

Brexit: The Spectre of Reciprocity Evoked Before German Courts

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While negotiations for an agreement on the future partnership between the EU and the UK are pending, a spectre haunts Europe: reciprocity.

I. The Residual Role of the Requirement of Reciprocity

In some EU Member States, provisions of national-autonomous aliens law enshrine the requirement of reciprocity. Those provisions are largely superseded by exceptions established in international law, including international treaties (so-called “diplomatic reciprocity”). EU (primary and secondary) law establishes broad exceptions concerning EU citizens and legal persons based in the EU.

In the context of EU / UK relations, the Withdrawal Agreement relieves UK nationals and legal persons from the requirement of reciprocity in the EU Member States. However, the scope of the exception established by the Withdrawal Agreement is limited in (personal and temporal) scope. An agreement on the future partnership between the EU and the UK could establish “full reciprocity” (Cf. points 29 and 49 of the Political Declaration accompanying the Withdrawal Agreement). Instead, if new arrangements will not be made, at the end of the transition period, in cases not covered by the Withdrawal Agreement, the method of reciprocity might once more play a residual role in the context of the treatment of UK nationals and legal persons in some EU Member States.

II. German Case-Law on Reciprocity with the UK and Civil Procedure

The spectre of reciprocity, in relations with the UK, was evoked in three recent cases brought before the German courts. The three cases concern provisions of German-autonomous aliens law in the field of civil procedure, which enshrine the requirement of reciprocity.

1. § 110 ZPO (Security for Court Costs)

In particular, two of the mentioned cases concern § 110 ZPO. Pursuant to § 110(1)

ZPO claimants not (habitually) residing in the EU (or in the EEA) must provide security for court costs (if the defendant requests so). § 110(2) ZPO provides exceptions to that duty. The claimant is relieved from the duty to provide security if an international treaty so provides (See § 110(2) no 1 ZPO) or if a treaty ensures the enforcement of the decision on court costs (see § 110(2) no 2 ZPO; see also the other exceptions listed in § 110(2), nos 3-5 ZPO).

In 2018 - before the UK's withdrawal from the EU -, in a case brought before the Düsseldorf Regional Court, a German defendant sought a decision ordering the UK claimant to provide security under § 110 ZPO (Düsseldorf Regional Court, interim judgment of 27 Sept 2018 - 4c O 28/12). The Regional Court dismissed the defendant's application, since (at that time) the UK was still an EU Member State. The German court thus shun an investigation as to "whether other international treaties might relieve the claimant from the obligation of providing security for costs after the [UK's] withdrawal".

Subsequently, in 2019 - after the UK's withdrawal from the EU, during the transition period -, a German defendant sought from the Dortmund Regional Court a decision ordering the claimant seated in London to provide security under § 110 ZPO (Dortmund Regional Court, interim judgment of 15 July 2020 - 10 O 27/20). The Regional Court dismissed the defendant's application, noting that - in the light of the legal fiction created by the Withdrawal Agreement - the UK must be considered as an EU Member State until the end of 2020. The German court - like the Düsseldorf Regional Court - shun an investigation as to whether treaties other than the Withdrawal Agreement relieve UK claimants - not habitually residing in the EU (or in the EEA) - from the duty of providing security under § 110 ZPO.

It appears that, apart from the Withdrawal Agreement, a treaty establishing diplomatic reciprocity for the purposes of § 110(2) no 1 ZPO does not exist yet (cf. ECJ, judgment 20 Mar 1997 - C-323/95).

Addendum: As mentioned above, § 110 ZPO does not apply to claimants habitually residing in the EU or EEA. It is important to underline that this holds true even in the case of UK nationals (habitually) residing in Germany (or in any other EU Member State or in an EEA Member State). It is also important to underline that, if the German-British Convention of 20 Mar 1928 on the conduct of legal proceedings will "revive" in relations between Germany and the UK after the

transition period, Art. 14 of that Convention will establish diplomatic reciprocity for the purposes of § 110 ZPO with respect to UK nationals having their “Wohnsitz” (domicile) in Germany. On the latter point see the ECJ’s judgment referred to above.

2. § 917(2) ZPO (Writ for Pre-Judgment Seizure)

The third case brought before the German courts concerns § 917(2) ZPO. Pursuant to the first sentence of § 917(2) ZPO, a writ for pre-judgment seizure can be issued if the prospective judgment will have to be enforced abroad and if “reciprocity is not granted” (*i.e.* if an international treaty does not grant that the judgment will be eligible for enforcement in the given foreign country).

In 2019 – before the UK’s withdrawal from the EU –, in a case brought before the Frankfurt Higher Regional Court, a German claimant applied for a writ under § 917 ZPO against a UK defendant (Frankfurt Higher Regional Court, judgment of 3 May 2019 – 2 U 1/19). The Higher Regional Court noted that reciprocity under § 917(2) first period ZPO could have been lacking if, after the UK’s withdrawal from the EU, the Brussels Ia Regulation would have not been replaced by new arrangements granting the enforcement of (German) judgments in the UK. This notwithstanding, the German court decided not to issue the writ under § 917(2) first period ZPO, since failure to conclude new agreements replacing the Brussels Ia Regulation was (at that time) unlikely. In fact, the court pointed to the then ongoing negotiations between the EU and UK, namely to Art. 67(II) of the draft Withdrawal Agreement (today’s Art. 67(1)(a) Withdrawal Agreement), providing for the continued application of the Brussels Ia Regulation in the UK.

It appears that, apart from the Withdrawal Agreement, a treaty establishing diplomatic reciprocity with the UK, for the purposes of § 917(2) ZPO, does not exist yet (unless the 1960 Convention between the UK and Germany for reciprocal recognition and enforcement of judgments – or even the 1968 Brussels Convention – will “revive”). An (albeit limited) exception concerns cases covered by exclusive choice-of-court agreements in favour of German courts falling under the 2005 Hague Convention (in fact, on 28 Sept 2020, the UK has deposited its instrument of accession to the 2005 Hague Convention, which should grant continuity in the application of the same Convention in the UK after the transition period).

III. Conclusion

In conclusion, at the end of the transition period, in cases not covered by the Withdrawal Agreement, unless new arrangements are made, the requirement of reciprocity might play a residual role in the context of the treatment of UK nationals and legal persons in some EU Member States, such as Germany.