

## LUGANO

The European Commission has recommended that the EU rejects the UK's application to accede to the Lugano Convention. But if this recommendation is accepted, will it achieve in fact the opposite of what the Commission intends?

Jurisdiction and the enforcement of judgments within the EU in civil and commercial matters is governed by the Brussels I Regulation. This Regulation sets out jurisdictional rules aimed at ensuring that only one court within the EU has jurisdiction over any particular claim and then provides for the judgment given by that court to be enforceable throughout the EU. The Lugano Convention is substantially the same as the Brussels I Regulation (though with no recourse to the EU's Court of Justice), but applies between the EU and three members of EFTA, Switzerland, Norway and Iceland.

One consequence of Brexit is that the UK is now outside this system. The Brussels I Regulation no longer applies to the UK (though it remains applicable to cases started before the end of the transition period, on 31 December 2020). Similarly, the Lugano Convention has lapsed since it only applied to the UK by virtue of the UK's membership of the EU. This has been the case since the beginning of 2021, so the absence of Brussels/Lugano has been factored into deals entered into since that date.

The Lugano Convention is, however, open for accession by anyone, subject to the consent of all existing signatories. In April 2020, the UK applied to join Lugano in order to restore the pre-Brexit status quo. The signatories other than the EU appear content for the UK to accede, but on 4 May 2021 the European Commission recommended that the EU should reject the UK's application. The Commission's position had been well-trialed and, though it is now for the EU's Council and Parliament to reach a view, few will have entered into transactions relying on the UK's application to join Lugano being successful.

The Commission's reasoning is that the Lugano Convention is a "flanking measure for the EU's economic relations with EFTA/EEA countries", supporting the EU's relationship with third countries that have a "particularly close regulatory integration with the EU". The UK does not have that close relationship, and, in the Commission's view, jurisdiction and the enforcement of judgments between the UK and the EU should therefore be governed by the framework for more distant third countries agreed through the Hague Conference on Private International Law. This framework includes the 2005 convention on choice of court agreements.

### Key issues

- The Commission wants to encourage litigation in the EU rather than the UK
- When rejecting the UK's application to join Lugano, the Commission pointed parties to the Hague choice of court convention
- The exclusivity required by Hague may serve only to reduce litigation in the EU

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The penultimate paragraph of the Commission's recommendation states that "practitioners engaged in cross-border contractual matters involving the European Union, should take this into account when making a choice of international jurisdiction". It seems likely that the Commission's objective is to encourage contracting parties to choose courts in EU member states rather than the English courts. But will that really be the effect of the Commission's recommendation or will it in fact turn out to be the reverse?

If parties to a contract would otherwise choose the jurisdiction of the English courts - whether through a non-exclusive jurisdiction clause, an asymmetric jurisdiction clause of the sort commonly found in financial agreements, or an exclusive clause - the disappearance of the Brussels/Lugano system will only be an issue if it is likely to be necessary to enforce an English judgment on the contract in an EU or EFTA member state (as to the likelihood of that being necessary, see our briefing entitled *Brexit, law and jurisdiction: where will we be after transition?*). If that is the case, the parties can consider whether the means of enforcing an English judgment outside Brussels/Lugano are adequate for their purposes (see our briefing entitled [How English judgments will be enforced in the EU post-Brexit](#)).

However, the Commission itself points to an answer for contracting parties: the Hague Convention on choice of court agreements. The Hague Convention provides that if the parties have agreed that the courts of a participating state are to have exclusive jurisdiction, participating states must give effect to that agreement, and a judgment given by the chosen courts will be enforceable in all those states. The UK and the EU are both parties to the Hague Convention. As a result, if the parties agree that the English courts should have exclusive jurisdiction, any judgment given by the English courts will be enforceable in all EU member states (and vice versa) pursuant to the Convention.

For Hague purposes, "exclusive" means a clause that binds all parties to bring claims in the same court – ie not an asymmetric or non-exclusive clause. If, therefore, the parties are otherwise minded to give jurisdiction to the English courts and enforcement of a resulting judgment in an EU member state is important, a solution will be to give exclusive jurisdiction to the English courts. This may lead to a reduction in the amount of litigation coming to courts in EU member states because parties will no longer have the ability at the time a dispute arises to sue outside England that a non-exclusive or asymmetric clause would have given them – surely not what the Commission had in mind.

The Hague Convention is not a solution for the three EFTA participants of Lugano, which have not acceded to Hague (though the UK and Norway have expressly revived their pre-Lugano treaty on the mutual enforcement of judgments), but Hague does, all other things being equal, provide an answer for contracting parties so far as EU member states are concerned. Asymmetric jurisdiction clauses became common as a result of uncertainties caused by the Brussels Regulation's predecessor, the Brussels Convention; the disappearance of the Brussels Regulation and of its counterpart, the Lugano Convention, may require another change in practice.

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