The new Lugano II Convention and Swiss trust disputes

Julie Wynne and David Wallace Wilson*

Abstract

This article reviews the revised Lugano Convention's provisions on court jurisdiction and enforcement of judgments that apply to international trust disputes, especially from the Swiss perspective.

Foreword

The new Convention on the Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 30th October 2007 (the 'Lugano II Convention' or 'Lugano II')[1] entered into force in Switzerland on 1st of January 2011. It replaced the former Lugano Convention of 16 September 1988, that applied until 31st December 2010, although still continues to be relevant for matters that were pending in court on such date.[2] The Lugano II Convention actually mirrors a proposed 2010 regulation from the European Union, dubbed 'Brussels II',[3] which itself is a recasting of the 2001 regulation.[4]

Together, the Lugano II Convention and Brussels II constitute the matrix of civil judicial cooperation in Europe, by identifying the most appropriate jurisdiction for solving a cross-border dispute and ensuring the smooth enforcement of judgments. To date, the contracting States of the Lugano II Convention include all central European countries, especially the following trust law jurisdictions: Gibraltar, Ireland, Italy, Luxembourg, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland (only). In contrast, the following trust jurisdictions are not bound by the Lugano II Convention: all other 'dependent territories' of the UK in the sense of the European Savings Tax Directive, Aruba, the Bahamas, the British Virgin Islands, the Cayman Islands, Jersey, Guernsey, and the Isle of Man.

In particular, the Lugano II Convention serves to determine whether Swiss courts have jurisdiction over in cross-border trust disputes and whether they will enforce foreign trust judgments.

More specifically, the Lugano II Convention applies to trusts if the defendant is domiciled in a contracting

*Julie Wynne, TEP, and David Wallace Wilson, TEP, MCJ (NYU), specialize in private client matters at Schellenberg Wittmer, Geneva.
Email: julie.wynne@swlegal.ch; david.wilson@swlegal.ch.

1. Convention concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale, RS 0.275.12, Feuille Fédérale 2009 1497.

2. Art 63 Lugano II Convention. Little, if at all, had been written on trusts under the 1988 Lugano Convention: Stephen V Berti, Trusts and the Lugano Convention – Does It Matter? And what about the Hague Trust Convention? in Nedim Peter Vogt (ed.), *Disputes Involving Trusts* (Helbing & Lichtenhahn, 1999) 9–13. Stephen V Berti, Der Trust, das Lugano Übereinkommen und das schweizerische IPR in H. Walder, T. Jaag and D. Zobl (eds), *Aspekte der Wirtschaftsrechts – Festtage zum schweizerischen Juristentag* (Schulthess, 1994) 223; Markus Stieger, Was bringt das Lugano Übereinkommen für Trusts mit Berührung zur Schweiz *Der Schweizer Treuhänder* vol. 4 (1992) 202.

3. Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial Matters of 14th December 2010, COM(2010) 748 final, 2010/0383 (COD), SEC(2010) 1547 final.

4. Council Regulation (EC) No 44/2001 of 22 December 2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I'). This Regulation, in turn, had replaced the 1968 Brussels Convention.

doi:10.1093/tandt/ttr025
Advance Access publication 3 March 2011

State, or if the parties, one of whom at least is domiciled in a contracting State, have prorogued of jurisdiction in favour of a contracting State's court (articles 1–2 Lugano II). Further, the Lugano II Convention only applies to trusts created by statute, by written instrument, or created orally and evidenced in writing, and not to the so-called 'constructive' or 'implied' trusts (Article 5 (6) Lugano II).[5]

Trust issues covered by the Article 5 (6) of the Lugano II Convention

According to Article 5 of the Lugano II Convention, there are some special jurisdiction rules, which, provided certain conditions are met, enable the plaintiff to sue a defendant domiciled in a contracting State, in another contracting State. With regard to trusts, a defendant may thus be sued in his capacity as settlor, trustee, or beneficiary of a trust in the courts of the Contracting State where the trust (as opposed to the trustee) is domiciled (Article 5 (6) Lugano II). However, because Article 5 of the Lugano II Convention constitutes a derogation from the basic principle of domicile stated in Article 2 of the Lugano II Convention, its provisions must be construed restrictively.[6]

Moreover, in order to ascertain whether a specific trust issue falls within the scope of the Article 5 (6) of the Lugano II Convention, one must first analyse the nature of the trust issue at play as well as in which quality the parties involved appear. Indeed, a distinction is made between claims filed against settlors, trustees, or beneficiaries of a trust and 'involving rights or obligations under the trust' and all other trust claims that do not involve rights or obligations under the trust. Determining whether the claim at hand involves rights or obligations under the trust thus requires examining the kind of (internal or external) legal relationship involved in the trust.[7]

Determining whether the claim at hand involves rights or obligations under the trust thus requires examining the kind of (internal or external) legal relationship involved in the trust

Claims involving rights or obligations under the trust

For such claims, a person domiciled in a State bound by the Lugano II Convention may be sued as settlor, trustee, or beneficiary of a trust in the courts of the contracting State in which the trust is domiciled (Article 5 (6) Lugano II). Disputes that may arise in connection with the internal relationships of a trust may be between the trustees themselves, between persons claiming the status of trustees, and, above all, between trustees on the one hand and the beneficiaries of a trust on the other.[8]

Further, disputes may occur among a number of persons as to who has been properly appointed as a trustee; among a number of trustees doubts may arise as to the extent of their respective rights to one another; there may be disputes between the trustees and the beneficiaries as to the rights of the latter to or in connection with the trust property. Disputes may also arise between the settlor and other parties involved in the trust.[9]

However, as mentioned, Article 5 (6) of the Lugano II Convention has to be construed restrictively. Thus, in *Gomez v Gomez-Monche Vives*,[10] it was held that the power to sue a trustee domiciled in a contracting State does not authorize a suit against a

5. Report by Prof. Peter Schlosser of 9 October 1978 on the Convention on the Association of Denmark, Ireland, the United Kingdom to the Brussels Convention, published in OJ 1979 C 59 p. 71, §117 ('Schlosser report'); *Gomez v Gomez-Monche Vives* [2008] EWHC 259 Ch [2008] WTLR 1623 [79].

6. *Gomez v Gomez-Monche Vives* [2008] EWCA Civ 1065, [2008] WLR (D) 305 [72]; Case C-103/05, *Reisch Montage AG v Kiesel Baumaschinen Handels GmbH* [2006] ECR I-6827 [22]–[33].

7. Schlosser report, §109.

8. Schlosser report, §111.

9. Schlosser report, §111.

10. *Gomez v Gomez-Monche Vives* [2008] EWCA Civ 1065 [2008] WLR (D) 305.

person in his capacity as an appointor, although the power to appoint under the trust was of a fiduciary nature. Similarly, Article 5 (6) of the Lugano II Convention would apply neither to protectors nor to any other person enjoying fiduciary powers who does not come within the normal meaning of the expression 'trustee'.[11]

Article 5 (6) of the Lugano II Convention has to be construed restrictively

Claims not involving rights or obligations under the trust

Trust disputes not involving the respective rights or obligations of the settlor, trustee, or beneficiary of a trust, ie involving the external relationships of the trust, fall outside the scope of the Article 5 (6) of the Lugano II Convention. Thus, the Lugano II Convention does not apply when the trustee acts towards third parties as any legal person by disposing of and acquiring rights, entering into commitments binding on the trust, and acquiring rights for its benefit.[12]

In such cases, the general rules governing the specific external relationship (eg contractual, matrimonial successoral, or insolvency matters) are applicable, as they would in any ordinary dealing between persons who are not acting as trustees, settlors, or beneficiaries of a trust.[13]

When the Lugano II Convention does not apply, Swiss courts will turn to the Swiss conflict provisions—notably the Swiss Private International Law Act (SPILA)—to determine whether they have jurisdiction over these other trust-related claims—especially Article 149b SPILA, whereby, the trust's forum selection clause is conclusive for all matters related to the law of trusts; but in the absence of a forum selection clause or where such selection is not exclusive, jurisdiction shall fall upon the Swiss court at the defendant's domicile or at the trust's seat.

Swiss jurisdiction

Domicile or seat in Switzerland

As a rule, the courts of the State where the defendant is domiciled have jurisdiction, irrespective of the defendant's nationality (Article 2 Lugano II).

In order to determine whether a party is 'domiciled' in the State whose courts are seized of a matter, the court must apply its internal law (Article 59 Lugano II). The same applies for trusts (Article 60 (3) Lugano II).

Under Swiss law, a natural person is domiciled in the State in which he resides with the intention of remaining permanently (Article 20 SPILA).[14] And in the case of trusts, its seat is deemed to be the domicile. The seat of a trust is the place of administration designated by the terms of the trust in writing or in another form that can be evidenced in writing. In the absence of such designation, the seat is the place where the trust is administered in fact (Article 21 (3) SPILA). In such a case, criteria such as the administrative centre of the trust, the place of residence of the trustees, the situs of the assets of the trust, the nature of the trust purposes, and the place where these are to be fulfilled can be taken into account (Article 7 of the Hague Convention of 1 July 1985 on the law Applicable to Trusts and on their Recognition).[15]

For example, beneficiaries may issue proceedings in Switzerland against a Gibraltar trustee if the trust instrument does not specify the place of administration and if the trust is effectively administered in Geneva (whenever, for instance, the Gibraltar-licensed trust company exclusively operates through Swiss-based personnel who manage on a daily basis the trust assets deposited on a Swiss bank account).

11. *Gomez v Gomez-Monche Vives* [2008] EWCA Civ 1065 [2008] WLR (D) 305 [99].
12. Schlosser report, §111.
13. As the case may be, the other Lugano Convention II provisions on jurisdiction may then apply to such external relationship.
14. Domicile is defined according to the local law of the court that is to give judgment in a matter and generally has a meaning closer to 'long-term residence' than to 'domicile' in the English (fiscal) understanding of the word.
15. See also Schlosser report, §114.

Prorogation of jurisdiction

Forum selection clause

The special jurisdiction rule on trusts provided by Article 5 of the Lugano II Convention applies unless the trust instrument contains a forum selection clause. In such a case, the court of the contracting State on which the trust instrument has conferred jurisdiction enjoys exclusive jurisdiction in any proceedings brought against a settlor, trustee, or beneficiary, if relations between these persons or their rights or obligations under the trust are involved (Article 23 Lugano II).

The only requirement is that at least one of the parties is domiciled in a contracting State; interestingly, no link between the dispute and another contracting State is needed.

Further, one should remember that the trust's forum selection clause takes precedence over the other jurisdictional provisions of the Lugano II Convention. Such clause may thus exclude the Swiss courts' jurisdiction, especially in cases where forced heirship rules may interfere unfavourably with the terms of the trust.

The trust's forum selection clause takes precedence over the other jurisdictional provisions of the Lugano II Convention

Implied prorogation of jurisdiction

Apart from an express forum selection clause, one should not forget that courts can also become competent by implicit prorogation. Indeed, pursuant to Article 18 of the Lugano II Convention, the court of a contracting State before whom a defendant appears shall have jurisdiction. This means that a court, which may otherwise not enjoy jurisdiction, has to entertain a dispute if the defendant appears before it. However, if the defendant appears only to object to the court's jurisdiction, this court will not be granted jurisdiction over the matter for that sole reason.

Multiple defendants

A person domiciled in a contracting State may also be sued where he is one of a number of defendants, in the courts of the State where any one of them is domiciled (Article 6 Lugano II).

It is worth mentioning that the Court of a contracting State does not have power to stay its proceedings in favour of a non-contracting State on the basis of *forum non conveniens*—which grants the court to seize a wide discretion as regards the question whether a foreign court would constitute a more appropriate forum for the trial of an action.[16]

The Court of a contracting State does not have power to stay its proceedings in favour of a non-contracting State on the basis of forum non conveniens

Following the *Owusu v Jackson and Others* case,[17] where a number of defendants are sued in a contracting State, but only one of them is domiciled there, the court of that contracting State will not stay proceedings even if the natural forum lies in a non-contracting State, or even if the principal defendant is domiciled in a non-contracting State. Such a defendant may, therefore, find himself 'dragged' into proceedings in the contracting State, even where neither he nor the subject matter of the proceedings have any material connection to such contracting State.

The court considered that 'genuine as these difficulties may be' they were not such as to call into question the mandatory nature of the fundamental rule of jurisdiction contained in Article 2 of the Lugano II Convention, whereby persons domiciled in a contracting State shall be sued in the courts of that State.[18]

16. For the definition of *forum non conveniens*, as understood in English law, see *Spiliada Maritime Corp v Cansulex Ltd* [1986] 3 WLR 972, 3 All ER 843, [1987] AC 460.

17. Case C-281/02, *Owusu v Jackson and others* [2005] ECR I-1383.

18. Case C-281/02, *Owusu v Jackson and others* [2005] ECR I-1383 [45].

Provisional measures

Finally, Swiss courts may grant provisional, including protective, measures even if they do not otherwise have jurisdiction over the matter (Article 31 Lugano II). For example, a Swiss court may thus seize the assets of an English trust located in Switzerland even though substantive jurisdiction lies with the English courts.

Note that exclusive jurisdiction does not apply to provisional measures. Therefore, a Swiss-based trustee may be ordered by a Swiss court to freeze trust assets even though the forum selection clause contained in the trust instrument is in favour of English courts.

Enforcement of foreign trust decisions

Insofar as the Lugano II Convention applies, the rule is that an enforceable judgment concerning a trust dispute and rendered in a contracting State will be enforced in Switzerland once it has been declared enforceable there (Article 33 (1) Lugano II). However, if the Lugano II Convention does not apply, Article 149e SPILA governs the enforcement of the foreign trust judgment.

Foreign provisional measures relating to trusts may also be recognized and enforced in Switzerland under the Lugano II Convention. For instance, an English freezing order must be recognized and enforced in Switzerland, once the defendant has been heard or has had the opportunity of being heard before an English court, as decided by the Swiss Federal Supreme Court in the *Uzan v Motorola Credit Corp.* case.[19]

A foreign judgment will not be enforced, however, if:

- its recognition is contrary to Switzerland's public policy;
- it was given in default of appearance, and if the defendant was not duly served;
- it is irreconcilable with a judgment already given in a dispute between the same parties;
- it is irreconcilable with an earlier judgment given in a contracting State or in a non-contracting State involving the same cause of action and between the same parties, provided that this latter judgment fulfils the conditions necessary for its recognition in the State addressed; or
- it conflicts with specific provisions of the Lugano II Convention (Article 34 Lugano II).

Among these exceptions to enforcement, two are worth examining in more detail.

Swiss public policy

First, Swiss courts can still resort to Swiss public policy to limit the enforcement of foreign judgments concerning trusts, despite the rule laid down by the Lugano II Convention. The general reserve in favour of public policy under Swiss conflict rules (Article 17 SPILA) therefore applies to the enforcement of a foreign trust decision.

Swiss courts can still resort to Swiss public policy to limit the enforcement of foreign judgments concerning trusts

More specifically, abuse of law and the good faith principles—both of which derive from article 2 of the Swiss Civil Code—are part of Swiss public policy.[20] Therefore, a foreign trust judgment would be disregarded if the facts and the legal status were in obvious contradiction.

Moreover, it is worth mentioning that Swiss forced heirship rules do not belong to Switzerland's public policy.[21] Thus, a foreign judgment giving effect to a testamentary trust attributing the deceased's entire estate to his second wife and nothing to the children of the first wife would thus be held enforceable in Switzerland. Yet, discrimination between legitimate

19. ATF 129 [2003] III 626.
20. *Overseas Development Bank in liquidation v Estate of Werner K. Rey*, ZR 98 [1999] n 52, p. 226 and ff.
21. *Hirsch c Cohen*, ATF 102 [1976] II 136.

and illegitimate children on inheritance matters could breach Swiss public policy.[22]

Furthermore, a clause which provides that the rights of a trust beneficiary cease if he becomes subject to an insolvency claim is not contrary to Switzerland's public policy either.[23]

Judgment given in default of appearance

Article 34 (2) of the revised Lugano II Convention relaxes the consequences of a formal irregularity that affects the service of the document instituting the proceedings: if the service is only irregular from a formal point of view but does not infringe material the defendant's defence rights, the irregularity should not prevent the claimant from obtaining the enforcement of the foreign decision.[24]

Intending to limit the extent of the new Article 34 (2) of the Lugano II Convention, Switzerland made a reservation to the effect that it will not apply the following part of this provision:

> unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.[25]

Debt-collection aspects

Pre-trial attachment

In Switzerland, a pre-trial attachment can be ordered in particular if the creditor establishes (i) that the debtor has no residence or, in the case of a company, is not registered in Switzerland; (ii) there are no other grounds for attachment; and (iii) the debt has a 'sufficient link with Switzerland' or is based on an enforceable judgment or a written acknowledgement of debt (Article 271 (1) Ch 4 of the Swiss Federal Act on Debt Collection and Bankruptcy, 'SDCBA'). When the debtor is resident in Switzerland, creditors are prohibited from seeking a pre-trial attachment on the basis of this article (*séquestre des étrangers*). However, the other grounds for attachment provided by Article 271 SDCBA (absence of determined domicile, dissimulation of assets, and declaration of insolvency) remain available to seize assets located in Switzerland of Swiss or foreign debtors.

Pursuant to the revised Lugano II Convention, the SDCBA now also allows creditors who hold a definitive award (*titre de mainlevée définitive*) to seek a pre-trial attachment order, regardless of the debtor's place of residence (Article 271 (1) Ch 6 SDCBA). Previously, creditors holding such an award could only seek a pre-trial attachment if the debtor was not resident in Switzerland.

With respect to trusts, if the trust's designated seat is located in Switzerland or if the trust is effectively administered in Switzerland, a debt-collection forum exists for proceedings in Switzerland (Article 284a (2) SDCBA).

Forum arresti jurisdiction

Under Swiss conflict rules, once Swiss courts have issued a pre-trial attachment order, they enjoy jurisdiction to decide the matter on the merits (*forum arresti jurisdiction*), unless the creditor and the debtor have agreed to a different jurisdiction or to arbitration.[26]

However, Switzerland must prohibit *forum arresti jurisdiction* for claims falling within the scope of the Lugano II Convention (Article 3 Lugano II). Thus, Swiss courts will have to decline jurisdiction over a debtor domiciled in a contracting State, where such jurisdiction arises solely out of an attachment made to the debtor's assets located in Switzerland.

Furthermore, the *forum arresti jurisdiction* in Switzerland is not exclusive, so creditors can also

22. ATF 118 [1992] II 108, but mentioned as *obiter dictum*.
23. Luc Thévenoz, Trusts en Suisse (2001) 83.
24. See the Report of the Federal Council published in the *Feuille Fédérale* (2009) pp. 1497–1550 and 1523–1524.
25. Art 3 of the Protocol 1 of the Lugano II Convention.
26. *X. Corp. v C & Cour de Justice du canton de Genève*, ATF 124 [1998] III 219.

decide to file their claim on the merits before a foreign court, provided the judgment to be rendered will be enforceable in Switzerland. If a creditor files his claim in Switzerland despite the jurisdiction agreement concluded with the debtor in favour of a foreign court or of arbitration, Swiss courts will decline their jurisdiction.[27]

Conclusion

With regards to cross-border trust disputes, the Lugano II Convention has only come into force since 1st of January 2011in Switzerland. Taking into account its new rules, it is recommended to always provide for forum selection clause in the trust instrument to avoid any uncertainty regarding the competent jurisdiction in a potential future dispute. Furthermore, this would avoid potential investigation and issues on the effective place of management of the trust. Moreover, with respect to determining jurisdiction for cross-border trust disputes, it is important to remember that the prorogation of jurisdiction will take effect under the Lugano II Convention trust rules only if the trust issue under scrutiny constitutes a claim filed against settlors, trustees, or beneficiaries of a trust involving rights or obligations under the trust. All other claims will be subject to ordinary jurisdiction rules, either under the Lugano II Convention or under Swiss private international law rules.

At the present time, there has been little case law in Switzerland that addresses the Lugano Convention and its application in the trust context. Yet, given the increasing number of Swiss trust companies and the fact that the Lugano II Convention allows for provisional measures in trust litigation and ensures smooth enforcement of foreign trust judgments in Switzerland, we are bound to see greater reliance upon Lugano II Convention's-specific trust-related provisions in future case law.

27. *Al Bank Al Saudi Al Hollandi v Ibrahim Adbullatif Al-Issa*, ATF 127 [2001] III 118.