

AN ‘ENGLISH GOOD-BYE’: THE UNITED KINGDOM AND THE LUGANO CONVENTION

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Linda Silberman has made an enormous contribution to the analysis and design of jurisdiction rules and to the cross-border enforcement of judgments. Her perspective has been a global one and includes the European legal framework for cross-border disputes. In addition, she has always had a particular interest in English law and a personal fondness for London as a city. This Article picks up on these themes and examines the consequences of Brexit for civil justice cooperation in Europe. It critically assesses why the European Union has refused the United Kingdom’s readmission to the Lugano Convention and argues that judicial cooperation through the Hague Conventions of 2005 and 2019 is only the second-best option.

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I. INTRODUCTION

“Je vous suis, me dit-il, mais nous ne pouvons pas partir à l’anglaise. Allons dire au revoir à Mme Verdurin, conclut le professeur [...].”¹

When the United Kingdom departed from the European Union, there was considerable concern, including in cross-border judicial cooperation. However, in the case of the Lugano Convention,² the United Kingdom did not want to be a “stranger.” When all European instruments ceased to apply on

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1. MARCEL PROUST, *À LA RECHERCHE DU TEMPS PERDU* 377 (1913).

2. Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Dec. 21, 2007, 2007 O.J. (L 339) 3–41 [hereinafter Lugano Convention].

December 31, 2020, the country tried to find a way to restore part of this cooperation—first by unilaterally copying the bulk of the Rome I and II Regulations into its domestic private international law regime³ and second by requesting readmission⁴ to the Lugano system of civil justice cooperation which has governed international disputes for many years, in parallel with diverse E.U. Regulations.⁵

The European Commission, however, forced a British goodbye to European judicial cooperation by denying the United Kingdom re-entry to a convention which would have ensured continuity and maintained legal certainty in pan-European cross-border disputes. Many expected the United Kingdom to be able to join the Lugano regime, given the thirty-year history of its application, the existing trade links between the United Kingdom and the European Union, and the benefits that maintaining reciprocal arrangements would have had for all parties concerned. But despite the clear support of the non-E.U. Lugano states Switzerland, Norway and Iceland, the European Commission has refused to agree to a British re-accession as an individual Member State. The United Kingdom was only able to re-join the open-access 2005 Hague Convention on Choice of Court Agreements, which successfully contributes to the

3. The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (E.U. Exit) Regulations 2019, SI 2019/834.

4. On 8 April 2020, the United Kingdom addressed a request to re-join the Convention to the Lugano States. Swiss Fed. Dep't of Foreign Aff., *Notification to the Parties of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, concluded at Lugano, Oct. 30, 2007, available at <https://perma.cc/46WY-JA5D>.

5. Regulation 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) 2012 O.J. (L 351) 1–32 (Brussels I bis) (E.U.); Regulation 593/2008, of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6–16 (EC); Regulation 864/2007, of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), 2007 O.J. (L 199) 40–49 (EC); Regulation 2020/1784, of the European Parliament and of the Council of 25 November 2020 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Service of Documents) (recast), 2020 O.J. (L 405) 40–78 (E.U.); Regulation 2020/1783, of the European Parliament and of the Council of 25 November 2020 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters (Taking of Evidence) (recast), 2020 O.J. (L 405) 1–39.

preservation of London as a forum of choice for international commercial disputes,⁶ but which excludes many types of disputes beyond London's main litigation business.

This Essay outlines the context (II), reasons for (III) and critique of the refused accession (IV), as well as its consequences (V).

II. CONTEXT

The Lugano regime binds the European Union, Denmark in its own right, and three third States: Switzerland, Norway, and Iceland. It is a double convention covering jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The first version dates from 1988,⁷ the revised version from 2007.

The 2007 Lugano Convention reproduces the regime of the Brussels I Regulation, but reflects the content of its 2001 version. A few major differences characterize the original and revised instruments, the most significant being the area of recognition and enforcement of judgments: the 2012 Brussels I *bis* Regulation eliminates exequatur procedures and thus avoids related delays and costs. Moreover, by overturning the *Gasser* judgment of the CJEU,⁸ the recast Brussels I Regulation has established the priority of a court seized on the basis of an exclusive choice of court clause to determine its competence (Art. 31(2) of the Regulation). The revised Regulation also permits the election of an intra-E.U. forum, even when all parties to a dispute are domiciled outside the European Union.⁹ Lastly, it creates the option for E.U.-based consumers and employees to initiate proceedings in their home jurisdiction against professionals

6. As accession to the Convention is not subject to consent of the contracting parties, the re-accession to the 2005 Hague Choice of Court Convention was not an issue for the United Kingdom. REPORT, PRIVATE INTERNATIONAL LAW (IMPLEMENTATION OF AGREEMENTS) BILL 2019-2021, [HL 101], EXPLANATORY NOTES 9, 21, available at <https://perma.cc/HDF9J4N3>.

7. Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 J.O. (L 319/9).

8. Case C-116/02, *Erich Gasser GmbH v. MISAT Srl*, ECLI:EU:C:2003:657 (Dec. 9, 2003).

9. Regulation 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), art. 25, 2012 O.J. (L 351) 11.

or employers domiciled in third countries.¹⁰ Despite not being identical, the Lugano Convention remains a close equivalent to the 2012 Brussels I regime and ensures much more effective cross-border judicial cooperation than domestic private international law rules.

The reason why and the way in which the United Kingdom lost its status as a Lugano Member State is linked to several legal technicalities. The United Kingdom was a Member State of the 1988 Lugano Convention in its own right, but a member of the revised 2007 Lugano Convention only by virtue of its E.U. membership. The famous opinion 1/03 of the CJEU¹¹ confirmed that the ratification of the new Lugano Convention was subject to the exclusive competence of the European Union. By losing its status as an E.U. State on 31 January 2020, the United Kingdom therefore also technically lost its status as a Lugano state. Nonetheless, the Convention continued to apply after that date, during a transitional period that lasted until 31 December 2020. According to Arts. 129 and 2(a) (iv) of the Withdrawal Agreement, “Union law” continued to apply until the end of the transitional period in cases involving the United Kingdom, and “Union law” also included “international agreements to which the Union is a part,”¹² such as Lugano.¹³ The non-E.U. Lugano States were simply informed of the United Kingdom’s transitional status as a Lugano Member State in a *note verbale* from the Commission,¹⁴ without having formally agreed to the

10. *Id.* arts. 18(1) & 21(2).

11. Opinion 1/03 of the CJEU, ECLI:EU:C:2006:81 (Feb. 7, 2006).

12. The Withdrawal Agreement stated in a footnote to art. 129 that “[t]he Union will notify the other parties to these agreements that during the transition period the United Kingdom is to be treated as a Member State for the purposes of these agreements.” Council Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, art. 129, 2019 O.J. (C 384 I) 62.

13. *Support for the UK’s Intent to Accede to the Lugano Convention 2007*, U.K. Ministry of Justice (Jan. 28, 2020), <https://perma.cc/SVU3-9LT5>; *Auswirkungen des “Brexit” auf das Lugano-Übereinkommen*, BUNDESAMT FÜR JUSTIZ, <https://perma.cc/C6G4-FZGF> (last modified Aug. 29, 2023); Eva Lein, *Drittstaaten im Kontext des Europäischen Zivilverfahrensrechts nach dem Brexit*, ZVGLRWISS 120 (2021) 1ff., 7.

14. See E.U. Secretary-General, *Note Verbale of 28 January 2020 on the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, Ref. Ares(2020)518161, annex (Jan. 28, 2020) (Union and

continued application of the Convention during the transition period.¹⁵

Due to these particular characteristics of the Lugano Convention, its application as a transitional regime has caused a few uncertainties in practice. This notably concerns non-E.U. Lugano jurisdictions, such as Switzerland, which are not bound by the Withdrawal Agreement's transitional regime. While the latter contains specific transitional provisions for E.U. judicial cooperation, the Lugano Convention was not specifically mentioned in this chapter, as it does not apply in purely intra-E.U.-U.K. relations. Art. 67 of the Withdrawal Agreement provides, in particular for Brussels I *bis*,¹⁶ that legal proceedings instituted before the end of the transition period shall continue to be governed by the European instruments. According to Art. 67 (2), the Brussels I *bis* Regulation also applies to the recognition and enforcement of judgments given in legal proceedings which were instituted on or before 31 December 2020. Hence, the focus for both adjudication and enforcement is the moment when an action is brought. Considering that the Lugano Convention is an almost identical parallel regime, assimilated into Union law by virtue of the aforementioned Art. 129 of the Withdrawal Agreement, the adoption of the same transitional solution as in Art. 67 seems not only logical but also convincing, even more so on the basis of general principles of international law and civil procedure (acquired rights, principle of non-retroactivity, and principle of legal certainty).¹⁷ From a U.K. perspective, the legislation implementing Brexit (*Sec. 92 Civil Jurisdiction and Judgments (Amendment) (E.U. Exit) Regulations 2019*) provides a parallel solution. Art. 63 of the 2007 Lugano Convention itself¹⁸

Euratom will notify parties that the United Kingdom is to be treated as a Member State for purposes of international agreements during the transition period).

15. *See* Sievi, Auswirkungen des Brexit auf die Vollstreckung von ausländischen Urteilen, ZZZ/PCEF 54/2021, 544 *et seq.*

16. Article 67(1) (a) of Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

17. *Cf.* House of Lords, Brexit: Acquired Rights, 2016-17, HL 82, Chapter 6: The Protection of E.U. Rights as Acquired Rights n.63.

18. Article 63 of Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters:

1. This Convention shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments

contains transitional provisions for States joining the Lugano Convention, which should apply *mutatis mutandis* to the situation in which a State leaves the cooperation regime.¹⁹ The Swiss courts were confronted with the application of Article 63 of the Lugano Convention,²⁰ as Art. 67 of the Withdrawal Agreement does not extend to them. According to the *Bezirksgericht Zürich*, a judgment given during the transitional period, can no longer be enforced under the Lugano Convention if the application for enforcement was filed after the end of the transition period. This application would institute a new, autonomous procedure, contrary to Art. 67 of the Withdrawal Agreement.²¹ On the other hand, the Swiss Federal Supreme Court has expressly declared the provisions of the Lugano Convention applicable where the procedure took place before 1 January 2021, but where it continued in appeal beyond the transition period.²² Although the facts of the aforementioned cases differ, the approach of the Swiss Federal Court seems to favor the continued application of the Lugano Convention for proceedings initiated before the end of the transition period,²³

after its entry into force in the State of origin and, where recognition or enforcement of a judgment or authentic instruments is sought, in the State addressed.

2. However, if the proceedings in the State of origin were instituted before the entry into force of this Convention, judgments given after that date shall be recognised and enforced in accordance with Title III:

(a) if the proceedings in the State of origin were instituted after the entry into force of the Lugano Convention of 16 September 1988 both in the State of origin and in the State addressed;

(b) in all other cases, if jurisdiction was founded upon rules which accorded with those provided for either in Title II or in a convention concluded between the State of origin and the State addressed which was in force when the proceedings were instituted.

19. Rodriguez/Gubler, *Vollstreckung von Urteilen aus dem Vereinigten Königreich nach dem Brexit*, 55 SCHWEIZERISCHE ZEITSCHRIFT FÜR ZIVILPROZESS- UND ZWANGSVOLLSTRECKUNGSRECHT [ZZZ] 690 *et seq.* (2021) [hereinafter Rodriguez & Gubler].

20. Bezirksgericht Zurich, [Zurich District Court] Feb. 24, 2021, at 2.2; Rodriguez & Gubler, *supra* note 19.

21. Arrêts du Tribunal Fédéral Suisse [ATF] Feb. 24, 2021; Rodriguez & Gubler, *supra* note 19.

22. ATF 5A_697/2020, 22 March 2021, at 6.1. *See also* art. 1 fin. Tit. CC and Art. 196 LDIP (ATF 145 III 109 at 5.6) which inspired Art. 63 CL.

23. Rodriguez & Gubler, *supra* note 19; Nicolas Jeandin, *Convention de Lugano, Brexit et ordre public*, 57 ZZZ 89 (2022) [hereinafter Jeandin].

as it states that the United Kingdom should be considered to be an “E.U. Member State.”²⁴ Subsequent decisions of the Federal Court also confirm that Swiss courts retain jurisdiction under the Lugano Convention in proceedings that are still pending after the transition period.²⁵ For the sake of legal certainty, the recognition and enforcement of decisions rendered before the end of the transition period should continue to be subject to the Lugano Convention in all Lugano States.²⁶

Proceedings initiated after 31 December 2020 are subject to either international or bilateral treaties or to domestic rules. Due to the United Kingdom’s re-adhesion to the 2005 Hague Choice of Court Convention, disputes for which the parties have selected an exclusive forum are currently the only ones covered by a multilateral judicial cooperation regime. Bilateral conventions in the field of recognition and enforcement are no longer adapted to the requirements of present-day cross-border proceedings, and apart from a revised convention between the United Kingdom and Norway, their applicability is questionable.²⁷ Many post-Brexit cases are instead subject to internal rules on cross-border civil proceedings.

In this context, reference should also be made to a doctrinal debate according to which the old Lugano Convention of 1988—to which the United Kingdom was a party in its own

24. ATF Mar. 22, 2021, 5A_697/2021, at 6.1.1.

25. ATF Oct. 26, 2021, 4A_133/2021 & 4A_135/2021 at, 4.1.2.

26. See Jeandin, *supra* note 23.

27. Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, U.K.-Austria, Jul. 14, 1961, F.C.D.O.T.S. 70; Convention for the Reciprocal Enforcement of Judgments, U.K.-Belgium, 2 May 1934; Convention between Great Britain and Northern Ireland and France Providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters, U.K.-Fr., Jan. 18, 1934, 181 L.N.T.S. 465; Convention for the Reciprocal Recognition and Enforcement of judgments in Civil and Commercial Matters, U.K.-Ger., July 14, 1960, 414 U.N.T.S. 143; Convention for the reciprocal recognition and enforcement of judgments in civil and commercial matters, U.K.-Italy, Feb. 7, 1964, 175 U.N.T.S. 941; Convention Between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, U.K.-Neth., Nov. 17, 1967, Tractatenblad 1967, 197; Agreement on the Continued Application and Amendment of the Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters signed at London on 12 June 1961, Oct. 13 2020, *available at* <https://perma.cc/AKG4-EQU3>.

right—could be resurrected. The question was whether the old Convention would automatically “revive” with Brexit, provided it had not been repealed.²⁸ Reference was made to Art. 54 lit. a and b of the Vienna Convention on the Law of Treaties,²⁹ according to which it is only possible to withdraw from a treaty in accordance with its provisions or by consent of all parties.³⁰ Given that the 1988 Lugano Convention had never been denounced according to its Art. 64 (3), and that Art. 59 (2) of the Vienna Convention allows a treaty to be only “suspended,” the argument has been put forward that the 1988 Lugano Convention has never been abrogated. In light of its Art. 59(1) (a) this reasoning, however, is not convincing: a treaty is indeed deemed terminated when all parties subsequently conclude a treaty on the same subject matter, and it is apparent from the treaty or otherwise established that it was the parties’ intention that the subject matter be governed by the latter instrument. Also, according to its Art. 69(6), the 2007 Lugano Convention “replaced” its predecessor of 1988.³¹ The use of the term

28. Rodriguez & Gubler, *supra* note 19.

29. Vienna Convention on the Law of Treaties, art. 54, 23 May 1969, 1155 U.N.T.S 331.

30. The Vienna Convention does not apply directly to the E.U. See Case 162/96, *A. Racke GmbH & Co. v Hauptzollamt Main*, 1997 CJEU ECLI:EU:C:1997:582, at 24 (June 16, 1997) (“By way of a preliminary observation, it should be noted that even though the Vienna Convention does not bind either the Community or all its Member States, a series of its provisions, including Article 62, reflect the rules of international law which lay down, subject to certain conditions, the principle that a change of circumstances may entail the lapse or suspension of a treaty. Thus the International Court of Justice held that “[t]his principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances.”).

31. Note that the Brussels I and I *bis* Regulations considered the Brussels Convention of 1968 as “suspended” “in the relationship between Member States”, while the Lugano Convention of 2007 uses the term “replaced.” Compare with Rodriguez & Gubler, *supra* note 19 (“It is highly doubtful that the contracting parties to the new Lugano Convention sought to completely repeal the old Convention”). The authors also question the competence of the European Union to abrogate treaties concluded by the Member States, as they consider that the exclusive competence of the European Union—as confirmed in the Court’s Opinion 1/03, 2006 CJEU ECLI:EU:C:2006:81 (Feb. 7, 2006)—is limited to treaty-making. This interpretation is not convincing. See also Andrew Dickinson, *Back to the Future: The UK’s EU Exit and the Conflict of Laws*, 12 J.P.I.L. 195, 206 (2016).

“replaced” and the fact that both conventions cover exactly the same subject matter suggests that the intention of the parties was not to suspend the old text.³²

III. REASONS FOR THE REFUSAL

Accession to the Lugano Convention is possible in two ways: firstly, through a simplified accession procedure provided for EFTA members and certain non-European Member State territories (Art. 70 (1) lit. a and b CL 2007); and secondly for “any other State” by a unanimous decision³³ of the Lugano States in favor of accession (Arts. 70 (1) lit. c, 72 CL 2007). The United Kingdom pursued this second route on 8 April 2020³⁴ when it submitted its application for accession to Switzerland as depositary of the Convention.³⁵

Article 72 CL 2007 requires non-EFTA or EEA countries to provide substantial information supporting their application for membership and justifying their request for entry. The information required covers the judicial system, including the system of appointment of judges and their independence; the provisions of domestic law relating to civil procedure and enforcement of judgments; and the provisions of private international law relating to civil procedure. It should also be noted that for decades, these provisions have been the same in the

32. See also Nino Sievi, *Auswirkungen des Brexit auf die Vollstreckung von ausländischen Urteilen [Impact of Brexit on the enforcement of foreign judgments]*, AJP 9 (2018), 1096; Johannes Ungerer, *Brexit von Brüssel und den anderen IZVR/IPR Verordnungen zum internationalen Zivilverfahrens- und Privatrecht [Brexit from Brussels and the other IZVR/IPR regulations on international civil procedure and private law]*, in *Brexit und die juristischen Folgen*, 302 (Kramme, Baldus, et. al. eds., 2016).

33. Lugano Convention, *supra* note 2, art. 72(3).

34. Note the date of the application—it was made after Brexit, but during the transition period.

35. See Art. 70(2) (specifying accession process for non-E.U. member states) and also Schweizerische Eidgenossenschaft, Notification to the Parties of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, concluded at Lugano on 30 October 2007 (Apr. 14, 2020), available at <https://perma.cc/2B52-ADM7> (notification of the United Kingdom’s application to accede to the Lugano Convention).

United Kingdom as in other E.U. countries,³⁶ Denmark being the only exception.³⁷

On 14 April 2020, Switzerland invited the Contracting Parties to express their views on the United Kingdom's application. The admission procedure provided that the Lugano States be required to give their consent within one year (Art. 70 (2)). Switzerland, Norway, and Iceland declared their consent to accession in time.³⁸ In contrast, in its assessment of the application for membership, published on 4 May 2021, the European Commission informed the European Parliament and the Council that it does not support the United Kingdom's Lugano membership³⁹ and finally refused its consent on 22 June 2021, in its *note verbale* to the Swiss Federal Council.⁴⁰

36. See *infra* Part IV (noting the similarity between the United Kingdom and the European Union's private international law regime and rules on international civil and commercial proceedings).

37. Denmark has only been able to access the Brussels I *bis* regime and the Service Regulation through specific agreements. Agreement between the European Community and the Kingdom of Denmark on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, arts. 1-2, Nov. 16, 2005, O.J. (L 299/62); Agreement between the European Community and the Kingdom of Denmark on the Service of Judicial and Extrajudicial Documents in Civil or Commercial Matters, arts. 1-2, Nov. 17, 2005, O.J. (L 300).

38. See Swiss Fed. Dep't of Foreign Affs., *Communication by the Depositary with respect to the application of accession by the United Kingdom of Great Britain and Northern Ireland*, 612-04-04-01 – LUG 1/21 (Feb. 25, 2021) (announcing Switzerland's declaration of consent to the United Kingdom's accession within a year of invitation); Swiss Fed. Dep't of Foreign Affs., *Communication by the Depositary with respect to the application of accession by the United Kingdom of Great Britain and Northern Ireland*, 612-04-04-01 – LUG 2/21 (Mar. 18, 2021) (announcing Iceland's declaration of consent to the United Kingdom's accession within a year of invitation); Swiss Fed. Dep't of Foreign Affs., *Communication by the Depositary with respect to the application of accession by the United Kingdom of Great Britain and Northern Ireland*, 612-04-04-01 – LUG 3/21 (Apr. 28, 2021) (announcing Norway's declaration of consent to the United Kingdom's accession within a year of invitation).

39. *Communication from the Commission to the European Parliament and the Council - Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention*, at § 3, COM (2021) 222 final (Apr. 5, 2021); Swiss Fed. Dep't of Foreign Affs., *Communication by the Depositary with respect to the application of accession by the United Kingdom of Great Britain and Northern Ireland*, 612-04-04-01 – LUG 4/21 (July 1, 2021) (announcing the European Commission's inability to consent to the United Kingdom's accession).

40. Note Verbale Communication from the European Commission Representing the European Union to the Swiss Federal Council as the Depositary of

The Commission's Communication of 4 May 2021 sets out the reasons for this refusal in a rather formal and "technical" manner.⁴¹ In contrast, the doctrine has also been reluctant to support a U.K. re-accession to the Lugano Convention, but based on more substantial arguments.⁴² None of the opinions against re-accession are convincing, but they deserve a more thorough discussion.

A. *The Technical and Political Arguments*

According to the European Commission, the Lugano Convention grants access to the European area of justice and judicial cooperation, facilitating the circulation of decisions between Member States and EFTA/EEA States. Judicial cooperation via Lugano would be justified insofar as the convention is accompanying economic cooperation with the EFTA/EEA countries and further facilitates an existing access to the internal market. However, access to judicial cooperation comes at a price: the Lugano countries are required to accept close regulatory integration with the European Union, and to align their legislation with (parts of) the *acquis*.

Furthermore, the Lugano Convention would require a high level of trust between its Member States which corresponds to their degree of economic interconnection based on the four freedoms. As the United Kingdom now only cooperates on the basis of an "ordinary" free trade agreement with the European Union and is no longer subject to the benefits and requirements of the internal market, it does not qualify as a Lugano State according to the Commission.

the 2007 Lugano Convention, REF ARES (2021) 4053632 - 22.06.2021 (June 22, 2021).

41. *Communication from the Commission to the European Parliament and the Council - Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention*, COM (2021) 222 final (Apr. 5, 2021); *See Communication from the Commission to the European Parliament and the Council - Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention*, at §§ 2.1-2.2, COM (2021) 222 final (Apr. 5, 2021) (explaining technical incompatibility of Lugano Convention and the United Kingdom's relationship with the European Union).

42. *See infra* Part III.B (outlining the substantive risks that the legal doctrine raises linked to U.K. re-accession).

Although Arts. 70 (1) lit. c and 72⁴³ of the Lugano Convention expressly permit the accession of “any other State,” the Commission maintains that the Lugano regime would not cover any third country and bases this statement on a historical argument: Poland has so far been the only country able to accede to the Convention outside the EFTA/EEA framework, and only in view of its accession process to the European Union. The term “any other State” has thus been reinterpreted very narrowly.

The Commission considers global conventions such as the Hague Conventions (2005 and 2019) as the appropriate framework for cooperation with states less interconnected with the European Union⁴⁴ while the Lugano Convention was named neither in the Political Declaration nor in the Trade and Cooperation Agreement of 24 December 2020.⁴⁵ The Hague Conventions would therefore be the new framework for judicial cooperation with the United Kingdom, which is already a party to the 2005 Hague Choice of Court Convention. At the same time, the Commission announced the European Union’s upcoming accession to the 2019 Hague Convention which was

43. See Lugano Convention, *supra* note 2, art. 70(1)(c) (“After entering into force this Convention shall be open for accession by: [...] (c) any other State, under the conditions laid down in Article 72.”). See also *id.* Art 72(1) (“Any State referred to in Article 70(1)(c) wishing to become a Contracting Party to this Convention: (a) shall communicate the information required for the application of this Convention; (b) may submit declarations in accordance with Articles I and III of Protocol 1; and (c) shall provide the Depository with information on, in particular: (1) their judicial system, including information on the appointment and independence of judges; (2) their internal law concerning civil procedure and enforcement of judgments; and (3) their private international law relating to civil procedure”).

44. Hague Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294; Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, July 2, 2019, <https://perma.cc/TA3Y-QE2K>. Communication from the Commission to the European Parliament and the Council, Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention, Brussels, 4 May 2021 COM(2021) 222 final, at 2.2.

45. Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, OJ C 384I, 12.11.2019; Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, Apr. 30, 2021, O.J. (L 149/10).

achieved in the meantime, in August 2022.⁴⁶ On 23 November 2023, the U.K. government has finally also announced its intention to sign the 2019 Hague Convention.⁴⁷

B. *The Substantive Arguments*

Contrary to the Commission, which has put forward no substantive arguments and has deprived Art. 70 (1) lit. c of its *raison d'être*, legal doctrine has raised concern about substantive risks linked to the U.K.'s re-accession. When the United Kingdom was a Member State, it was bound by the decisions of the CJEU which ensures the uniform interpretation of the Brussels I and Lugano regimes. According to Art. 1 of Protocol 2 to the Convention,⁴⁸ however, Lugano States that are not E.U.-members are only obliged to “pay due account” to the case law of the CJEU. The meaning of this term and the role of the CJEU has been debated on both the English and continental sides, particularly during discussions around a possible E.U.-U.K. agreement along the lines of the agreement between the European Union and Denmark.⁴⁹

46. See Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, arts. 26 and 27(1), <https://perma.cc/67MP-DASN> (reflecting reflect opinion 1/03 of the CJEU). See also Sandrine Clavel & Fabienne Jault-Seseke, *La convention de la Haye du 2 juillet 2019 sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale: Que peut-on en attendre?*, 2018-2020 TRAVAUX DU COMITÉ FRANÇAIS DE DROIT INTERNATIONAL PRIVÉ (2019).

47. Government Response to the Hague Convention of July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Ministry of Justice, 23 Nov. 2023, <https://perma.cc/KPY4-4RMV>.

48. Council Decision of 15 October 2007 on the signing, on behalf of the Community of the Convention on Jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, (EC) 712/2007, Protocol 2, Dec. 12, 2007, O.J. (L 339) 1, 27.

49. Agreement between the European Community and the Kingdom of Denmark on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Nov. 11, 2005, O.J. (L 299/62). Such an agreement failed due to a lack of political will on the part of both the European Union and the United Kingdom. Cf. Eva Lein, *Drittstaaten im Kontext des Europäischen Zivilverfahrensrecht nach dem Brexit*, 120 ZVGLRWISS 1, 10 (2021). The impact of the CJEU was a “red line” for the United Kingdom, which considered it as one of the benefits of Brexit that it would no longer be “forced” to follow its case law. The wording of Art. 1 of Protocol 2 seemed sufficiently flexible, preserving the option to depart from the CJEU case law in limited and justified “Gasser” type cases.

This flexibility of Art. 1 has given rise to serious concerns in the doctrine regarding a potential re-accession of the United Kingdom. Reference has been made to certain precedents, such as divergences in the interpretative practice of the Swiss Federal Court.⁵⁰ Because of major differences between the traditions of the common law and continental systems, there would be a greater risk that U.K. judges would begin to diverge considerably in their interpretation of the Convention as the flexibility of Art. 1(1) of Protocol 2 weakens the impact of the CJEU.⁵¹ Protocol 2 would therefore not ensure sufficient compliance with the case law of the CJEU and would be an insufficient tool to ensure a uniform interpretation of the Convention. In particular, the fear was expressed that English legal concepts such as anti-suit-injunctions and *forum non conveniens* might resurface in the context of European judicial cooperation.⁵² Moreover, in practice, there would be no obligation to explicitly point out any deviation from the CJEU case law, nor would the Lugano Convention provide for sanctions in such a case.⁵³

While these concerns are not insignificant, they cannot justify the exclusion of the United Kingdom from the Lugano regime.⁵⁴

IV. CRITIQUE OF THE REFUSAL

None of the arguments put forward are convincing. Article 70(1)(c) of the Lugano Convention expressly provides for

50. See, e.g., ATF 142 III 170 (interpretation of Art. 15 CL).

51. Burkhard Hess, *The Unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the United Kingdom and the European Union after Brexit*, (Jan. 2018) (on file with Max Planck Institute Luxembourg for Procedural Law Research Paper Series 2018) at 8.

52. Giesela Rühl, *Judicial Cooperation in Civil and Commercial Matters After Brexit: Which Way Forward?*, 67 INT'L & COMP. L.Q. 99, 122 (2018); Kate Davies & Valeriya Kirsey, *Anti-Suit Injunctions in Support of London Seated Arbitration Post-Brexit: Are All Things New Just Well-Forgotten Past?*, 33 J INT'L ARB. 501, 509 *et seq.* (2016).

53. Hess, *supra* note 51, at 5. His conclusion was not the absence of European judicial cooperation, but a specific agreement between the European Union and the United Kingdom. This proposal did not meet with a positive response.

54. Cf. *infra* Part IV (critiquing the proffered rationale for excluding the United Kingdom from the Lugano Regime).

access by any third country, subject to an unanimous decision.⁵⁵ If close economic integration of the EFTA/EEA-type were a precondition for accession, there would be no reason for the existence of such access route.

Indeed, it is wrong to turn adhesion to the internal market into the only reason as well as the main basis for judicial cooperation. It seems much more important that States wishing to join the Lugano Convention follow the same values and principles of justice.⁵⁶ Judicial cooperation is more than just a consequence of economic integration. Its importance goes far beyond that, as can be seen in family law and succession law. The roots of judicial cooperation lie in the idea of mutual trust. However, this trust must have its origin in similar values and principles of national legal and judicial systems, and cooperation should not be excluded because a state wishing to accede is not a member of the European Union, EFTA or the EEA.⁵⁷

The wording of Art. 72(1)(c) is precisely in line with this argument. The provision expressly lists the conditions for a third State to accede to Lugano.⁵⁸ That state is obliged to demonstrate the compatibility of its legal values and principles by providing information on its judicial system, its domestic law on civil procedure, its system of enforcement of judgments and its private international law. The Commission Communication of May 2021 contained no mention of this at all. The requirements of Art. 72 have been ignored as if they did not exist.⁵⁹

In the case of the U.K., the situation is even more peculiar, since its private international law regime and its rules on international civil and commercial proceedings were for decades the same as those of the European Union. The Brussels

55. Lugano Convention, *supra* note 2, art.70(1)(c).

56. See also Mathias Lehmann & Eva Lein, *L'espace de justice à la carte? La coopération judiciaire en Europe à géométrie variable et à plusieurs vitesses*, in MÉLANGES EN L'HONNEUR DU PROFESSEUR BERTRAND ANCEL 1093 (Iprolex, 2018).

57. This of course raises wider issues including access to European judicial cooperation measures, in particular the Lugano Convention, for third countries which are either geographically within the orbit of the European Union (e.g., the Balkan States), or whose judicial systems follow comparable principles despite their geographical distance (e.g., Australia, Canada or Japan).

58. Lugano Convention, *supra* note 2, art.72(c)(1).

59. *Communication from the Commission to the European Parliament and the Council - Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention*, COM (2021) 222 final (Apr. 5, 2021).

Regulation and the Lugano Convention were applied by the English courts and are still applied in cases initiated during the transition period. English judges are well versed in the interpretation of the Convention and are perfectly aware of the difference between a “Lugano” case and a dispute subject to domestic rules.⁶⁰

When the Commission qualifies the United Kingdom as a country having “only an ‘ordinary’ free trade agreement with the EU”—i.e., a third country with no particular link to the internal market and no interconnection—it blatantly ignores the decades during which the E.U. private international law framework and the Lugano Convention applied, and the practical experience consequently gained with the handling of Lugano Convention cases. The United Kingdom is not, and never will be, “just another third country.” This fact should have been taken into account appropriately and legal arguments should have prevailed over considerations of another, mostly political nature.

This leaves for discussion the main and substantial doctrinal argument against a U.K. accession—the risk of a divergent interpretation due to insufficient compliance with the case law of the CJEU. This argument, which is the only one of relevance, has not been addressed by the Commission. It is true that a risk of divergent application of the Convention by the United Kingdom cannot be excluded. It is well known that the impact of the CJEU played a decisive role in the Brexit decision and that U.K. practitioners have been critical of some important rulings of the CJEU,⁶¹ although often rightly so, as the *Gasser* case demonstrated. It seems unlikely, however, that English judges who have substantial experience with European judicial cooperation would systematically deviate from a uniform interpretation of a convention whose basis is the creation of a uniform regime

60. See e.g., English cases: *Noal GP v Kowski* [2022] EWHC 867 (Ch) (applying English law to a dispute that included court proceedings in Luxembourg); *CA Indosuez v Afrikaia* [2022] EWHC 2871 (applying Lugano to determine whether a claimant requires court permission to submit a claim form against a foreign seller); *Klifa v Stater* [2022] EWHC 427 (QB) (rejecting a *forum non conveniens* motion by English and Welsh defendants in a personal injury case that arose out of conduct in France).

61. Case 116/02, *Gasser v Misat*, CJEU ECLI:EU:C:2003:657 (Dec. 9, 2003); Case 281/02, *Owusu v Jackson*, 1.3.2005, CJEU ECLI:EU:C:2005:120 (Mar. 1, 2005); CJUE, Case 185/07, *Allianz SpA v West Tankers*, CJEU ECLI:EU:C:2009:69 (Feb. 10, 2009).

with a view toward legal certainty. This finding is reinforced by a recent English judgment of 2022, in which the judge confirmed: “As Lord Steyn described the Lugano Convention, it is a ‘Convention which aims at legal certainty.’”⁶² Lugano States commit by virtue of public international law to an interpretation of the Convention that is as uniform as possible, as demonstrated by the Lugano preamble.⁶³ The recitals of Protocol 2 also clarify that the Lugano States are aware of the CJEU’s role and have the desire “to prevent, in full deference to the independence of the courts, divergent interpretations and to arrive at as uniform an interpretation as possible of the provisions of the Convention, and of these provisions and those of the Brussels [Regime] which are substantially reproduced in this Convention.” Recent English cases also demonstrate that common law doctrines such as *forum non conveniens* or anti-suit injunctions are only applied to cases that are no longer subject to the European regimes.⁶⁴

On balance, political deliberations and a mere risk of divergent interpretation are insufficient arguments and by no means convincing, given the stakes. The risk should have been weighed against the disadvantages for parties, businesses, SMEs and consumers of not having access to a European judicial cooperation regime. Given that the other alternative, a bespoke agreement on judicial cooperation between the United Kingdom and the

62. See notably the recent decision in *CA Indosuez v Afriquia* [2022] EWHC 2871 (Comm) (“A truly important consideration in the exercise of discretion is the desirability of certainty. As Lord Steyn described the Lugano Convention, it is a ‘Convention which aims at legal certainty’ (Canada Trust v Stolzenberg (No 2) [2002] 1 AC 1, at 12D). A change in the conclusion on jurisdiction or admissibility as and when and if developments occur in the course of the particular litigation may lead to uncertainty. I am ready to accept that in some cases it may not. But it is in principle desirable that the parties, and the Court, should have appropriate certainty. In the context under consideration, predictability and continuity are aspects of certainty.”).

63. According to the preamble of the 2007 Lugano Convention, the contracting parties are “persuaded that the extension of the principles laid down in Regulation (EC) No 44/2001 to the Contracting Parties to this instrument will strengthen legal and economic cooperation.” They also “desir[e] to ensure as uniform an interpretation as possible of this instrument.” See Lugano Convention, *supra* note 2.

64. See *Klifa v Slater* [2022] EWHC 427 (QB) (rejecting *forum non conveniens* motion for personal injury claim arising out of conduct in France); *Assam v Tsouvelekakis* [2022] EWHC 451 (Ch), proceedings initiated in 2021.

European Union, did not find a consensus,⁶⁵ maintaining judicial cooperation through the Lugano Convention would have been more than desirable.

V. CONSEQUENCES

Although a future Lugano membership for the United Kingdom is not entirely precluded, it has become highly unlikely.⁶⁶ The United Kingdom has since moved on and will likely focus on the future role of the 2019 Hague Convention.

It appears that future judicial cooperation with the United Kingdom will indeed be based solely on Hague Conventions. After re-joining the 2005 and 2007 Conventions,⁶⁷ which did not require approval of the other Convention States, the United Kingdom was able to ensure some continuity after Brexit—and the respect of choice of court clauses in favor of the English courts.⁶⁸ However, despite the central role of the 2005 Hague Convention in major commercial transactions, the instrument covers neither consumer nor employment contracts, nor torts (Art. 2(1)). It also excludes the field of antitrust (Art. 2(2)(h)) and some maritime transport contracts. From the point of view of English legal practice, the limitation of the scope to solely exclusive choice of court clauses is also problematic, since the

65. On this point see Lehmann & Lein, *supra* note 57, at 1093 *et seq.*; Hess, *supra* note 52, at 5.

66. Note, however, the view of the English government: “To date all non-EU contracting parties have consented to the UK’s accession but the EU has not: as such, the UK’s application to join Lugano remains pending.” [...] “Should the UK sign and ratify Hague 2019, therefore, it would provide a set of common rules for the recognition and enforcement of judgments between the UK and the EU. It would not however provide a complete substitute for the 2007 Lugano Convention which includes jurisdiction rules and PIL rules on family maintenance. Looking forward, should the UK accede to the Lugano Convention in the future, the Lugano Convention rules would supersede Hague 2019 to provide jurisdiction rules and a recognition and enforcement framework between the UK, the EU and EFTA states, where they cover the same subject matter.” *Consultation on the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Hague 2019)* at V., Gov.U.K. (Dec. 15, 2022), <https://perma.cc/4EKB-ADYA>.

67. Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, M.S. No. 10/2018, Nov. 23, 2007.

68. See, e.g., art. 27(1) of the 2005 Hague Convention and art. 58(1) of the 2007 Hague Convention (with restrictions).

use of non-exclusive or asymmetrical clauses was not uncommon in English contracts (cf. Art. 1(1), but also Art. 22).

As the only remaining instrument of international judicial cooperation, the 2005 Convention is far from sufficient. Despite its Article 23, which refers to the need for uniform interpretation, there is less of a guarantee of a uniform interpretation by the courts of the Member States than the European regimes provide (including the Lugano Convention, ironically because of its Protocol 2).

Beyond the scope of the 2005 Hague Convention, except where a bilateral convention exists (such as the convention between the United Kingdom and Norway),⁶⁹ the enforcement of an English judgment is currently determined by the national law of the E.U. Member State concerned and vice versa. The enforcement of foreign judgments in England outside a cooperation regime is complicated. The judgment creditor may be obliged to bring a new action against the judgment debtor in the English courts with the foreign judgment being the cause of action. This procedure is generally more time consuming than the enforcement of judgments under a common enforcement regime.

This situation will change to some extent with the entry into force of the new Hague Convention of 2019, which aims at a global regime for the recognition and enforcement of foreign judgments in civil and commercial matters. On 29 August 2022, the European Union has ratified the Convention. Ukraine ratified it on the same day and its entry into force is scheduled for 1 September 2023.⁷⁰ After a longer consultation process⁷¹, the

69. Agreement on the Continued Application and Amendment of the Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters signed at London on 12 June 1961, Oct. 13, 2020, available at <https://perma.cc/KG5C-K63T>. It should be noted that bilateral conventions also exist between the United Kingdom and some Member States, but these date back to the 1960s and provide for cumbersome regimes (see *supra* note 28).

70. Art. 28 of the 2019 Hague Convention.

71. *Closed Consultation, Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, July 2, 2019, available at <https://perma.cc/A3MK-64WH>. As part of its decision-making process, the government is gathering a diversity of views, including from practitioners with experience in cross-border litigation, academics and any other stakeholder interested in private international law.

U.K. government has also announced on 23 November 2023 that it will sign the 2019 Hague Convention.⁷²

The imminent entry into force of the 2019 Convention and the future accession of the United Kingdom is good news for judicial cooperation on a global scale, even though judicial cooperation based on Hague Conventions can fill the post-Brexit gap only to a certain extent. The 2019 Convention is not a double convention, and its scope is limited to the enforcement of judgments. It does not cover certain areas such as the violation of personality rights, intellectual property and barriers to competition (Art. 2 (1) k-m, p). The criteria for indirect jurisdiction also follow a more restrictive approach in the field of contract law (Art. 5(1)(g)), consumer law (Art. 5(2)) and tort law (Art. 5(1)(j)).⁷³ Judicial cooperation under the Hague regimes will therefore not be equivalent to European judicial cooperation, and the situation remains unnecessarily complex, especially in the interim.

VI. CONCLUSION

Despite the support of the non-E.U. Lugano States, the path to the Lugano Convention has been blocked by the European Union. Judicial cooperation between the United Kingdom and the European Union in civil and commercial matters is currently exclusively based on the 2005 Hague Convention. It is quite likely that the United Kingdom will accede to the 2019 Hague Convention in the course of 2023, before it enters into force on 1 September 2023. As a result, the conventions aimed at judicial cooperation on a global scale will determine the fate of cross-border disputes involving Europe and the United Kingdom. The cooperation based on the 2005 and 2019 Hague Conventions, while highly desirable, will be less extensive.

The exclusion of the United Kingdom from the Lugano regime is regrettable and overlooks the special position the United Kingdom has held as a long-standing member of

72. Government Response to the Hague Convention of July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Ministry of Justice, 23 Nov. 2023, <https://perma.cc/26MV-YXPE>.

73. The exequatur procedure is maintained and governed by the law of the State of recognition (art. 13), but *idem* in the context of the Lugano Convention.

European regimes simplifying cross-border disputes. The European Union and the United Kingdom should have overcome their political disagreements and pursued the clear common objective of maintaining European judicial cooperation and avoiding unnecessary complexity—in the interest of legal certainty, and for the benefit of the parties to cross-border proceedings. The United Kingdom is not a third country “like all the others.” Despite the fact that they decided in favor of Brexit, it was the wrong decision to tell them “goodbye.”