The Unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the UK and the EU after Brexit

A working paper authored by Prof. Dr. Dres. h.c. Burkhard Hess, where he contests with strong arguments the suitability of the Lugano Convention (2007) to serve as a bridge between the UK and the EU after Brexit, has just been published at the MPI Luxembourg Working-Paper Series:

> In the current discussion on the post-Brexit judicial cooperation in civil and commercial matters, many consider the ratification of the 2007 Lugano Convention (LC) by the United Kingdom as a suitable avenue for an alignment of the UK with the current regime of European co-operation. Similarly, the UK government has already shown some sympathy for this option. So far, the European Commission has not endorsed any official position.
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> At first sight, the 2007 Lugano Convention appears an ideal tool for maintaining the core of the existing system of judicial cooperation between the EU and the UK: Although the LC has not been amended to reflect the latest changes (and improvements) introduced with the Brussels Ibis Regulation, it nevertheless provides for the essential provisions of the Brussels regime on jurisdiction, pendency and recognition and enforcement. In addition, Protocol No 2 to the LC requires the courts of non EU Member States only to "pay due account" to the case-law of the Court of Justice of the European Union (ECJ) on the Brussels I Regulation. Hence, Protocol No 2 might provide an acceptable way for British courts to respect the case-law of the ECJ – without being bound by it – in the post-Brexit scenario.

However, as I am going to argue in this posting, the 2007 Lugano Convention is not the appropriate instrument to align judicial cooperation between the United Kingdom and the European Union after Brexit. In the first part, I will briefly summarize the functioning of Protocol No 2 of the LC, as demonstrated by the practice of the Swiss Federal Tribunal. The second part will address the cultural divergences between the continental and the common private international and procedural laws by making use of two examples related to the Brussels I Regulation: the scheme of arrangement, on the one hand, and anti-suit injunctions, on the other hand. As I will explain in my conclusions, only a bilateral agreement between the European Union and the United Kingdom can offer a solution which is suitable and acceptable for both sides.

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