AUGUSTA
ABOGADOS

GUARANTEE REQUIREMENT FOR LEGAL COSTS FROM UK CLAIMANTS
(CAUTIO IUDICATUM SOLVI)

I. APPROACH

States have long been concerned about scenarios in which the foreign plaintiff who loses a Court case may have generated expenses for the other party, the winner of the litigation, by initiating and carrying out the proceedings. And, in this sense, it is possible that the winning party may find it difficult to recover the expenses incurred in defending itself if the foreign plaintiff and losing party does not have roots in the place where the litigation took place, i.e., if it does not have assets in the State where the legal case was handled.

In the search for a balance between the right granted to foreigners to litigate in another State, even if they do not have roots, and the right of the winning litigant who has incurred procedural costs because he has been forced to defend himself, the law invented the so-called *cautio iudicatum solvi*, i.e. a guarantee given by the foreign litigant to cover the costs and expenses incurred by the other party if the latter wins the case. This legal concept was, for example, expressly provided for in the former Spanish Civil Procedure Act of 1881.

Despite the existence of the legal figure of *cautio iudicatum solvi* in many legal systems, when commercial relations between States become abundant and mutual trust grows, it is usual to abolish it. This has been the case between the United Kingdom (UK) and the other EU Member States (MS) while the UK was a member of the EU. Until Brexit, Spain, like all other EU members, could not discriminate against foreign litigants -including UK litigants- in civil and commercial matters because of EU law. This is currently specified in section 56 of Regulation 1215/2012 of 12 December 2012 (Brussels I bis Regulation)[1].

However, Brexit could be changing this scenario and we are beginning to detect the resurgence of the old *cautio iudicatum solvi* in certain court decisions concerning claims brought by UK domiciled citizens against EU citizens. Specifically, the purpose of this note is to briefly analyse recent decisions taken by courts in two MS of the EU (Germany and Austria) and to reflect on whether such a downgrading of treatment of UK plaintiffs is also possible in the Spanish legal system.

[1] OJEU L 351/1, 20 December 2012 (https://www.boe.es/doue/2012/351/L00001-00032.pdf). This provision goes back, however, to its distant precedent of 1968 (Brussels Convention of 27 September 1968), which applied to the UK when it acceded to the amended version of that Convention following its accession to the EEC in 1973.

II. RECENT COURT DECISIONS IN GERMANY AND AUSTRIA

Several decisions have recently been handed down by German and Austrian courts in relation to the *cautio iudicatum solvi* and they show us the real possibility that this mechanism will gradually be reintroduced in some European legal systems in the post-Brexit period.

Firstly, the German Federal Supreme Court -on March 1st 2021[2]- and the German Federal Patent Court -on March 15th 2021[3]- issued decisions in which they required litigants habitually resident in the UK to provide security for the costs of the EU defendants. These decisions resolve the dispute as to whether the principle of the obligation to provide security laid down in section 110 of the German Civil Procedural Act and section 81 (6) of the German Patent Code (i.e. the *cautio* analysed) can be requested to UK plaintiffs who have their habitual residence in the UK. Both courts have held that in the absence of international treaties abolishing such a requirement, such a bond is enforceable.

Secondly, the Austrian Supreme Court issued a ruling on 22 March 2022[4] in which, despite the provisions of section 57 of the Austrian Civil Procedural Act -which states that every foreigner is obliged to provide security for costs in civil proceedings brought before Austrian courts (if the defendant requests it)- and despite the fact that international conventions do not prohibit security deposits, it considered that in the specific case no security could be required since the parties had concluded an exclusive choice of court agreement in favor of the Austrian courts. In that regard, the Austrian party had already contractually agreed that it could be sued in Austria by the foreign counterparty, in exchange for being able to sue in Austria without the foreign party being able to object to the jurisdiction of the Austrian courts. However, if such an agreement had not been made in the contract, it cannot be ruled out that the decision of the Austrian Supreme Court might have been different, and the provision of the guarantee might have been held to be enforceable.

III. THE ISSUE IN THE SPANISH LEGAL SYSTEM

If we analyse the Spanish procedural legislation, it seems unlikely that in the Spanish legal system it would currently be possible to apply the security provided for in the procedural legislation examined above on the pretext that the UK no longer belongs to the EU. This is precisely because the Spanish Civil Procedural Act in force in 2000 abolished the wording of the former section 534 of the Spanish Civil Procedural Act of 1881, which made it possible to demand guarantees from foreigners for legal costs and expenses. Therefore, the suppression occurred with respect to any foreign plaintiff, with or without roots in Spain. In fact, this suppression confirmed a line of case law that already severely limited the application of this institution.

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2 Beschluss des X. Zivilsenats vom 1.3.2021 - X ZR 54/19 - (bundesgerichtshof.de)
3 03020b20(EP) 15.03.2021.docx (bundespatentgericht.de)
4 RIS - 4Ob30/22y - Entscheidungstext - Justiz (OGH, OLG, LG, BG, OPMS, AUSL) (bka.gv.at)

However, it should be borne in mind that the UK is not a party to international conventions to which Spain is a party and which could directly affect this issue. In this respect, the UK is not a party to the 1980 Hague Convention (on international access to justice)[5] and its predecessor the 1954 Hague Convention (on civil procedure)[6]. These conventions abolish the *cautio iudicatum solvi* between the States parties, and, since the UK is not a party to them and there is therefore no other limitation[7], the door would in principle be open to Spain to reintroduce this surety or guarantee, in one form or another, on a selective or general basis.

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The litigation department of Augusta Abogados will be keeping an eye on the evolution and possible upward trend of the requirement of this guarantee in the future, both in our country and in the rest of the EU MS, as this is undoubtedly an aspect that will mark the future procedural strategies at international level of plaintiffs who are UK citizens or from any other country that does not have roots in an EU MS and who are considering litigating outside their borders.

Barcelona, October 25th 2022

Litigation area - Augusta Abogados

[5] *Hague Convention of October 25th 1980 on International Access to Justice* (https://www.hcch.net/en/instruments/specialised-sections/access-to-justice)

[6] *Hague Convention March 1st 1954 on civil procedure* (https://www.hcch.net/en/instruments/conventions/full-text/?cid=33).

[7] With regard to conventions on specific matters, it should be noted that the *Hague Convention June 30th 2005 on choice of court agreements* (https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf) is silent on whether or not cautio iudicatum solvi is required, so that a sensu contrario we could understand that it could be applied. On the other hand, the Hague Convention *July 2nd 2019 on the recognition and enforcement of foreign judgments in civil or comercial matters* (https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf) -which has not yet entered into force - does expressly exclude the *cautio* analysed between the states parties, and we will therefore keep an eye on the development of this instrument once it enters into force.