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Brexit and its Effects on Civil and Commercial Litigation in Switzerland

With the United Kingdom (UK) potentially set to leave the European Union (EU) on 31 October 2019, or at a later date should a further extension be granted, a different set of rules governing jurisdiction as well as the recognition and enforcement of UK judgments in Switzerland may apply. This Briefing provides an overview of the main effects that Brexit will have on civil and commercial litigation in Switzerland in connection to the UK.

Applicable Laws in Switzerland following Brexit

As an EU Member State, the UK is currently bound by the 2007 Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention). However, withdrawal from the EU strips the UK of its membership of the Lugano Convention regime.

Whether the latest withdrawal agreement reached with the EU (Withdrawal Agreement) is duly ratified or a No-Deal Brexit (or so-called 'hard Brexit') occurs will determine the applicable transition period, if any. On the one hand, the ratification of the **Withdrawal Agreement** by the UK (in its current version as of the day of this Briefing) would extend the applicability, vis-à-vis the UK, of international agreements concluded by or on behalf of the EU at least until 31 December 2020. As a result, the EU would notify Switzerland, as a Member State of the Lugano Convention, that during the above transition period, the UK is to be treated as a Member State. On the other hand, a **No-Deal Brexit** would in principle spell an immediate end to the applicability of the Lugano Convention in relation to the UK.

Given the uncertainties surrounding the ratification of the Withdrawal Agreement, both the UK and the EU have issued guidance on the possible legal repercussions in the event of a No-Deal Brexit. In its Notice to Stakeholders dated 18 January 2019, the European Commission stated that the EU rules on international jurisdiction will continue to apply only to proceedings that have been commenced pre-Brexit. Likewise, the EU rules on enforcement will no longer apply to UK judgments – even where the exequatur proceedings have been commenced prior to the withdrawal date – unless the UK judgment in question has already been duly recognized and declared enforceable (i.e. 'exequatured') prior to Brexit. For its part, the UK has opted unilaterally to continue applying the Lugano Convention regime in matters of jurisdiction, recognition and enforcement of EU and Lugano Member States' judgments, but only where the proceedings on the merits have been commenced prior to Brexit.

As part of its 'Mind the Gap' strategy, Switzerland has also taken various steps to soften the blow of Brexit and has concluded a set of provisional bilateral agreements with the UK in areas such as migration, trade, insurance and transport. However, questions of

jurisdiction, recognition and enforcement in post-Brexit cross-border civil and commercial litigation have not yet been subject to specific regulation between the two States. In addition, the transitional provisions of the Lugano Convention are unlikely to be of use to fill the resulting gap.

The extent to which the Swiss courts will extend the applicability of the Lugano Convention beyond Brexit therefore remains unclear. Indeed, in the event of a **Brexit Deal**, the key question is whether Switzerland would continue to treat the UK as a Member State pursuant to the provisions of the Withdrawal Agreement. As for a **No-Deal Brexit**, it is worth noting that in respect of the international jurisdiction of Swiss courts, the applicability of the Lugano Convention will need to be assessed based on the specifics of the case (e.g. in the presence of a jurisdiction clause in favor of Swiss courts, the key factor being the domicile of at least one of the parties in a Member State, see below). Turning to recognition and enforcement, various Swiss legal commentators urge for all UK judgments rendered before Brexit to be exequatured under the rules of the Lugano Convention. However, it remains to be seen how the Swiss courts will rule on this issue.

Should the Lugano Convention cease to apply altogether as a result of Brexit and were no other treaty to apply between the UK and Switzerland on these topics, the Swiss courts will instead rely on Swiss national law, and in particular the Swiss Private International Law Act (PILA), when assessing whether and under what conditions a choice of jurisdiction clause or a UK judgment can be recognized and enforced in Switzerland.

Recognition of Jurisdiction Clauses

In the event of the Lugano Convention no longer applying, the Swiss courts would assess jurisdiction clauses in favor of **UK courts** in accordance with the provisions of the PILA. Such clauses will have to meet the various requirements set forth in the PILA, which imposes slightly more stringent formalities as compared to the Lugano Convention. If these requirements are met, and provided the defendant contests the jurisdiction of the Swiss court before pleading the merits of the case, a Swiss judge will recognize the choice of jurisdiction clause in favor of the UK courts and, in so doing, deny its own jurisdiction.

When confronted with a choice of jurisdiction clause in favor of **Swiss courts**, a Swiss judge must first assess whether the Lugano Convention or the PILA applies. Such clause will continue to be assessed under the Lugano Convention despite Brexit if at least one of the parties is domiciled in a Member State. If, on the other hand, neither party is domiciled in a Member State of the Lugano Convention, the Swiss judge will assess the clause under the PILA.

It is worth noting that Switzerland is not a Contracting Party to the 2005 Hague Convention on Choice of Court Agreements, which was ratified by the UK on 28 December 2018. The Swiss courts are therefore not bound by the mechanisms set forth in this treaty.

Recognition and Enforcement of UK Decisions

In the event where the Lugano Convention is no longer applicable, UK judgments will be exequatured in Switzerland under the PILA. As such, UK judgments will no longer benefit from the various advantages of the Lugano Convention, such as ex parte proceedings before the first instance court, the possibility of enforcing interim measures or the fact that the Swiss exequatur judge need not in principle verify the foreign court's jurisdiction.

Indeed, one of the main particularities of the PILA as compared to the Lugano Convention is that the court seized with exequatur must verify that the issuing foreign court was duly competent to rule on the merits, based on the jurisdictional provisions of the PILA. The foreign court is namely deemed competent if its seat was in the State of the defendant's domicile, if it based its jurisdiction on a valid choice of jurisdiction clause or if the defendant waived its right to contest jurisdiction.

Moreover, contrary to the mechanism of the Lugano Convention, foreign judgments subject to the PILA

are not declared enforceable in *ex-parte* proceedings; instead, the defendant is allowed to make submissions on the exequatur application, which significantly delays the process. Under the Lugano Convention, on the other hand, the defendant is only heard on the exequatur application in the context of appeal proceedings, if any.

As mentioned above, another difficulty under the PILA concerns the enforceability of interim measures ordered by the UK courts. Under the Lugano Convention, such decisions can in principle be exequatured in all Member States if the decision is enforceable in the Member State in which it was rendered. Under the PILA, on the other hand, this issue has to this day been left undecided by the Swiss Federal Supreme Court. Interim decisions are not regarded as final within the meaning of the PILA, which is why an applicant trying to seek enforcement will likely be unsuccessful.

It should be noted that Brexit will not affect the recognition and enforcement of arbitral awards, for which the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) continues to apply, nor other decisions based on bilateral or multilateral treaties in which the UK is (and remains despite Brexit) a stand-alone Contracting Party (see, for example, certain Hague Conventions such as the 1973 Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations).

Outlook

The set of rules by which matters of jurisdiction and enforcement will be governed in the event of the Lugano Convention no longer applying differs from the current regime. Notwithstanding this, the Lugano Convention mechanism cannot, in its entirety, be maintained unilaterally by the UK or Switzerland, insofar as it requires reciprocity. To remedy this, the UK and Switzerland may pursue several alternative possibilities going forward.

One of these options entails the UK (re)joining the Lugano Convention, in which case the UK must meet the Convention accession criteria (meaning voluntary accession through EFTA Membership or the unanimous agreement of all Contracting Parties, including Switzerland and the EU). Another possibility would involve the signing of a bespoke agreement between the UK and Switzerland or the UK and the EFTA States. It currently appears unlikely that either one of these potential routes will be achieved or implemented by the end of 2019.

In the meantime, parties are advised to assess carefully whether the Lugano Convention still applies and to check if a choice of jurisdiction clause in favor of UK or Swiss courts or a UK judgment requiring an exequatur in Switzerland fulfils the requirements of the PILA.

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