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NewsLetter

No 26 April 2001

The Lugano Convention and the Swiss Speciality

With a view to later enforcement in Switzerland of a judgement rendered in an European country at the place of performance, there was a Swiss reservation to the Lugano Convention to be respected. Until recently, there was some uncertainty as to the effect of this reservation. The Swiss Supreme Court has now clarified the position.

Lugano Convention

The Lugano Convention on jurisdiction and enforcement of judgements in civil and commercial matters (herafter referred to as "the Lugano Convention") provides for a system of jurisdiction and reciprocal recognition and enforcement between Switzerland (and other EFTA states) and member states of the European Union (current member states are Belgium, Denmark, Germany, Finland, France, Gibraltar, Greece, Ireland, Iceland, Italy, Luxembourg, The Netherlands, Norway, Austria, Poland, Portugal, Sweden, Switzerland, Spain, the United Kingdom; subsequently referred to as "Lugano member states"). The Lugano Convention is in its content virtually identical with the Brussels Convention and therefore often being referred to as the "parallel convention".



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Issue

With regard to enforcing a judgement rendered in Lugano member states, in Switzerland, there was until recently a specific feature to bear in mind. This was because Switzerland had made an explicit reservation stating that foreign (i.e. non-Swiss) judgements rendered by a court at the place of performance, could not be recognized or enforced in Switzerland, provided the defendant was domiciled in Switzerland at the time the proceedings were commenced and further provided the defendant raised an objection to the recognition or the enforcement of the judgement in Switzerland. Consequently, with a view to later enforcement in Switzerland, it was not advisable to sue at the place of performance based on Article 5 (1) of the Lugano Convention.

Background to the Swiss Reservation

The reason for this reservation as to the recognition or enforcement was Article 59 of the former Swiss Federal Constitution that stated that the defendant had to be sued in the Canton (member state of Switzerland) of his domicile, thereby protecting the defendant against jurisdiction of a Canton other than the Canton of his domicile, which corresponds to the so-called principle of forum at the defendant's domicile. Over the years, this constitutional provision was more and more perforated by a number of Federal statutory provisions whereby courts were given jurisdiction in certain cases regardless of the defendant's domicile. However, when Switzerland became a member to the Lugano Convention, the forum at the place of performance of contractual obligations in accordance with Article 5 (1) of the Lugano Convention was still considered as too farreaching and as problematic with regard to Article 59. Consequently, Switzerland made the reservation.

Limitation of the Reservation

However, the Swiss reservation on recognition and enforcement was limited as its effect was to cease once Article 59 of the former Swiss Federal Constitution was amended, or at the latest on 31 December 1999. Switzerland was also entitled to withdraw the reservation at any time.

With effect as of 1 January 2000, the Swiss Federal Constitution was amended and in place of Article 59 a new Article 30 came into force. This new Article expressly guarantees the forum at the defendant's domicile but makes a general reservation in favour of statutory exceptions from the defendant's domicile principle. Consequently, the reservation of enforcement ceased to have effect on 31 December 1999.

Open Question
It was clear from the outset that the reservation had ceased to have effect regarding all proceedings that were commenced and decided on or after 1 January 2000. However, there was some discussion whether judgments that were rendered before 1 January 2000 and judgements rendered after 1 January 2000 but originating from proceedings that were commenced before the year 2000, were enforceable if they were rendered by a LuganoConvention State Court at the place of performance. According to one opinion uttered by scholars, the reservation had expired, and all judgements were enforceable, regardless of when the judgement was rendered or when the respective proceedings were commenced. Another opinion held that the reservation of the enforcement was an i mpediment to enforcement and that therefore the restriction of execution applied to all proceedings that were commenced before 1 January 2000.

Swiss Supreme Court Decision
A recent decision of the Swiss Supreme Court has now finally decided this question. In this case, a German company had sued a Swiss company at the place of performance in Germany. A German Superior Court rendered judgement against the defendant. When the plaintiff sought to enforce this judgement in Switzerland, the defendant made an objection based on Switzerland's reservation to the Lugano Convention and argued that judgements that were rendered at a foreign place of performance while the reservation was in effect (i.e., until 31 December 1999) could never be enforced in Switzerland. The defendant argued that the reservation was therefore an impediment to enforcement.

The Swiss Supreme Court found that the wording of the reservation in Article Ia to Protocol No.1 to the Lugano Convention was clear in that the reservation became ineffective on 31 December 1999, i.e. that the reservation had ceased to have any effect after this date. Accordingly, a defendant could not make an objection based on this reservation, regardless of when the judgement was rendered and regardless of when the proceedings were instigated.

Conclusion
Consequently, judgements rendered in a Lugano member state at the forum of performance are enforceable in Switzerland regardless of when they were rendered and when the respective proceedings were commenced.

NewsLetter

The ww&p **News**Letter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, adressees of this **News**Letter should seek specific advice on the matters which concern them.

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