kingdom's possible re-joining of the 2007 Lugano Convention

SUMMARY

The 2007 Lugano Convention is an international treaty that regulates the free movement of court judgments in civil cases between the Member States of the EU, on one hand, and the three EFTA states (Switzerland, Norway and Iceland), on the other. The convention effectively extends the regime of quasi-automatic recognition and enforcement of judgments that was applicable between EU Member States at the time under the Brussels I Regulation (No 44/2001).

Whereas the EU rules currently in force regulating the free movement of judgments in civil cases between the EU Member States – the 2012 Brussels I-bis Regulation (1215/2012) – bring about an even higher level of integration and presume, therefore, a very high level of mutual trust between the national judiciaries of the Member States, relations between the EU and EFTA Member States remain at the level of integration prescribed in 2001 by the Brussels I Regulation.

Following the expiry of the transition period provided for by the Withdrawal Agreement between the United Kingdom (UK) and the EU, the UK is no longer bound by either the Brussels I-bis Regulation or the 2007 Lugano Convention. Given the fact that the latter is open not only to EU and EFTA Member States, but also explicitly to third countries, the UK has made a bid to re-join the Lugano Convention. For a third country to become part of this legal regime, all parties to the convention must give their explicit consent. Whereas this has been the case with Switzerland, Norway and Iceland, the European Commission, acting on behalf of the EU as a party to the 2007 Lugano Convention, has indicated that it is not prepared to grant such consent, effectively blocking – for the moment – the UK's reintegration within the Lugano regime of mutual recognition of civil judgments.

For the Commission, accession to the Lugano regime is bound up with the notion of close economic integration with the EU, presupposing a high level of mutual trust. Participation in the Lugano system should not therefore be offered to any third country that is not part of the internal market.

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Background: Conflict of laws and jurisdictions and the EU

Divergences in private law and economic integration

Private law is the area of law that regulates relationships between private parties – both individuals (natural persons) and legal entities (legal persons) such as companies, associations, foundations, etc. The main areas of private law include family law, property law (including intellectual property law and land law), contract law, tort law, company law and intellectual property law. Because each country has its **own system** of private law, and its own courts competent to deal with disputes concerning private law disputes (civil courts), if a cross-border dispute arises there is a need to determine which national system of private law will apply (**conflict of laws**) and the courts of which country should hear the case (**conflict of jurisdictions**). Both sets of rules are known in civil law countries as **private international law**. Whereas questions of private law may seem technical and removed from politics, it must be borne in mind that given private law's all-encompassing scope covering – both economic and non-economic relations – differences between private law systems and civil procedure arrangements can constitute a **tangible obstacle to economic integration**, as they affect in particular the free movement of persons (e.g. family law), goods (e.g. contract law, property law), services (e.g. contract law, tort law) and capital (e.g. land law, company law). Within the EU, Article 114 of the Treaty on the Functioning of the European Union (TFEU) allows the harmonisation of private law rules as regards the smooth functioning of the internal market (mainly by means of directives), and Article 81 TFEU allows the creation of instruments in the area of judicial cooperation in civil matters (mainly by means of regulations).

Conflict of laws and conflict of jurisdictions: National rules

By default, both conflict of laws and conflict of jurisdictions are solved by the **domestic law** of each country. Thus, private international law is 'international' in the sense of regulating cross-border legal disputes, but not necessarily in the sense of belonging to the domain of public international law. In the absence of *public* international law instruments relating to *private* international law, it is up to the domestic conflict of laws/jurisdictions rules to determine the legal system that applies to a given legal relationship and the jurisdiction of courts to hear a case arising under such a relationship. Thus, for instance, if a case is brought to an English court, that English court will apply English conflict of law rules to decide whether English or foreign law is applicable, as well as English conflict of jurisdiction rules to determine whether it is the courts of England or of some other country that have jurisdiction. However, domestic rules on conflict of laws and on conflict of jurisdictions tend to differ, leading to different outcomes depending on where a dispute is brought (which can lead to 'forum shopping'), and potentially giving rise to conflicting judgments issued by courts in various countries on the same matter.

International conventions on private international law

In order to mitigate these risks, and in particular to prevent strategic forum shopping and make it easier to enforce foreign judgments in domestic courts, states adopt international conventions that lay down uniform rules on the conflict of laws (private international law) and conflict of jurisdictions (international civil procedure). Some of these conventions, drawn up by the Hague Conference on Private International Law, are intended as global instruments, open to all countries of the world. There are 90 members (89 states and the EU) of the Hague Conference, and in addition to members 65 other states have signed at least one of its conventions. Thus, a total of **155 states of the world are part of the Hague Conference system**, making it a truly global initiative in the area of private international law.

The most recent conventions[1] pertaining to the conflict of jurisdictions include:

- the Convention of 30 June 2005 on Choice of Court Agreements (HCCH 2005 Choice of Court Convention), to which the EU is party, and which entered into force in 2015; and
- the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention), as yet signed by only four countries.

It is worth noting that whereas the UK was bound by the HCCH Choice of Court Convention by virtue of its EU membership, ahead of ceasing to be bound by the convention at the end of the transition period, on 28 September 2020, it submitted an act of accession in its own right.

From EEC conventions to EU regulations

Whereas the Hague Conference draws up conventions intended for global use, in Europe a form of **regional private international law** instrument began to emerge from the 1960s. In 1968, the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters was concluded between the six EEC Member States, followed in 1980 by the Rome Convention between the nine EEC Member States at the time. The Member States that subsequently acceded to the EEC, and later the EU, simultaneously acceded to those two international treaties. At the time, the EEC did not enjoy competence in the area of judicial cooperation in civil matters, and therefore these legal acts had to be adopted in the form of conventions between EEC Member States.

However, following the Treaty of Maastricht, the EU gained sufficient competence to address these matters through EU legal acts (current legal basis: Article 81 TFEU), and therefore, for the Member States of the EU, the two **conventions were replaced by EU regulations** – the Brussels Convention was replaced by the Brussels I Regulation in 2000 (44/2001), and the Rome Convention was replaced by the Rome I Regulation (593/2008). The Brussels I and Rome I Regulations were soon followed by further EU instruments, giving rise to the 'Rome regime' in the area of intra-EU conflict of laws and the 'Brussels regime' for intra-EU cross-border civil procedure.

1988 Lugano Convention: Special relations with EFTA states

Whereas directly applicable EU instruments, such as the Rome I Regulation or the Brussels I Regulation, regulate conflicts of law and jurisdictions between the EU Member States, they are not *per se* designed to regulate such conflicts with non-EU countries. In order to have a common EU approach to such conflicts, the EU can – on behalf of its Member States (excluding Denmark) – negotiate and sign international conventions with selected third countries. Until now, the EU approach has been to **offer this possibility of regional conventions only to countries that are economically integrated with the EU** – in practice selected Member States of the European Free Trade Association (EFTA) and the European Economic Area (EEA). Thus, in 1988, the 12 then Member States of the EEC signed the Lugano Convention[2] regulating conflicts of jurisdictions with six non-EEC countries: Austria, Finland, Iceland, Norway, Sweden and Switzerland. The preamble to the 1988 Lugano Convention made it clear that the signatories are 'aware of the links between them, which have been sanctioned in the economic field by the free trade agreements concluded between the European Economic Community and the States members of the European Free Trade Association', thus underlining the link between economic integration, on one hand, and the special, regional regime of rules regulating the conflict of jurisdictions, on the other.

2007 Lugano Convention: Extending the benefits of Brussels I

Following the replacement of the Brussels Convention by the Brussels I Regulation (44/2001) in relations between the EU Member States, there was a need to update the legal regime for conflict of jurisdictions also for EU-EFTA relations. This was done by the 2007 Lugano Convention signed by the EU (representing all EU Member States except Denmark), Denmark (acting on its own behalf)

and three EFTA states: Norway, Iceland and Switzerland. It is therefore said that the 2007 Lugano Convention 'has effectively extended the Brussels I Regulation' to these countries.[3]

Therefore, the benefits of the **quasi-automatic system of recognition and enforcement of judgments** in civil cases provided for by the Brussels I Regulation was extended to the participating EFTA states, thereby facilitating the free movement of judgments issued by EFTA countries' civil courts within the EU and, *vice versa*, ensuring the free movement of judgments issued by EU Member States' courts within these EFTA countries. This led to an integration of the participating EFTA countries in the EU's area of civil justice, presupposing a high level of mutual trust between the civil judiciaries of EU Member States and of EFTA countries. As Konstantinos Kerameus points out, this idea rests on 'the conception of the EU territory as a legally unified territory, within which judgments rendered in any Member State are entitled to free movement to any other Member State'.[4]

Although the system of recognition and enforcement brought about by the Brussels I Regulation did not abolish the need for a request for recognition or enforcement, the bases for a requested court to refuse such recognition or declaration of enforceability were defined narrowly. Under the Brussels I Regulation a judgment from a different Member State can be given effect in the Member State of prospective enforcement by means of (1) a principal request for recognition, (2) an incidental request, or (3) or a request for *exequatur*.[5] The list of checks that a court requested to rule on recognition and enforcement may perform were limited to (1) manifest contrast to public policy of the forum, (2) missing or improper service of process, (3) irreconcilability with another judgment, (4) conflict with mandatory jurisdictional bases in matters relating to insurance, consumer contracts, or individual contracts of employment, or (5) use of exorbitant jurisdictional bases in violation of a particular agreement between Member States.[6]

Whereas the opening up of EU Member States (and EFTA states) towards judgments coming from other EU/EFTA states is based on mutual trust, it has to be balanced with the need to protect fundamental rights.[7] This is because each state-party to the European Convention of Human Rights (ECHR) retains its own responsibility for upholding fundamental rights.[8] In this context, a third country's ECHR membership and its track record with regard to fundamental rights protection, especially in the judicial process, become relevant factors with regard to the possibility of a sufficient level of mutual trust of EU judiciaries in the judiciary of that third country.

Brussels I-bis: Highest level of judicial trust within the EU

In the meantime, Parliament and Council replaced the Brussels I Regulation with a new instrument, known as the Brussels I-bis or Brussels Ia Regulation (Regulation 1215/2012). It reflects a **higher stage of integration** as regards judicial cooperation in civil matters between the EU Member States, providing in particular for the abolition of *exequatur* (declaration of enforceability).[9] Thus, according to Article 36(1) of the Brussels I-bis Regulation, 'a judgment given in a Member State shall be recognised in the other Member States **without any special procedure** being required', and according to Article 39, 'a judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States **without any declaration of enforceability being required**'. Nonetheless, refusal of recognition and enforcement is still possible, notably on grounds of public policy (Article 45). The abolition of *exequatur* is to be seen in the context of far-reaching economic integration and a high level of mutual trust between the national judiciaries.[10] However, as pointed out by Marta Requejo Isidro, the 'suppression of the *exequatur* procedure does not necessarily entail immediate enforcement of the foreign decision. […] In some countries a claim for enforcement is needed, and an additional proper procedure, even entailing the possibility of a hearing, takes place. […] In addition, if the forum law so provides, the debtor may already resist enforcement at this first stage or/and by appealing the enforcement decision on the basis of procedural or substantive grounds of the law foreseen by the Member State addressed …'.[11]

The previous level of integration, corresponding to the Brussels I Regulation with its quasi-automatic recognition and a high, though not yet highest level of mutual trust, remains applicable in relations with Denmark and the EFTA states (save for Liechtenstein), in the guise of the 2007 Lugano Convention.

The UK and the Lugano regime: Impact of Brexit

At the time of the signature of the 1988 and 2007 Lugano Conventions, the United Kingdom was a Member State of the EEC/EU. Thus, it was a signatory of the 1988 Lugano Convention, and was represented by the EU for the signature of the 2007 Lugano Convention. As a result, the Brussels I Regulation was applicable to the UK's conflicts of jurisdictions with other EU Member States (save for Denmark), and the 2007 Lugano Convention to the UK's conflicts of jurisdictions with Denmark, Iceland, Norway and Switzerland.

On 17 October 2019, the EU and UK signed the Withdrawal Agreement, which entered into force on 1 February 2020. The Withdrawal Agreement provided for a **transition period** (which lasted until 31 December 2020). Article 129(1) of the Withdrawal Agreement stipulates that during that transition period, the UK remained 'bound by the obligations stemming from the international agreements concluded by the Union, by Member States acting on its behalf, or by the Union and its Member States acting jointly', which encompassed the 2007 Lugano Convention. Therefore, the UK ceased to be bound by the 2007 Lugano Convention as of 1 January 2021.[12] As a result, for all civil cases initiated as of 1 January 2021, questions of jurisdiction and enforcement are governed by the **national law of the UK and each EU Member State**, as well as the 2005 Hague Choice of Court Convention.

The same follows from domestic UK law. According to Regulation 82 of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, any 'rights, powers, liabilities, obligations, restrictions, remedies and procedures' that continue by virtue of Section 4(1) of the European Union (Withdrawal) Act 2018 and are derived from the Lugano Convention 'cease to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly) on exit day'. In the words of the official guidance for legal professionals, issued by the UK government, the effects of the Lugano Convention have thereby been '**extinguished**'.

This is likewise confirmed, on the EU side, by the European Commission guidance of 27 August 2020 which clearly indicates that following the extinguishment of the Lugano Convention in EU-UK relations, EU rules on enforcement and recognition do not apply to UK judgments any longer. Therefore, recognition and enforcement of such judgments are, from 1 January 2021 onwards, subject to the rules on international civil procedure of each individual EU Member State.

UK bid to re-join the Lugano Convention

Accession of non-EU/non-EFTA states to the Lugano Convention

Although the 2007 Lugano Convention was conceived as an instrument tied to economic integration of EFTA/EEA states with the European Union – as clearly stated in its preamble[13] – it **remains open to third countries too**. This follows clearly from Article 70 of the Convention, which provides that it is open not only to future EFTA members and to EU Member State territories not yet bound by the Convention, but also *expressis verbis* to 'any other State under the conditions laid down in Article 72' (Article 70(1)(c)). Article 72, in turn, provides that any other, i.e. non-EFTA state, may become a contracting party to the Lugano Convention provided that it communicates all required information, in particular concerning its judicial system, judicial independence, internal law on civil procedure and enforcement of judgments, as well as its private international law relating to civil procedure. Such a third country may accede only if all the other contracting parties give their unanimous agreement (Article 72(3)). Once signed and ratified by the acceding non-EFTA party, the Convention enters into force only in relation to the acceding state and those contracting parties that

have not made any objections to the accession before the first day of the third month following the deposit of the instrument of accession (Article 72(4)).

UK application to join the Lugano Convention

As of 1 January 2021, the UK is 'any other state' within the meaning of Articles 70(1)(c)-72 of the Lugano Convention, and as such it has made an application to join it. On 8 April 2020, the United Kingdom **submitted a request for accession to the Lugano Convention**. Switzerland, Iceland and Norway have given their consent to the accession of the United Kingdom to the Lugano Convention by notifications of 11 September 2020, 26 February 2021 and 30 March 2021 respectively. The EU first made a notification on 25 March 2021 that its declaration will be late, stressing that this should not be understood as a tacit agreement. Following that, on 28 June 2021 the Depositary was informed by a letter that the EU was 'not in position to give its consent to invite the United Kingdom to accede to the Lugano Convention'.

Commission communication of 4 May 2021

The Commission explained its position in a communication to Parliament and Council issued on 4 May 2021, raising the following arguments:

- the Lugano Convention 'represents an **essential feature of a common area of justice** and is a **flanking measure** for the EU's economic relations with the EFTA/EEA countries';
- parties to the Lugano Convention 'participate, at least partly, in the EU's **internal market**, comprising the free movement of goods, services, capital and persons';
- as a consequence, the Convention 'supports the EU's relationship with third countries which have a particularly **close regulatory integration** with the EU, including by aligning with (parts of) the EU *acquis';*
- even though the text of the convention makes it open to third countries, it would not be an 'appropriate general framework for judicial cooperation with any given third country' because, in the Commission's view, '**It is not aimed to all third countries**';
- apart from Poland (prior to its EU accession), no other third country has joined the Lugano Convention;
- the Convention 'is based on a **high level of mutual trust** among the contracting parties and represents an essential feature of a common area of justice commensurate to the high degree of economic interconnection based on the applicability of the four freedoms'.

Based on these arguments, the Commission then went on to state that EU-UK relationships concerning private international law should rather be based on the Hague Conference regime (discussed above), pointing out that in fact the political declaration on the framework for the future relationship between the European Union and the United Kingdom of 17 October 2019 also referred to that framework. The Commission added that the UK's re-accession to the Lugano regime was not mentioned in the political declaration, nor in any other joint EU/UK document on the framework of the future relationship, nor in the EU-UK Trade and Cooperation Agreement (TCA) which entered into force on 1 May 2021 after having been provisionally applied from 1 January 2021.

In conclusion, the Commission took the view that the Lugano Convention 'is a flanking measure of the internal market and relates to the EU-EFTA/EEA context', whereas the UK is simply 'a third country without a special link to the internal market' and therefore 'there is no reason for the European Union to depart from its general approach in relation to the United Kingdom'.

2019 HCCH 2019 Judgments Convention: Will the EU join?

Shortly after its notification to Switzerland that it opposed the UK's bid to re-join the Lugano Convention, the European Commission proposed that the EU join the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. The proposal

of 16 July 2021 is for a Council Decision on the EU's formal accession to the convention. In the explanatory memorandum, the Commission points out that EU citizens and businesses, seeking to have an EU Member State court judgment enforced outside the EU 'face a scattered legal landscape due to the absence of a comprehensive international framework for the recognition and enforcement of foreign judgments in civil and commercial matters'.[14] Indeed, the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, as the Commission points out, 'has the potential to improve the current system of the circulation of foreign judgments'.[15]

For the time being, however, the Convention has only been signed by four states (Costa Rica, Israel, Ukraine, and Uruguay) and not yet ratified by any state. According to Article 28 of the Hague Judgments Convention, it will enter into force once it has been ratified by two states, which is not yet the case. EU accession to the convention is possible thanks to Article 27, which indicates that 'a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.' The EU's accession to the Convention would, by virtue of Article 26, count as the accession of a state for the purposes of the Convention's entry into force. Within the European Parliament, the proposal will be dealt with by the Committee on Legal Affairs which has yet to appoint its rapporteur. As provided for in Article 218(6)(v) TFEU, the Parliament will have to give consent to the EU's accession to the Hague Judgments Convention, since its subject-matter falls within the scope of the ordinary legislative procedure (i.e. Article 81 TFEU on judicial cooperation in civil matters).

Outlook

Given the European Commission's decision to block UK accession to the Lugano Convention, the legal regime of EU-UK judicial cooperation in civil matters will be governed, for the time being, by the national law of the EU Member States, on one hand, and that of the UK, on the other. Should, at some point, both the EU and the UK accede to the Hague Judgments Convention, the free movement of judgments in civil cases between EU Member States and the UK would once again be facilitated. However, the degree of legal integration provided for by the Hague Convention is far lower than the quasi-automatic system of recognition provided for by the Lugano Convention or the automatic one of the Brussels I-bis Regulation.[16]

MAIN REFERENCES

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Kramer X.A., 'Cross-Border Enforcement and the Brussels I-Bis Regulation: Towards a New Balance Between Mutual Trust and National Control over Fundamental Rights', *Netherlands International Law Review*, Vol. 60(3), 2013.

Mańko R. Europeanisation of civil procedure: Towards common minimum standards?, EPRS, European Parliament, 2015.

ENDNOTES

1 For an overview of the Hague Conference instruments see this table. A full list of all conventions, with links to full text, is available on the HCCH website.

2 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Done at Lugano on 16 September 1988 (88/592/EEC).

3 P. Stone and Y. Farah, 'Preface', in P. Stone and Y. Farah (eds.), *Research Handbook on EU Private International Law*, Edward Elgar, 2015.

4 K. Kerameus, 'Recognition and Enforcement', in U. Magnus and P. Mankowski (eds.), *Brussels I Regulation*, Sellier, 2007, p. 643.

5 Kerameus, op. cit. p. 636.

6 Kerameus, op. cit., p. 636.

7 X. Kramer, 'Cross-Border Enforcement and the Brussels I-Bis Regulation: Towards A New Balance Between Mutual Trust and National Control over Fundamental Rights', *Netherlands International Law Review*, Vol. 60(3), 2013, pp. 364-367.

8 European Court of Human Rights, 21 January 2011, *M.S.S.* v *Belgium and Greece*, Appl. No. 30696/09.

9 See e.g. L. Je Timmer, 'Abolition of Exequatur under the Brussels I Regulation: Ill Conceived and Premature?,' *Journal of Private International Law*, Vol. 9(1), 2013, pp. 129-147.

10 See e.g. X. Kramer, 'Cross-Border Enforcement in the EU: Mutual Trust Versus Fair Trial? Towards Principles of European Civil Procedure', *International Journal of Procedural Law*, Vol. 2, 2011, pp. 202-230.

11 M. Requejo Isidro, 'The Enforcement of Monetary Final Judgments Under the Brussels Ibis Regulation (A Critical Assessment)', in V. Lazić and S. Stuij (eds.), *Brussels Ibis Regulation: Changes and Challenges of the Renewed Procedural Scheme*, Springer Verlag & T.M.C. Asser Press, 2017, p. 74.

12 The present briefing does not deal with issues of intertemporal law, i.e. the continued application of the 2007 Lugano Convention to legal relationships with a UK component that arose prior to 31 December 2020.

13 'Aware of the links between them [signatories], which have been sanctioned in the economic field by the free trade agreements concluded between the European Community and certain States members of the European Free Trade Association'.

14 Proposal for a Council Decision on the accession by the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, 2021/0208 (NLE), Explanatory memorandum, p. 2.

15 Ibid.

16 More specifically, numerous subject-matter areas are excluded from the Hague Convention (Article 2); specific grounds need to be established in order to recognise a judgment, such as in particular a connection of the defendant with the state in which the judgment was issued (Article 5); judgments awarding exemplary or punitive damages may be excluded from recognition (Article 10); and, finally, *exequatur* proceedings (for the recognition of a judgment) are kept in place and governed by the law of the state of recognition (Article 13).

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