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The Impact of Brexit on Dispute Resolution – a Swiss Perspective

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"The Brexit saga is madder than a box of hallucinating frogs."



Overview

1. **Litigation – Enforcement of Judgments**
 2. **Litigation – Choice of Court Agreements**
 3. **Litigation – Lis Pendens**
 4. **Litigation – What happens after Brexit?**
 5. **Arbitration**
 6. **Direct impact of Brexit**
 7. **Indirect impact of Brexit: International Commercial Courts**
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Litigation – Enforcement of Judgments

- Currently governed by Lugano Convention
- Brexit to take UK out of Lugano Convention – regardless of any deal with EU
- No treaty between Switzerland and UK re enforcement of judgments
- Enforcement will be governed by domestic law:
 - Switzerland: Federal Act on International Private Law
 - England: Common Law or (if deal with EU) incorporation of Lugano Convention into domestic law

Litigation – Enforcement of Judgments

Main issues with falling back to domestic law:

- Enforcement proceedings less straightforward
- No enforcement of interim relief
- Enforcement uncertain if no valid choice of court agreement

Litigation – Choice of Court Agreements

Swiss courts: Lugano Convention will continue to apply if:

- Designated court in a "Lugano Convention State"; and
- At least one of the parties is domiciled in a "Lugano Convention State"

English courts: Protection of choice of court agreements might increase due to possible return of anti-suit injunctions

Litigation – Lis Pendens

- Currently, strict rule in Article 27 of Lugano Convention
- More flexible approach under domestic Swiss and English law
- Higher risk of parallel proceedings
- But: Less "torpedo" actions

Litigation – What happens after Brexit?

- Will the UK re-join the Lugano Convention?
 - Plans announced
 - Role of the CJEU under Lugano Convention might become an issue
 - EU's consent required, unless UK joins EFTA
- Bilateral treaty between Switzerland and UK?
- Will Switzerland join the 2005 Hague Convention?
 - Issue with temporal scope of application: need to renew choice of court agreements?

Arbitration

- New York Convention will continue to govern enforcement of awards
- Return of the anti-suit injunction?
- Increase of arbitration clauses in contracts involving UK parties?
- Impact on London's reputation as a seat for international arbitration?

Direct impact of Brexit

Limited impact on litigation:

- Enforcement of judgments will become slightly more uncertain and burdensome
- Choice of court agreements will generally still be enforced

No negative legal impact on arbitration:

- No impact on enforcement
- Return of anti-suit injunctions
- But: Soft factors when choosing seat of arbitration (perceived political instability)

Indirect impact of Brexit: International Commercial Courts

- International commercial courts already in Singapore, China and Dubai
 - Rise of international commercial courts in Europe in the dawn of Brexit
 - In Switzerland initiatives in Zurich and Geneva
 - Attempt to compete with London Commercial Court
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Indirect impact of Brexit: International Commercial Courts

Example: Netherlands Commercial Court (NCC)

- Proceedings in English
 - Specialised judges
 - Special rules: NCC Rules
 - Low court fees (first instance, max. EUR 15'000 per party)
 - New modern court building
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Indirect impact of Brexit: International Commercial Courts



Indirect impact of Brexit: International Commercial Courts

Will international commercial courts succeed?

- As an alternative to the London Commercial Court:
 - Costs speak for continental courts
 - But: Prevalence of English law
- As an alternative to arbitration:
 - Interesting to SMEs wanting to keep home-field advantage
 - But: Issue of enforceability



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Thank you!

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