

European Civil Procedure

Introduction: Switzerland and European Civil Procedure

- Getting started

Seller S (domiciled in Switzerland) and buyer F (domiciled in France) enter into a sales contract on goods. They conclude the contract in London. According to the contract, the goods shall be transported from Singapore to Rotterdam. F asserts that the goods are defective, and refuses to pay.

 - Where can S sue for payment?
 - How can process be served?
 - What special rules are there regarding the conduct of the proceedings?
 - Which law applies to the substance of the case? (→ private international law/conflict of laws)
 - Can the judgment be recognised and enforced abroad?
 - If a party becomes insolvent, where would insolvency proceedings take place?
 - What happens if the parties entered into an arbitration agreement?
- International civil procedure: rules on the enforcement of (private) law in cases with an international element
 - Special procedural rules for cases with international elements (e.g., jurisdiction, recognition and enforcement, special rules on parallel proceedings, special deadlines, security for costs, rules on legal aid for foreign parties, special rules on evidence, rules on applying and determining the content of foreign law)
 - Conflict of laws rules for procedural issues (e.g., rules on the applicable law for standing, competence, evidence)
- Development of European civil procedure
 - Earliest basis for competence Article 220 EEC Treaty (later Article 293 EC Treaty)
 - Convention on jurisdiction and the enforcement of judgments in civil and commercial matters 1968 (Brussels Convention)
 - International treaty between the members of the European Community
 - “double convention” (*convention double*) – containing rules on recognition and enforcement of foreign judgments *and* on direct international jurisdiction
 - Lugano Convention of 1988: “parallel convention” (to the Brussels Convention) concluded between EC member states and Iceland, Norway, and Switzerland
 - Maastricht treaty: judicial cooperation in civil matters as part of the “third pillar” (intergovernmental cooperation – international conventions)
 - Treaty of Amsterdam: “Communitarisation” of European civil procedure

- New Title IV in Part Three of the EC Treaty (visas, asylum, immigration and other policies related to free movement of persons) “in order to establish progressively an area of freedom, security and justice”
- measures in the field of judicial cooperation in civil matters as part of the free movement policy (Article 61(c) EC Treaty)
- new competence (Article 65 EC Treaty)
- consequence: new EU legislative acts in the field of international civil procedure (regulations and directives)
- EU Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) 2001 and revised Lugano Convention 2007
- Treaty of Lisbon: transfer of EU competence to Article 81 of the Treaty on the Functioning of the European Union (TFEU)
- Today’s status and development perspectives of EU civil procedure
 - Regulation on **jurisdiction** and the recognition and enforcement of **judgments in civil and commercial matters**
 - Brussels I Regulation (44/2001): “communitarisation” of the Brussels Convention with relatively modest evolution of the content
 - Recast 2012 (applies since 2015): Brussels I *bis* Regulation (abolition of exequatur; extension of protective fora for weaker parties to third-state defendants; strengthening of jurisdiction agreements by giving the chosen court priority with regard to the decision on jurisdiction; rules on lis pendens and related proceedings in third-state relationships)
 - Potential further recast (currently under discussion – potential areas for reform: collective redress, “mosaic” approach to the tort forum, further inclusion of third-state defendants, relationship with arbitration)
 - Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in **matrimonial matters** and the matters of **parental responsibility**, and on international child abduction (recast) (Brussels II *ter* Regulation)
 - Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to **maintenance** obligations (Maintenance Regulation, Brussels III Regulation)
 - Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of **succession** and on the creation of a European Certificate of Succession (Succession Regulation; Brussels IV Regulation)
 - Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on **insolvency proceedings** (recast) (Insolvency Regulation)
 - Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a **European Account Preservation Order** procedure to facilitate cross-border debt recovery in civil and commercial matters (EAPO Regulation)

- Regulation (EU) 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)
 - Regulation (EU) 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)
 - Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a **European Enforcement Order** for uncontested claims
 - Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a **European order for payment** procedure
 - Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a **European Small Claims Procedure**
 - Draft **Anti-SLAPP Directive** (political agreement reached in November 2023, see https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6159)
 - Towards a European Code of Civil Procedure?
- Further integration of Switzerland into the European judicial area?
 - Content of the Lugano Convention
 - (direct) jurisdiction in cross-border cases
 - *lis pendens* and related proceedings
 - recognition and enforcement of foreign judgments

Interpretation of the Lugano Convention

- theoretical possibilities
 - autonomous interpretation
 - *lex causae* (law applicable to the subject matter of the dispute)
 - *lex fori* (law of the forum)
- primacy of autonomous interpretation (uniform and independent of national law)

See, e.g. ECJ 15 July 2007, Case C-292/05, Lechouritou/Germany, para. 29:

“It is to be remembered that, in order to ensure, as far as possible, that the rights and obligations which derive from the [...] Convention for the Contracting States and the persons to whom it applies are **equal and uniform**, the terms of that provision should not be interpreted as a mere reference to the internal law of one or other of the States concerned. It is thus clear from the Court’s settled case-law that ‘civil and commercial matters’ must be regarded as an independent concept to be interpreted by referring, first, to the **objectives and scheme of the [...] Convention** and, second, to the **general principles which stem from the corpus of the national legal systems.**”

- textual interpretation (can be problematic, see list of authentic languages in Annex VIII)
 - systematic interpretation
 - historical interpretation (use of travaux préparatoires) and its problems
 - **teleological interpretation**
 - comparative law approach
- Relevance of ECJ case law for the interpretation of the Lugano Convention
 - See preamble and Articles 1 and 2 of Protocol 2 on the uniform interpretation of the Convention and on the Standing Committee
 - (at least) *de facto* leading role of the ECJ

Scope of application of the Lugano Convention

- Material scope (basics – more later)
 - civil and commercial matters
 - autonomous concept
 - actions between a public authority and another person governed by private law can fall within the scope of the Convention
 - cases where a public authority acts in the exercise of its powers are excluded
 - necessity to examine the basis and the detailed rules governing the bringing of the action
 - excluded matters (Article 1(II) LC)
- Territorial and personal scope

Case 1

A (domiciled in the US) sues B (domiciled in Zurich) for payment of a sales price in a Zurich court.

a) *What are the relevant rules on international jurisdiction?*

b) *What are the relevant rules on local jurisdiction?*

Case 2

A (domiciled in the US) sues B (domiciled in Canada) for declaration that A is the owner of an immovable property in Zurich.

Do the Zurich courts have international jurisdiction?

Case 3

A (domiciled in the US) sues B (domiciled in Zurich) for declaration that A is the owner of an immovable property in Canada.

Do the Zurich courts have international jurisdiction?

Case 4

A (domiciled in the US) and B (domiciled in Zurich) concluded a choice-of-court agreement contained in a sales contract. According to the agreement, the Zurich courts have jurisdiction over all disputes in connection with the sales contract. Now B sues A for a claim based on the sales contract in a Zurich court.

Which rules apply to the choice-of-court agreement?

Case 5

D (domiciled in Dubai) has a bank account in Munich. Based on section 23 of the German Code of Civil Procedure, a court in Munich issues a judgment in favour of creditor C (domiciled in Cyprus) ordering D to pay back a loan to C. There is not enough money in the German bank account to cover the entire judgment debt. D also has assets in Switzerland, and C wants to enforce the German judgment here. D wants to oppose the enforcement in Switzerland based on the argument that the judgment was given in a forum that is explicitly “blacklisted” under Article 3(2) in conjunction with Annex I of the Lugano Convention.

Variant: D is domiciled in Denmark.

Will D’s objection be successful?

Section 23 of the German Code of Civil Procedure:

“For pecuniary claims against a person who is not domiciled in Germany, the court in the district of which assets belonging to the defendant [...] are located has jurisdiction. Claims are deemed to be located at their debtor’s domicile [...]”