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The Unsuitability of the Lugano Convention (2007)
to Serve as a Bridge between
the UK and the EU after Brexit

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THE UNSUITABILITY OF THE LUGANO CONVENTION (2007) TO SERVE AS A BRIDGE BETWEEN THE UK AND THE EU AFTER BREXIT

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Abstract:

This article explores whether the Lugano Convention might be the appropriate instrument for the judicial cooperation between the European Union and the United Kingdom after Brexit. It argues that the mechanism of the Protocol no 2 to the Lugano Convention, which provides for an obligation to 'pay due account' of the case law of other Contracting Parties (including the CJEU), is an insufficient tool to keep the different procedural cultures of Civil and Common Law together. The only suitable solution will be a bilateral agreement between the UK and the EU which will not provide the same level of judicial interchange as does the Lugano Convention.

Keywords:

Brexit; judicial cooperation in civil and commercial matters; Lugano Convention; procedural cultures of Civil and Common Law; lack of international trust in international relations

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In the current discussion on the post-Brexit judicial cooperation in civil and commercial matters, many consider the ratification of the 2007 Lugano Convention¹ (LC) by the United Kingdom as a suitable avenue for an alignment of the UK with the current regime of European co-operation.² Similarly, the UK government has already shown some sympathy for this option.³ So far, the European Commission has not endorsed any official position.⁴

At first sight, the 2007 Lugano Convention appears an ideal tool for maintaining the core of the existing system of judicial cooperation between the EU and the UK: Although the LC has not been amended to reflect the latest changes (and improvements) introduced with the Brussels I^{bis} Regulation,⁵ it nevertheless provides for the essential provisions of the Brussels regime on jurisdiction, pendency and recognition and enforcement. In addition, Protocol No 2 to the LC requires the courts of non EU Member States only to “pay due account” to the case-law of the Court of Justice of the European Union (ECJ) on the Brussels I Regulation. Hence, Protocol No 2 might provide an acceptable way for British courts to respect the case-law of the ECJ - without being bound by it - in the post-Brexit scenario.

However, as I am going to argue in this posting, the 2007 Lugano Convention is not the appropriate instrument to align judicial cooperation between the United Kingdom and the European Union after Brexit. In the first part, I will briefly summarize the functioning of Protocol No 2 of the LC, as demonstrated by the practice of the Swiss Federal Tribunal. The second part will address the cultural divergences between the continental and the common private international and procedural laws by making use of two examples related to the Brussels I Regulation: the scheme of arrangement, on the one hand, and anti-suit injunctions, on the other hand. As I will explain in my conclusions, only a bilateral agreement between the European Union and the United Kingdom can offer a solution which is suitable and acceptable for both sides.

Protocol No 2 to the 2007 Lugano Convention

It must be remembered that the LC was enacted in order to extend to the Member States of EFTA the judicial cooperation established between EU Member States with the 1968 Brussels Convention.⁶ Until

¹ Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, done at Lugano on 30 October 2007. OJ L 339 of 21.12.2007, p. 3-41.

² *Dickinson*, Close the Door on Your Way Out, Free Movement of Judgments in Civil Matters – A ‘Brexit’ Case Study, ZEuP 2017, 540, 558 et seq.; *Masters/McRae*, What does Brexit mean for the Brussels Regime, J Int'l Arb. 33 (2016), 483, 487 et seq.; *Rühl*, Cooperation in Civil and Commercial Matters after Brexit, ICLQ 67 (2018), 99, 102; *Sonnentag*, Die Konsequenzen des Brexits für das Internationale Privat- und Verfahrensrecht (2018), p. 80 et seq.

³ Written evidence of the Rt Hon Sir Oliver Herald (HM Minister of Justice) to the House of Lords' Sub-Committee on European Affairs, 1/31/2017, answer to question 44, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcom-mittee/brexit-civil-justice-cooperation/oral/46539.html>. The position paper of the UK government of 8/22/2017, para 18, mentions the LC but favours a bilateral agreement, www.gov.uk/government/uploads/system/uploads/attachment_data/file/639271/Providing_a_cross-border_civil_judicial_cooperation_framework.pdf.

⁴ European Commission, Position paper on Judicial Cooperation in Civil and Commercial matters, 7/12/ 2017, TF50 (2017) 9/2 – Commission to UK, http://ec.europa.eu/commission/sites/beta-political/files/essential-principles-civil-commercial-matters_en_0.pdf

⁵ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), OJ L 351, 20.12.2012, p. 1–32 (repealing Council Regulation (EC) No 44/2001 of 22 December 2000, OJ L 12, 16.1.2001, p. 1–23).

⁶ However, it is not to be expected that the UK will not join EFTA as, by joining EFTA, the UK guarantees the free movement of people (and not only money) between the Island and the Continent. The only avenue to join the Convention is a ratification by

today, the LC aligns the practice of the courts in Switzerland, Norway and Iceland to the Brussels I Regime.⁷ Consequently, the 2007 Lugano Convention closely follows the wording of the Brussels I Regulation.⁸ However, the negotiations of the (first) Lugano Convention⁹ proved to be difficult because of the role and function of the ECJ. For the European Union, the Convention is Union law and (solely) the ECJ is competent to interpret the Convention. However, the non EU-States (especially Switzerland) were unwilling to accept the jurisdiction of the ECJ for the interpretation of the Convention with regard to their courts. Finally, both sides agreed on Protocol No 2 as a compromise. Its Article 1 (1) obliges all Courts (including the ECJ) to “pay due account” to the case-law of the courts of other contracting parties, including the ECJ.¹⁰ Article 1 (2) states that the Courts of EU Member States may make preliminary references to the ECJ on the interpretation of the Lugano Convention which – being EU-law – is subject to the jurisdiction of the ECJ.¹¹ However, the objective of these provisions is clearly expressed by the last recital of Protocol No 2. According to the said recital the contracting parties are desiring “to prevent, in full deference to the independence of the courts, divergent interpretations and to arrive at an interpretation as uniform as possible of the provisions of this Convention and of those of the Regulation (EC) No 44/2001 which are substantially reproduced in this Convention and of other instruments referred to in Article 64(1) of this Convention.”¹²

Although the objective of the Protocol was clearly expressed in its preamble, its legal implementation appears to be feeble. Its operative provision only provides for an obligation of the courts of Contracting States “to pay due account” to the case-law of the ECJ regarding the interpretation of the Brussels I Regulation. There is no obligation to follow the ECJ’s case-law as closely as possible and the freedom of the courts to deviate from the ECJ’s case law is not limited to cases where the Court of Justice interpreted the Brussels I Regulation in the light and the context of general EU law. All in all, “paying due account” does not mean more than looking at the pertinent case-law and giving reasons as to why a deviation is considered to be necessary. Furthermore, as I will demonstrate in the next paragraph, in practice, there is even no such thing as an obligation to explicitly highlight, in the judgment of a Contracting State, any deviation from the pertinent case-law. And, finally, there is no sanction in the event the case-law of national courts deviates from the established case-law of the ECJ. All in all, the respect of the Lugano Protocol appears to boil down to a matter of goodwill and of courtesy of the courts involved.

If one looks at the case-law of the Swiss Federal Tribunal on the Protocol No 2, the concerns expressed in the last paragraph are – unfortunately – confirmed. Although the Swiss Federal Tribunal

the UK and all other Contracting parties including the EU. Such ratification should be made conditional in the sense that the UK remains bound by the ECHR.

⁷ Historically the LC was used as an instrument to facilitate the accession to the European Union, not the exit from it.

⁸ It should be mentioned here that the profound changes of Regulation 1215/2012 to the former Regulation 44/2001 have not been reflected in the Lugano Convention so far. In this respect, the LC lags behind the latest developments of European procedural law, cf. *Dickinson*, ZEuP 2017, 540, 562.

⁹ Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, done at Lugano on 16 September 1988, OJ L 319, 25.11.1988, p. 9–48.

¹⁰ Article 1 (1) of the Protocol reads as follows: “Any court applying and interpreting this Convention shall pay due account to the principles laid down by any relevant decision concerning the provision(s) concerned or any similar provision(s) of the 1988 Lugano Convention and the instruments referred to in Article 64(1) of the Convention rendered by the courts of the States bound by this Convention and by the Court of Justice of the European Communities.”

¹¹ Article 1 (2) states: “For the courts of Member States of the European Community, the obligation laid down in paragraph 1 shall apply without prejudice to their obligations in relation to the Court of Justice of the European Communities resulting from the Treaty establishing the European Community or from the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed at Brussels on 19 October 2005.”

¹² It should be added that the same considerations apply to the Recast of the Regulation (EC) No 44/2001, Regulation No 1215/2012, ECJ, 20/12/2017, case C-467/16 *Schlömp*, EU:C:2017:993, para. 42.

clearly stated its willingness to follow the ECJ's case-law on the Brussels I Regulation,¹³ there are many cases where the Federal Tribunal has deviated from the ECJ's case-law. In this respect, two different settings must be distinguished: On the one hand, cases where the Federal Tribunal openly deviated from the ECJ's case-law because the latter had been influenced by systematic considerations and paid regard to other EU instruments: The most pertinent example in this respect relates to a judgment where the Swiss Federal Tribunal did not endorse the ECJ's case-law on avoidance actions. Overall, this case-law was largely based on the relationship between the Insolvency Regulation¹⁴ and the Brussels I Regulation.¹⁵ As Switzerland is not bound by the Insolvency Regulation, the Tribunal departed openly from the case-law of the ECJ. However, there are also cases where the Federal Tribunal moved away from the ECJ's case-law but without making this deviation expressly. This case-group is more important in numbers and it is – from a EU perspective – much more problematic. Here, the Federal Tribunal interpreted some provisions of the LC in a manner which was not fully in line with the case-law of the ECJ but did not make the deviations explicit. In practice, this group of judgments is more important than the first one.¹⁶ Indeed, this case-law clearly demonstrates the inherent weakness of Protocol No 2 to the LC: As there is no sanction, the deviations entail that the same provisions of the LC and the Regulation are interpreted differently – an unwelcome outcome, to be sure. As a result, the conclusion may be drawn that the Protocol does not provide for a mechanism for the uniform and coherent interpretation of the LC. As a result, there is no uniform interpretation of the LC in the light of the Brussels I Regulation, although deviations under the LC usually do not affect the core concepts of the said Regulation.

The specific situation of the Common Law's procedural culture

The reason why the LC operates without a strong mechanism for the alignment of the case-law might be found in its historical origins: The LC was never meant to bridge cultural divergences between the Common and the Civil Law as its Contracting States were either EU Member States (as such, subject to the case law of the ECJ) or EFTA States belonging to the civil law tradition.¹⁷ There was an expectation that the basic concepts and approaches of the Contracting States would be similar. However, the – overall very positive – experiences of the United Kingdom being part of the Brussels system during the last 40 years demonstrates that there was a recurrent need to overcome divergent approaches of the civil and the common law.¹⁸ It was the ECJ which bridged the gaps between the two worlds, often in a sense of cross-fertilization.¹⁹ Sometimes the case-law of ECJ has been criticized in the common law

¹³ Bundesgericht (Swiss Federal Court), 9/26/1997, BGE 123 III 414, 420-421; 7/20/2003, BGE 129 III 626.

¹⁴ Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160, 30.6.2000, p. 1–18, repealed by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, 5.6.2015, p. 19–72.

¹⁵ Bundesgericht, 12/15/2004, BGE 131 III 227 (actio pauliana).

¹⁶ In 2016, the Swiss Federal Tribunal rendered 9 judgments on the Lugano Convention. In 4 cases it deviated from the established case-law of the ECJ. The most problematic of these cases was a decision of 2/9/2016, BGE 142 III 170 (on the interpretation of Article 15 LC).

¹⁷ I'm well aware that the distinction highlighted here is a simplistic one and that one has to be very cautious with the categories of "legal families". However, it is also clear that there are considerable differences between the civil and the common law procedural law.

¹⁸ The divergences were highlighted in *Airbus Industries v. Patel* [1999] 1 AC 199 (HL), pp. 131-133 (per Lord Goff).

¹⁹ A prominent case where the ECJ permitted the „import“ of an instrument of English procedural law into the Brussels I Regulation was the judgment of 4/2/2009, case C-394/07, *Gambazzi* EU:C:2009:219 (the debarment of an obstructing party from the proceedings does not amount to a violation of public policy under the Brussels I Regulation).

world because it stopped well established practices of English courts. The most prominent example in this respect is provided by anti-suit injunctions.²⁰

Without the unifying function of the European Court of Justice it is to be expected that the diverging forces of the common law approach to procedural law²¹ will quickly entail split interpretations of the LC. This can be exemplified by the actual practice of English courts regarding the scheme of arrangement.²² This instrument, which permits the restructuring of distressed debts (and companies) by a majority of creditors (and shareholders) under the approval of the court, is often used for the restructuring of foreign companies. In this instance, foreign companies move their seat to England, creditors agree to the jurisdiction of English courts (Article 25 Brussels I^{bis} Regulation) or jurisdiction is based on Article 8 no 1 of the Brussels I^{bis} Regulation.²³ Article 8 no 1 provides for jurisdiction against co-defendants in situations where the claims are closely connected so that it is expedient to hear them together in order to avoid irreconcilable judgments. According to the case-law of the ECJ, Article 8 no 1 which must be strictly interpreted²⁴ requires that discrepancy must also arise in the context of the same situation of fact and law.²⁵ However, English courts do not apply these criteria literally, but ask: „[...] whether it would be expedient to hear and determine the application for sanction of the scheme as regards the other creditors to avoid inconsistent judgments from separate proceedings. On one view, this question will necessarily be answered in the affirmative because of the desirability of binding all scheme creditors to the same restructuring. Alternatively, the answer may depend upon a consideration of the number and value of the creditors domiciled in the United Kingdom.“²⁶

These are valuable considerations; but they do not correspond to the ECJ's case-law. Of course, English courts should refer to the ECJ for a preliminary ruling in order to clarify the issue.²⁷ Yet, the approval of a scheme is a matter of urgency and one cannot blame the judges for deciding these cases quickly. However, my point here is different: the scheme of arrangement is strongly influenced by a common law approach to restructuring proceedings which is not easily transferred into the framework of the Brussels I Regulation. Until today, this practice has been unique in the European Judicial Area and, still, the application of the Brussels I Regulation to the scheme of arrangement is heavily discussed in literature.²⁸ However, in the post-Brexit scenario English courts might rely on the

²⁰ ECJ, 12/9/2003, case C-116/02, *Gasser*, EU:C:2003:657; ECJ, 4/27/2004, case C-159/02, *Turner*, EU:C:2004:228, paras. 24 et seq.; EuGH, 2/10/2009, case C-185/07, *Allianz (West Tankers)* EU:C:2009:69, paras 29 et seq.; ECJ, 5/13/2015, case C-536/13, *Gazprom*, EU:C:2015:316, paras 32 - 37. For a critique see *Fentiman*, *International Commercial Litigation* (2nd ed. 2015), paras 16.131 et seq.

²¹ The same forces are found in the civil law perception of the Brussels I Regulation.

²² Part 26 (sections 895-901) Companies Act 2006, *Bork*, *Rescuing Companies in England and Germany* (2012), chapter 1; *Hess*, in: *Hess/Pfeiffer/Oberhammer, Heidelberg/Luxembourg/Vienna Report on the EU Insolvency Regulation* (2015), paras 162-175.

²³ Article 8 no 1 requires that one party to the proceedings (the “anchor defendant”) is domiciled in the EU Member State where the proceedings are initiated. According to the case-law of the High Court of London, *CBR Fashion GmbH* [2016] EWHC, 2808, Rdn. 9 a creditor holding 1,58 % of all debts involved may act as an anchor defendant.

²⁴ ECJ, 12/2/2011, case C-145/10, *Painer*, EU:C:2011:798, para. 74

²⁵ ECJ, 9/27/1988, case C-189/87, *Kalfelis / Schröder*, EU:C:1988:459; ECJ, 5/21/2015, case C-352/13, *CDC Hydrogen Peroxide*, EU:C:2015:335.

²⁶ *In the Matter of APCOA Parking (UK) Ltd. & Others* [2014] EWHC 997 (Ch); *Re DTEK Finance PLC* [2016] EWHC 3563; *Re Global Garden Products Italy SpA* [2016] EWHC 1886; *Algeco Scotsman PIK SA* [2017] EWHC 2236 (Ch).

²⁷ It goes without saying that a clarification of the applicability of the Brussels I Regulation to the scheme of arrangement would be beneficial. A preliminary reference regarding Article 8 of the Brussels I^{bis} Regulation can only be made by English courts as the jurisdiction of the court of origin is not reviewed at the enforcement stage.

²⁸ Recital 7 to Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings (EIR) states that proceedings relating to the restructuring of insolvent companies are dealt with by the Insolvency Regulation. However, the applicability of the EIR presupposes that the national proceedings are listed in its Annex A. Otherwise, the Brussels I^{bis} Regulation shall apply to avoid regulatory loopholes between the two instruments. The last sentence states: “However, the mere fact that a national procedure

Lugano Convention (especially Articles 6 no 1 and 23 LC) in order to export restructuring proceedings onto the Continent. Protocol No 2 to the Lugano Convention does not, in any way, provide for any clarification of this issue. As a result, a debated practice will continue to apply absent any clarification by the ECJ.²⁹ And it is expected that this practice will not only impact the operation of the LC but also of the Brussels I^{bis} and the Insolvency Regulations as it affects the application of the COMI concept.

Another example relates to anti-suit injunctions. Here, the question arises as to whether the practice of protecting and enforcing choice of court and arbitration agreements will be taken up again after Brexit.³⁰ One might argue that the principle of mutual trust does not operate with regard to the courts of non-EU States and, therefore, after Brexit the *West Tankers* judgment³¹ will no longer bind English courts in the context of the 2007 Lugano Convention. However, it must be stated that the issue has not been discussed yet with regard to the 2007 Lugano Convention. Nevertheless, with regard to the 2005 Hague Choice of Court Convention³² *Ahmed* and *Beaumont* have already argued that the Convention does not prevent English courts from issuing anti-suit injunctions after Brexit.³³ The same considerations apply to the Lugano Convention. Again, Protocol No 2 to the LC does not remedy to such a situation and the operation of European procedural law will be affected.³⁴

The need for a bilateral agreement

To sum up, the 2007 Lugano Convention does not seem to be the appropriate instrument to bridge judicial cooperation between the United Kingdom and the European Union in the post-Brexit scenario. One must be aware of the differences between the civil and the common law world, on the one hand, and of the need for a uniform interpretation and application of the European law of civil procedure, on the other hand. The return to the private international law of the common law after Brexit, which is already openly favored by some authors,³⁵ will certainly increase the gap between the two sides of the Channel.

Nevertheless, in the long run, there might be a need for an instrument in this area of law.³⁶ The only suitable solution would be a bilateral agreement between the European Union and the United Kingdom which could address all important aspects of cross-border litigation between the Contracting Parties: An instrument which would cover not only jurisdiction and recognition, but also service of

is not listed in Annex A to the Insolvency Regulation should not imply that it is covered by the Brussels I^{bis} Regulation." This sentence refers to the scheme of arrangement which has not been communicated by the UK government to be listed in Annex A.

²⁹ The „transfer“ of the scheme of arrangement under the LC is already discussed, see *Prusko*, *The Brexit Stakes for Corporate Activity – a Restructuring & Insolvency Poerspective*, in: *Armour/Eidenmüller, Negotiating Brexit* (2017), p. 57, 59.

³⁰ *Davies/Kirse*y, *Anti-Suit Injunctions in Support of London Seated Arbitrations Post-Brexit: Are All Things New Just Well-Forgotten Past?*, *J Int'l Arb.* 33 (2016), 501, 509 et seq.

³¹ ECJ, 10/2/2009, case C-185/07, *West Tankers*, EU:C:2009:69, paras 29 – 31; ECJ, 5/13/2015, case C-536/13, *Gazprom*, EU:C:2015:316, paras 32 - 37.

³² *Convention of 30 June 2005 on Choice of Court Agreements*, available at www.hcch.net.

³³ *Ahmed/Beaumont*, *Exclusive choice of court agreements: some issues on the Hague Convention on choice of court agreements and its relationship with the Brussels I recast especially anti-suit injunctions, concurrent proceedings and the implications of BREXIT*, *JPIIL* 13 (2017), 386, 401 ff.

³⁴ At present, many (maybe even most) jurisdiction clauses and arbitration agreements designate London as the place of litigation or arbitration.

³⁵ *Briggs*, *Secession from the European Union and private international law: the cloud with a silver lining*, *Commercial Bar Association*, 24/1/2017, <http://www.blackstonechambers.com/news/secession-european-union-and-private-international-law-cloud-silver-lining/>.

³⁶ One should not forget the practical impacts of EU procedural law: at present, the British Central Authority processes about 20.000 requests for formal service under the EU-Service Regulation per year.

process and taking of evidence. It could also include family matters, especially divorce and maintenance.³⁷ Such an agreement would certainly run parallel, to some extent, to the existing *acquis*, but it could also take into account the cultural divergences between the common and the civil law. For instance, it might be an option to openly address in it questions such as anti-suit injunctions and the scheme of arrangement. The same considerations apply to disclosure and freezing orders. However, the agreement should also provide for a bold public policy exception for occurrences where - from the Continental law perspective³⁸ - the different legal cultures entail diverging (and disproportionate) results.³⁹ Finally, the interpretation of the agreement could be organized in a better way than in Protocol No 2 of the LC: With regard to the courts of the EU Member States the European Court of Justice will be competent for its interpretation.⁴⁰ However, there should be more than a mutual obligation to “duly take into consideration the case-law of the courts of the other Contracting States” (including the ECJ). Therefore, it would be a good outcome if the Agreement provides for a stronger formula which transgresses the wording of Protocol No 2 to the LC.⁴¹ It is certainly desirable and advisable that such a robust instrument be negotiated in the context of the framework for Brexit although it will finally lower the current *acquis* of the cooperation in civil matters under the existing EU instruments, including the Lugano Convention.

³⁷ It must be underlined that the interest of the UK (especially of the London judicial market) to be connected with the European Judicial Area is much bigger than the correspondent interest of the Union as the UK exports much more civil judgments to the Continent compared to judgments from the Continent travelling to the UK. Contrary opinion: *Briggs*, (footnote 35), <http://www.blackstonechambers.com/news/secession-european-union-and-private-international-law-cloud-silver-lining/>, p. 18.

³⁸ Similar considerations may also apply from the UK perspective.

³⁹ The danger of disproportionate outcomes was clearly addressed by the ECJ, 4/2/2009, case C-394/07, *Gambazzi* EU:C:2009:219, paras 33 and 48.

⁴⁰ The competence of the ECJ for the interpretation of such an Agreement is vested in Article 19 EU-Treaty.

⁴¹ One option is to provide for a renegotiation clause in case the respective case-law in the UK and in the EU regarding the Agreement deviates considerably. This renegotiation could also be made by a Standing Committee under the Agreement.



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