

An Attractive Regime For Governing Jurisdiction Post-Brexit

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The U.K. recently requested to join the Lugano Convention 2007, which is the U.K.'s preferred regime for governing questions of jurisdiction and the enforcement of judgments with EU countries post-Brexit. These rules will be critically important for all parties when they consider which jurisdiction clauses to include in their contracts.

This article explains what the Lugano Convention is, provides an update on recent developments in the accession process, and highlights some important differences between the Lugano Convention and the current regime.

What is the Lugano Convention 2007?

The Lugano Convention governs jurisdiction and the enforcement of judgments between the EU and European Free Trade Association states — Switzerland, Iceland and Norway. The U.K. is currently already a member of the Lugano Convention by virtue of Article 127 of the Brexit withdrawal agreement, which provides for EU law (and international agreements to which the EU is a party) to continue to apply until the end of the transition period, currently scheduled for Dec. 31, 2020.

The Lugano Convention is a mirror image of the 2001 Brussels Regulation (Regulation 44/2001), which is the EU regime governing jurisdiction and enforcement of judgments for proceedings commenced before Jan. 10, 2015. The Brussels Regulation has since been replaced by the Brussels Recast Regulation (Regulation 1215/2012), which applies to proceedings commenced on or after Jan. 10, 2015.[1]

Why does the U.K. want to join?

The purpose of all of these regimes governing jurisdiction and enforcement of judgments between the U.K. and EU — whether the Brussels Regulation, Brussels Recast or the Lugano Convention — is to promote cross-border judicial harmony and cooperation, to enable the straightforward cross-border enforcement of judgments, and to provide legal certainty and predictability for parties by allowing



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them to identify the courts in which they may sue and be sued.

At the end of the transition period, the existing Brussels Recast regime governing jurisdiction and enforcement of judgments between the U.K. and EU will no longer apply. In the absence of a replacement regime, the advantages for litigants of a common set of rules and the ability to easily enforce English judgments in the EU (and vice versa) will be lost. U.K. and EU parties would need to fall back on the rules that apply to the courts and nationals of third countries, which are generally much more cumbersome.

Continuing the status quo is not an option for the U.K. as the Brussels Recast regime is only available to EU countries. The Lugano Convention, on the other hand, already includes the European Free Trade Association states. Despite some important differences (discussed further below), the essentials of the Lugano Convention and Brussels Recast regimes are the same. The Lugano Convention is therefore an attractive "oven-ready" option.

What is the accession process?

Despite the convenience of the Lugano Convention, the U.K.'s accession may not be straightforward. For the U.K. to join the Lugano Convention as an independent state, all the current contracting parties including the EU must provide their unanimous consent.

Accession is a four-step process:

1. Requesting to join (Article 72(1), Lugano Convention). The U.K. requested accession on April 8, 2020.[2]
2. Unanimous approval by the current contracting parties: the EU (including Denmark, which is a contracting state in its own right) and the European Free Trade Association states (Article 72(3)).
3. Depositing the instrument of accession by the U.K., as the party requesting to join (Article 73(4), 72(1)).
4. A three-month objection period before the Lugano Convention enters into force. A contracting state that previously approved the U.K.'s accession may object during this period. If a contracting state objects, the convention will not enter into force between the U.K. and that party (Article 72(4)). For accession to be effective on Jan. 1, 2021, the contracting states must have approved the U.K.'s accession by Oct. 1, 2020.

Switzerland, Iceland and Norway have already indicated they support the U.K.'s accession.[3] However, on April 27, the European Commission reportedly advised the EU member states that there were clear reasons to reject the U.K.'s application, and making a quick decision was not in the EU's interests.[4]

How does the Lugano Convention differ from the current regime, and why might the EU not want the U.K. to join?

Although the Lugano Convention broadly replicates the current Brussels Recast regime, there are also some important differences.

Under the current regime, the Court of Justice of the EU plays a role in ensuring the uniform and

consistent interpretation of the rules as between the courts of the member states. Parties are able, in principle, to refer questions about the operation of the Brussels Recast to the CJEU.

Under the Lugano Convention, however, the courts of non-EU contracting states are merely required to "pay due account" to the case law of the CJEU on the Brussels Regulation and Brussels Recast (Lugano Convention, Protocol 2, Article 1). This is arguably a relatively weak obligation, which may not mean more than looking at the CJEU's case law and giving reasons as to why a deviation is necessary.[5]

Moreover, the Lugano Convention has no mechanism to penalize deviation from the rules by national courts. Some commentators have suggested that the U.K. joining the Lugano Convention might therefore result in unacceptable divergence between the U.K. and EU approaches in a way that might advantage the U.K., for example by the return of anti-suit injunctions, which the current regime prohibits.[6] This may be one reason why the EU Commission is apparently taking a cautious approach to the U.K.'s request to accede to the convention.

However, certain aspects of the Lugano Convention are disadvantageous to the U.K. as compared to the current Brussels Recast regime.

The Lugano Convention accords less importance to exclusive jurisdiction agreements than the Brussels Recast. It does not adequately address the problems of the so-called "Italian torpedo," whereby one party commences proceedings in the courts of a state in breach of an exclusive jurisdiction clause in favor of the courts of another state, in an attempt to bog down its opponent in litigation proceedings.

The Brussels Recast solves that problem by according the court designated by the exclusive jurisdiction clause priority to decide on the validity and effectiveness of the clause in question, even if that court was seised second. The Lugano Convention does not provide the same neat solution.

There is no quick fix for this. The English High Court has recently made clear in the case of *Mastermelt Ltd. v. Siegfried Evionnaz SA*[7] that courts cannot merely interpret the Lugano Convention consistently with Brussels Recast so as to solve the Italian torpedo problem. Litigants and practitioners therefore need to be very mindful of the important differences between the Lugano Convention and the current regime.

Conclusion

The regime that governs jurisdiction and the enforcement of judgments post-Brexit will be extremely important to all parties and litigators. Until the uncertainty as to which regime will apply is resolved, parties may want to consider including arbitration clauses in their contracts.

The recognition and enforcement of arbitral awards is governed by an entirely different treaty, the New York Convention, and is unaffected by Brexit. We expect London to maintain its deserved reputation as one of the most popular and trusted arbitral seats in the world.

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[1] <https://www.latham.london/2018/07/english-court-cannot-issue-anti-suit-injunctions-restraining-other-eu-court-proceedings/>, <https://www.latham.london/2017/09/how-will-court-of-appeal-decision-in-sabbagh-v-khoury-and-others-affect-future-article-61-cases/>, <https://www.latham.london/2017/04/rebalancing-the-law-on-asymmetric-jurisdiction-clauses/>

[2] https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/autres-conventions/Lugano2/200414-LUG_en.pdf

[3] <https://www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007>

[4] <https://www.ft.com/content/d3cf6d9f-2e2d-4af9-a550-91e476723ea2>

[5] See the criticisms by Professor Hess, for example — https://www.mpi.lu/fileadmin/user_upload/Hess_Lugano_Convention_Brexit_16_Jan_18.pdf

[6] See Professor Hess, page 8 — https://www.mpi.lu/fileadmin/user_upload/Hess_Lugano_Convention_Brexit_16_Jan_18.pdf

[7] *Mastermelt Limited v. Siegfried Evionnaz SA* [2020] EWHC 927 (QB)