

Update

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The Revised Lugano Convention Implications for Swiss Financial Institutions

On 1 January 2011, the revised Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the “**Revised Lugano Convention**”, “**RevLC**”) signed by the European Community, Denmark, Iceland, Norway and Switzerland in Lugano on 30 October 2007, has entered into effect in Switzerland. Among several substantial changes, the Revised Lugano Convention notably extends the scope of its provisions in matters of consumer contracts. These new rules are likely to be of particular practical relevance for Swiss financial institutions. This newsletter summarizes the relevant amendments to the Revised Lugano Convention and outlines their most significant implications for Swiss financial institutions.

1. Introduction

The revision of the 1988 Lugano Convention began in 1997, in parallel with the revision of the Brussels Convention of 27 September 1968 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 1968 (the “Brussels Convention”). After a long negotiation process, the text of a Revised Lugano Convention was signed on 30 October 2007 between the European Community, Denmark, Iceland, Norway and Switzerland. The Swiss ratification of the Revised Lugano Convention was accepted by Parliament on 11 December 2010 and the entry into force set for **1 January 2011**.

2. Overview of the Main Amendments

The aim of the parallel revision of the Lugano Convention and the Brussels Convention (now replaced by Council Regulation (EC) No 44/2001 of 22 December 2000, the “Brussels I Regulation”) was to harmonise both texts and to resolve certain implementation issues.

In order to ensure an interpretation and an application of both international texts that would be as uniform as possi-

ble, the provisions of the Brussels I Regulation have been substantially reproduced in the Revised Lugano Convention. When interpreting and applying the Lugano Convention, Swiss courts will have to pay due account to the rulings rendered by the Court of Justice of the European Union and by the national courts of the EU Member States in relation to both the Lugano Convention and Brussels I Regulation.

From a substantive point of view, the **main amendments** resulting from the Revised Lugano Convention relate to:

- > the reinforcement of the place of performance as the forum for contractual disputes;
- > the broadening of the scope of consumer protection provisions;
- > the clarification of the notion of *lis pendens*;
- > the adoption of a common definition for the “domicile” of companies and other legal persons;
- > limited amendments to the rules on jurisdiction over employment contracts, insurance contracts, as well as

in matters of immovable property, and intellectual property rights; and

- > facilitated recognition of judgements and simplified enforcement procedures.

In addition, the **territorial scope of application** of the Lugano Convention is considerably extended. While 19 States were signatory States to the 1988 Lugano Convention, the Revised Lugano Convention is binding upon 30 States: the 27 EU Member States, Iceland, Norway and Switzerland. In addition, the scope of application of the Revised Lugano Convention will be automatically extended to new States that will accede to the EU in the future. The ratification of the Revised Lugano Convention is also open to extra-Community States, subject to the unanimous consent of the States bound by the Convention.

Among the above-mentioned changes, the amendments adopted in relation to consumer contracts are the ones that are likely to have the most substantial impact on the cross-border business of Swiss financial institutions. These are reviewed in more detail below.

3. Consumer Protection under the Revised Lugano Convention

3.1 Special Jurisdiction Rules

Issues relating to the jurisdiction over consumer contracts are governed by Articles 15 to 17 RevLC.

Under these provisions, consumers enjoy an enhanced protection as regards the choice of forum to file a claim. If a contract qualifies under Article 15 RevLC, the consumer is entitled to action the other contracting party either before the courts of the consumer's own domicile or before the courts of the State in which the other party is domiciled. The other party, by contrast, may only bring an action in the courts of the consumer's domicile. These jurisdiction rules are mandatory and apply irrespective of any choice-of-law clause included in the relevant contract or in the applicable general terms and conditions.

This system was already provided for under the 1988 Lugano Convention and does not change under the Revised Lugano Convention. However, the scope of application of these protective rules is now significantly extended, in particular as regards supply of services.

3.2 Scope of the Rules

The 1988 Lugano Convention covered, in addition to standard consumer credit contracts, any other contracts for the supply of goods or services, provided that (i) the counterparty had specifically offered or advertised its products or services to the relevant consumer in its State of domicile and that (ii) the consumer had concluded the contract in its State of domicile.

The Revised Lugano Convention abandons these specific conditions and introduces new criteria, which considerably widen the concept of consumer contract and simplify the determination of the range of contracts covered.

In order to fall under the consumer protection rules of the Revised Lugano Convention, a contract, other than a consumer credit contract, will have to qualify (i) as a "consumer contract" and (ii) as a "cross-border contract" under Article 15 (1) (c) RevLC.

3.2.1 Concept of "Consumer Contract"

Pursuant to the Revised Lugano Convention, any contract binding, on the one side, a consumer and, on the other, a person pursuing commercial or professional activities, may qualify as a "consumer contract".

According to Article 15 (1) RevLC, a **consumer** can be defined as a **natural person** who concludes a contract "*for a purpose which can be regarded as being outside his trade or profession*", *i.e.*, **for a private purpose**. As a result, a sophisticated business man, for instance, may be considered a "consumer", to the extent the relevant contract was executed for a private purpose. By contrast, a company or any other legal entity is excluded from the consumer definition.

Regarding the **other party** to a consumer contract, Article 15 (1) (c) RevLC now expressly requires that it be a person or entity who **pursues commercial or professional activities**.

Under the Revised Lugano Convention, it is not necessary for the contract to relate to personal or family needs in order to qualify as a consumer contract. Further, the financial value of the contract or the fact that the contract is profit driven are irrelevant.

3.2.2 Concept of “Cross-Border Contract”

The second set of criteria relate to the existence of certain cross-border elements. Indeed, according to Article 15 (1) (c) RevLC, the specific rules on consumer protection of the Revised Lugano Convention apply if the consumer’s counterparty (i) carries out commercial or professional activities in the State of the consumer’s domicile or (ii) “*by any means, directs such activities to that State*”.

Under the Revised Lugano Convention, the place where the consumer acts or where the contract is concluded is no longer relevant. Under the revised Treaty, the focus is on the place in which or towards which the counterparty pursues its commercial and professional activities.

Any commercial activities carried out by the contracting party – be it through its own employees or through a branch, agency or representative office – in the State of domicile of the consumer is likely to qualify as a pursuit of commercial or professional activities pursuant to (i) above.

The second alternative connection with the consumer’s State of domicile under (ii) above represents the act of “**directing**” commercial or professional activities towards that State. This new criterion, introduced in order to encompass new technological means of communication that are increasingly used for reaching consumers abroad, is likely to have considerable relevance in practice. Based on the wording of Article 15 (1) (c) RevLC, any advertisement, marketing and prospecting activity targeting the consumer, for instance, through the Internet, emails, newsgroups, ordinary mail, brochures, phone calls, faxes, newspaper publications, etc., is likely to qualify as a commercial or professional activity “directed” towards the State of domicile of the consumer. Actual physical presence of the commercial counterparty is not required.

The broad formulation of Article 15 (1) (c) may become a source of legal uncertainty. An illustration of the issues this raises is the characterization of a website that would be accessible in the State of the consumer’s domicile. Does it constitute a “direction” of commercial and professional activities towards that State? In light of official explanatory reports on the Revised Lugano Convention, it appears that an “active” Internet site that would not only present products and services, but would also allow the consumer to actually contract with its counterpart, directly or after a re-direction, is likely to be construed as founding jurisdiction under the Revised Lugano Convention. However, the cir-

cumstances under which a “passive” website (*i.e.* a website merely presenting products or services) accessible in the State of the consumer’s domicile could also be considered as sufficient for consumer protection rules to apply are unclear. Hence, the issue is likely to be resolved judicially over the coming years on a case-by-case basis. In this context, elements such as express geographical limitations or the language of the website, are likely to be of relevance.

4. Implications for Swiss Financial Institutions

In view of the criteria applicable under the Revised Lugano Convention, a risk exists that certain financial services contracts will, under certain circumstances, be qualified as consumer contracts. This is indeed likely to concern the majority of **private banking** relationships, within which Swiss financial institutions offer deposit, investment or loan facilities to private individuals residing in the EU.

Should a financial services contract, such as a bank account agreement, an asset management or asset advisory agreement, a loan or a guarantee agreement, qualify as a consumer contract, the consequences would be twofold:

- > First, as mentioned, in case of judicial dispute, the client/consumer residing in a State bound by the Revised Lugano Convention would be in the position to action its Swiss counterpart either before the courts of his State of domicile or before the Swiss courts of the financial institution’s domicile. The Swiss financial institution, by contrast, would only be able to initiate a claim before the courts of client’s State of domicile. These jurisdiction rules are mandatory. As a result, a contractual clause providing for another place of jurisdiction than the domicile of the client would be considered as having no legal effect.
- > Second, should an action be brought in the State of the consumer’s domicile, the law applicable to the dispute will be determined according to the *lex fori*, *i.e.*, the law of the court handling the dispute. In this context, courts of EU Member States, Denmark, Iceland, or Norway could be led to apply their own mandatory national provisions to consumer or investor relationships, irrespective of any contractual choice-of-law clause. As a result, it cannot be excluded, for instance, that EU courts would be led to apply standards set out in the EU Markets in Financial Instruments Directive (MiFID) to a contract

concluded between an EU client and a Swiss financial institution, as the case may be.

5. Conclusion

The entry into force of the Revised Lugano Convention will force Swiss financial institutions to take into account the changed criteria applicable to their cross-border customer relationships, as well as the potential risks resulting therefrom.

Swiss financial institutions should in particular exercise caution as regards their presence on the Internet. Indeed, although access to passive websites, which merely present products and services of the relevant institution, is likely not to be sufficient to trigger the application of the Revised Lugano Convention, the matter will remain uncertain until settled judicially.

As a preventive measure, the inclusion or strengthening of geographical disclaimers on the Internet site could be looked into. Such attempts to ring fence commercial activi-

ties against transactions with consumers domiciled in particular states, however, merely limit risks of inadvertence and uncertainty as to jurisdiction to a certain extent.

Another option, which could be explored by Swiss institutions to prevent being sued or having to sue before foreign courts, would be to agree on arbitration clauses instead of standard contractual jurisdiction clauses in favour of Swiss courts. However, the validity of such arbitration clauses in consumer contracts is still a delicate and unsettled issue in certain EU Member States. Hence, should the client nevertheless bring an action in the EU State of his domicile, depending on the EU Member State at hand, a risk exists that the court handling the dispute could dismiss the arbitration clause and apply the Revised Lugano Convention.

In any event, the type of services rendered to cross-border private clients and the manner in which these are marketed and offered will need to be reviewed and, as the case may be, altered.

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