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The Effects of the Brexit on the Lugano Convention – A Matter of Time

A few weeks after the European Union notified a negative answer to the United Kingdom's application to accede to the Lugano Convention, the Swiss Federal Supreme Court published a landmark decision on the law governing applications for the recognition and enforcement of UK decisions in Switzerland that were issued prior to Brexit. The decision addresses a salient issue that is likely to be often debated before the courts in the upcoming times.



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The Swiss Federal Supreme Court sheds some light on the post-Brexit application of the Lugano Convention

In its decision of 22 March 2021 5A_697/2020, which was published online on 28 July 2021, the Swiss Federal Supreme Court confirms that, under certain conditions, the Lugano Convention can still apply to recognition and enforcement proceedings in Switzerland relating to UK decisions, even after Brexit and the end of the transition period on 31 December 2020. However, various questions remain unanswered about the intertemporal application of the Lugano Convention to proceedings involving UK decisions.

The relevant facts of the case

On 26 November 2019, four companies (the "**Creditors**") filed applications for attachment with the competent District Court in the Canton of Vaud, targeting assets located in Switzerland of an Italian national (the "**Debtor**"), up to an amount in Swiss Francs equivalent to £ 8'000'000, based on an order rendered by the High Court of Justice of England and Wales dated 17 October 2019 (the "**Order**"). In their submission before the District Court, the Creditors also applied for the recognition and the declaration of enforceability of the Order.

On 3 December 2019, the District Court granted the Creditors' applications for attachment based on the Order and notified its decision to the debt collection offices. On 19 and 23 December 2019, the Debtor requested the court to lift the attachments. Both the District Court and, on appeal, the Cantonal Court dismissed the Debtor's requests. On 28 August 2020, the Debtor filed an appeal with the Swiss Federal Supreme Court (the "**FSC**") against the Cantonal Court's decision.

In an additional submission filed with the FSC in January 2021, the Debtor claimed that, in view of the United Kingdom's exit

from the European Union on 1 February 2020 ("**Brexit**") and of the lapse of the transition period on 31 December 2020 (the "**Transition Period**"), the pending proceeding was not governed by the Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "**Lugano Convention**") anymore, but by the Swiss Private International Law Act (the "**PILA**") instead.

In their response to the Debtor's additional submission, the Creditors argued that the Lugano Convention still governed the proceeding, since the **Order** had been rendered and declared enforceable **before Brexit**.

On 15 February 2021, upon invitation to voluntarily provide comments on the applicability of the Lugano Convention, the Federal Office of Justice (the "**FOJ**") submitted a legal opinion in which it held that the recognition in Switzerland of judgments rendered in the United Kingdom before 1 January 2021 continued to be governed by the Lugano Convention.

The decision of the Swiss Federal Supreme Court

The FSC upheld the decision of the lower courts and dismissed the Debtor's appeal. In reaching its conclusions, the FSC provided some useful clarifications on the applicability of the Lugano Convention in the post-Brexit world.

First, the FSC noted that the United Kingdom was bound by the Lugano Convention as member state of the European Union, and not as individual signatory state (art. 1(3) Lugano Convention). Still, according to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C 384 I/01 (the "**Withdrawal Agreement**"), the United Kingdom continued to be treated as a state bound by the Lugano Convention during the Transition Period.¹ In accordance with the Exchange of Notes of 28/30 June 2020 between Switzerland and the European Union,² it was agreed that under Swiss law, the term "Member State of the EU" would continue to include the United Kingdom during the Transition Period. In its opinion filed with the FSC, the FOJ held that the Exchange of Notes is based on general principles of international law; hence, the question of whether its scope covers issues of civil procedure or only economic agreements is not relevant. **Since the judgment of the cantonal court under scrutiny in the appeal proceedings was rendered during the Transition Period and concerned the recognition and enforcement of a UK order rendered before Brexit**, the FSC concluded that the cantonal court was right in applying the **Lugano Convention** (para. 6.1.1).

The FSC then analysed the consequences of Brexit on the recognition and enforcement in Switzerland of judgments rendered in the United Kingdom as of 1 January 2021 to determine whether the Lugano Convention continued to apply in the pending appeal proceedings before the FSC even after the lapse of the

Transition Period. The FSC noted that the Lugano Convention does not provide any transitional rule for the situation where a state ceases to be bound by it, and that the question is debated in the legal doctrine. Several authors consider – with various reasonings – that the Lugano Convention continues to govern the recognition and enforcement of judgments rendered when the Lugano Convention still applied. Similarly, the FOJ held that the recognition and declaration of enforceability of decisions rendered before 1 January 2021 continue to be governed by the Lugano Convention even after the Transition Period. The FSC further noted that, in the case at hand, not only was **the Order issued prior to Brexit, but the entire proceedings before the cantonal courts and the filing of the appeal with the FSC took place before the end of the Transition Period**. Also, it did **not see an overriding public interest** requiring an immediate application of the PILA for the first time in the pending proceeding before the FSC, as argued by the Debtor. Therefore, the FSC concluded that **the Lugano Convention continued to govern the pending dispute even after the Transition Period** (para. 6.1.2).

What the decision says and what the decision does not say

The decision 5A_697/2020 sheds some light on the law applicable to the recognition and enforcement of UK judgments in Switzerland after Brexit. This light may, however, be somewhat faint.

If strictly interpreted, the decision of the FSC seems only to cover the recognition and enforcement of UK judgments rendered **before Brexit**, in case of proceedings initiated in Switzerland and completed at a cantonal level **before the end of the Transition Period** (para. 6.1.1). The decision 5A_697/2020 thus confirms the judgment of the Cantonal Supreme Court of Zurich of 15 September 2020 (RV200011), which featured a situation similar to the one before the courts of

Vaud. In order to reach the conclusion that the Lugano Convention applied to the appeal proceeding before the FSC **after the lapse of the Transition Period**, the FSC held it necessary to specify that (i) the Order was rendered before Brexit, (ii) the proceedings before the lower courts and the filing of the appeal took place before the end of the Transition Period, and (iii) there was no overriding public interest in the case at hand justifying the application of the PILA instead of the Lugano Convention (para. 6.1.2). Hence, by strictly limiting its decision to the specificities of the case at hand, the FSC refrained from providing more general and clear guidelines for similar cases that have been arising or are likely to arise following Brexit.

The FSC left the question open as to whether the Lugano Convention continues to govern the recognition and enforcement proceedings relating to decisions rendered in the United Kingdom **before the end of the Transition Period** and that the applicant initiated in Switzerland **after the end of the Transition Period**.³ As a relatively recent judgement of the District Court of Zurich on 24 February 2021 shows, the answer is far from being clear.⁴ In the case before the District Court, the creditor filed, after the Transition Period, an application for the declaration of enforceability of a decision that the London High Court of Justice had issued during the Transition Period. The District Court considered that the declaration of enforceability was no longer governed by the Lugano Convention and rejected the application. In its reasoning, the District Court held, inter alia, that the declaration of enforceability is not a continuation of the decision on the merits (issued before the relevant date) but an independent new proceeding ("*ein eigenständiges neues Verfahren*"). The District Court thus concluded that, in such a situation, there was no legal basis to continue to apply the Lugano Convention. The District Court's judgment is in contrast with the legal assessment

published by the FOJ on its website, according to which Brexit only has an impact on the Lugano Convention as of the end of the Transition Period and, accordingly, the Lugano Convention continues to apply to the recognition and declaration of enforceability of UK judgments rendered before the end of the Transition Period even after the end of the Transition Period.⁵ The FSC seems to align with the position of the FOJ and of various authors to which it refers in its decision. However, the FSC does not expressly confirm this position, nor does it clarify the legal basis or principle governing the issue. Similar uncertainties arise when a UK decision was rendered **before the end of the Transition Period**, and the recognition and enforcement proceedings were initiated, though not completed, in Switzerland **before the end of the Transition Period**. However, it is (even more) doubtful that the arguments of the District Court of Zurich could apply to this latter case, since the Lugano Convention still applied when the proceeding in Switzerland was initiated. In contrast, the abovementioned reasoning of the FOJ and of the authors cited by the FSC should apply *mutatis mutandis* to this hypothesis. Still, the decision of the District Court of Zurich shows that one has to be prudent when filing an application for recognition and enforceability.

The decision 5A_697/2020 also leaves unanswered the highly debated question as to whether the Lugano Convention applies to the recognition and enforceability of UK judgments rendered **after the Transition Period** in cases where the proceedings were initiated in the United Kingdom **before the end of the Transition Period**. Even the authors cited by the FSC provide different answers to this question. Part of the legal doctrine considers the judgment as the relevant point to determine the application of the Lugano Convention. Accordingly, the Lugano Convention only governs the recognition and enforceability of judgments issued before the end of the Transition Period. If a UK court renders

a judgement after that date, the Lugano Convention does not apply anymore, regardless of when the proceedings were initiated.⁶ According to another opinion, the relevant point is, in contrast, the moment when the proceedings in the UK were initiated. Hence, the Lugano Convention should continue to apply to judgments rendered after the Transition Period, if the proceeding was pending before the end of the Transition Period.⁷ In the opinion published on its website, the FOJ does not take a stand on the question and simply notes that art. 67(2) Withdrawal Agreement and the UK legislation favor the second solution, but that Switzerland does not have express provisions on this issue.⁸

The upcoming legal regime for proceedings initiated after the end of the Transition Period

The publication of the decision 5A_697/2020 in July 2021, though dated 22 March 2021, arrives at an interesting time. Only a few weeks earlier, the Swiss Federal Council, in its capacity as depositary of the Lugano Convention, had published a communication in which the European Commission notified the depositary "*that the European Union is not in a position to give its consent to invite the United Kingdom to accede to the Lugano Convention.*" This communication followed the application deposited in April 2020 by the United Kingdom to accede to the Lugano Convention and extend its application to Gibraltar. In the absence of unanimous consent of the contracting parties, the United Kingdom cannot accede to the Lugano Convention. As the European Commission's notification shows that such acceptance is not around the corner, clarifications on the applicable legal regime become even more essential.

Where the Lugano Convention does not apply to the proceeding, it seems almost undisputed that the domestic law applies to the recognition and enforcement of decisions, with the exception of specific

treaties in force in both states. Most of the authorities reject a "resurgence" of the predecessor of the Lugano Convention of 2007.⁹ It follows that the PILA governs the recognition and enforceability of UK decisions in Switzerland, with punctual exceptions where specific conventions (such as the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations) apply.¹⁰

Applying the PILA instead of the Lugano Convention is likely to have a practical impact on some relevant aspects of the enforcement proceedings of foreign decisions in Switzerland. Parties seeking the recognition and enforcement of a UK decision will not benefit from the simplified proceeding under the Lugano Convention.¹¹ Instead, they will have to demonstrate that their application fulfils the requirements under art. 25 et seqq. PILA, in a proceeding where the party opposing the recognition and enforcement is heard at an early stage.¹² Further, not all decisions enforceable under the Lugano Convention are necessarily recognized and enforced in a proceeding governed by the PILA. The situation can in particular be different when it comes to freezing orders and other interim injunctions.¹³ Applicants are thus well-advised to carefully analyse the specificities of their case, when filing an application for recognition and enforcement of a UK decision before Swiss courts. As seen above, even though the decision 5A_697/2020 provides some answers to the legal uncertainties created by Brexit, the parties may be confronted to situations where there is still no clarity about the applicable legal regime. In absence of further clarifications from the Swiss authorities, applicants may have to find creative solutions to have a UK decision recognised in Switzerland and, for instance, base their requests on both the Lugano Convention and the PILA.

Endnotes

- 1 Art. 129(1) Withdrawal Agreement, which provides that, during the transition period, the United Kingdom is bound by the obligations arising from the international agreements concluded by the European Union.
- 2 <https://www.fedlex.admin.ch/eli/cc/2020/74/fr> (visited on 24 August 2021).
- 3 As the majority of the authorities seem to agree that Brexit and the Transition Period are under the same regime, the authors refer to the Transition Period; see, however, Matthias Gstoehl, Pierre-Yves Marro, Impact of Brexit on Asset Recovery in Switzerland, Lalive-Blog, 2021, para. 6.
- 4 Published with redactions in: https://www.arrestpraxis.ch/fileadmin/redaktion/arrestpraxis/media/2021-02-24_Urteil_BGZ_Audienz_redacted.pdf (visited on 24 August 2021).
- 5 <https://www.bj.admin.ch/bj/de/home/wirtschaft/privatrecht/lugue-2007/brexit-auswirkungen.html> (visited on 24 August 2021).
- 6 Christian Arnold, Das Exequaturverfahren im Anwendungsbereich des Lugano-Übereinkommens vom 30. Oktober 2007 aus schweizerischer Sicht, RJL Nr. 72, 2020, p. 1 – 31, p. 29; Nino Sievi, Auswirkungen des Brexit auf die Vollstreckung von ausländischen Urteilen, AJP 2018, p. 1096 – 1104, p. 1099 (it seems that the reference to Brexit as the relevant point in time is due to the fact that, at the time the article was written, the transition period was not fixed).
- 7 Alexander Markus, Ivan Ruprecht, Rechtsprechung zum Lugano Übereinkommen (2020), SRIEL 2021, p. 313 – 341, p. 316; Alexander R. Markus & Melanie Huber-Lehmann, Rechtsprechung zum Lugano-Übereinkommen (2017), 28 Swiss Rev. Int'l & Eur. L. (2018), p. 75 - 110, p. 98; Eva Lein, Drittstaaten im Kontext des Europäischen Zivilverfahrensrechts nach dem Brexit, ZVglRWiss 2021, p. 1 – 22, p. 21.
- 8 <https://www.bj.admin.ch/bj/de/home/wirtschaft/privatrecht/lugue-2007/brexit-auswirkungen.html> (visited on 24 August 2021).
- 9 Nino Sievi, Auswirkungen des Brexit auf die Vollstreckung von ausländischen Urteilen, AJP 2018, p. 1096 – 1104, p. 1097 et seq. with references; the FOJ reaches a similar conclusion; of another opinion Rodrigo Rodriguez, Vollstreckung und Sicherung von Unterhaltstiteln im internationalen Verhältnis, FamPra.ch 2018, p. 699 – 720, p. 705. Such a possibility is not mentioned in the decision 5A_697/2020.
- 10 Currently, more comprehensive conventions, such as the Hague Convention on Choice of Court Agreements of 30 June 2005 or the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters of 2 July 1919, do not find application in Switzerland.
- 11 See also Dieter Hofmann, Oliver Kunz, Enforcement of Foreign Judgments in Switzerland, in: Getting the Deal Through, 2020, p. 7 et seq.; Matthias Gstoehl, Pierre-Yves Marro, Impact of Brexit on Asset Recovery in Switzerland, Lalive-Blog, 2021, paras. 11 et seq.
- 12 Ibid.
- 13 See also Dieter Hofmann, Oliver Kunz, Enforcement of Foreign Judgments in Switzerland, in: Getting the Deal Through, 2020, p. 5 et seq.; Robert Däppen/Ramon Mabillard, BSK-IPRG, Art. 25, para. 15 et seq.

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