

Switzerland: Post-Brexit Enforcement Of UK Judgments In Switzerland: All Is Not Lost

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It is perhaps appropriate that our first article on Switzerland for the Mondaq Asset Recovery Newsfeed is devoted to commenting on a recent Federal Court ruling dealing with the post-Brexit application of the Lugano Convention to the enforcement in Switzerland of a UK judgment made in 2019.

Indeed, for almost thirty years, the Lugano Convention has played a central role in the enforcement of foreign judgments in Switzerland, in particular the enforcement of English judgments.

The legal issues at stake

On 18 December 1987, Switzerland adopted a Federal Act on Private International Law (**PILA**), which came into force on 1 January 1989, codifying the rules of private international law, in particular those on the recognition and enforcement of foreign judgments and decisions.

However, since almost the same time, the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, done at Lugano on 16 September 1988, which entered into force on 1 January 1992, replaced by the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, done at Lugano on 30 October 2007, which entered into force on 1 January 2011 for Switzerland, has governed the recognition and enforcement of most of the judgments of its European neighbours.

Over the last thirty years, a special connection has been established between the United Kingdom and Switzerland through the Lugano Convention, with litigants often favouring the speed and efficiency of the London courts in obtaining decisions that were then enforced in Switzerland. In particular, worldwide freezing orders (or Mareva Injunction until 1998) were recognised in Switzerland provided that they were served to the defendants and pronounced or confirmed in an adversarial hearing.

However, the application of the 2007 Lugano Convention to the United Kingdom was dependent on its membership of the European Union.

Brexit therefore leads to the end of the applicability of the Lugano Convention to the United Kingdom.

On 8 April 2020, the United Kingdom informed the depositary (Switzerland) of the Lugano Convention of its intention to accede to that treaty, which required the agreement of all parties. Switzerland, Norway and Iceland had given their approval. However, on 22 June 2021, the European Union informed the depositary of its refusal to give its consent to such accession. According to the European Commission's communication, the Lugano Convention supports the European Union's relations with third countries that have a particularly close regulatory integration with it, including by aligning with certain parts of the *acquis communautaire*. The appropriate framework for cooperation with third countries in the field of judicial cooperation in civil matters is provided by the 2005 Hague Convention on Choice of Court Agreements and the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (once it enters in force), which should therefore apply to relations with the United Kingdom.

The inability of the United Kingdom to accede to the Lugano Convention will have a significant effect both on the enforcement procedure and on the possibility of recognition of certain decisions in Switzerland, which will be governed by the Federal Act on Private International Law (**PILA**).

Indeed, Switzerland is not a party to the Hague Convention of 30 June 2005 on Choice of Court Agreements, and neither Switzerland nor the United Kingdom are parties to the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

Thus, the following decisions may no longer be recognised in Switzerland:

- Decisions that are enforceable, but subject to ordinary appeal (Article 25(3) PILA).
- Judgments in which the jurisdiction of the foreign court was not given under the PILA, for example judgments relating to a tort obligation against a defendant domiciled in Switzerland (Article 149(2)(f) PILA).
- Judgments against several defendants, insofar as the jurisdiction of the foreign court was not given under the PILA with respect to some of them (Article 26 PILA).

The question of whether the Lugano Convention still applies to judgments given in the United Kingdom while it was in force and until when it applies is therefore of primary importance.

There was indeed a debate in Switzerland on the question of whether the recognition of judgments pronounced respectively until 31 January 2020 (date of the United Kingdom's exit from the European Union) or until 31 December 2020 (end of the transition period) was governed by the Lugano Convention.

The Lugano Convention does not contain any provisions indicating what would be the consequence of a member state leaving the European Union.

The relevant provision of the Lugano Convention is Article 63(1), which reads as follows: "*This Convention shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after its entry into force in the State of origin and, where recognition or enforcement of a judgment or authentic instrument is sought, in the State addressed.*"

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 of 24 January 2020 (the "**Withdrawal Agreement**") provides, in Article 67(1), that for proceedings commenced before 1 January 2021, both the jurisdiction rules and the recognition and enforcement of judgment rules in the Brussels Recast Regulation will continue to apply on a reciprocal basis.

However, there is no similar agreement with respect to the Lugano Convention.

The United Kingdom put in place legislation to ensure that the English courts would continue to apply the Lugano Convention to proceedings issued before 1 January 2021, but Switzerland did not adopt any legislation in that respect.

An Exchange of Notes of 28/30 January 2020 between Switzerland and the European Union concerning the continued application of the agreements between Switzerland and the European Union to the United Kingdom during the transitional period after its withdrawal from the European Union on 31 January 2020, provides that, as far as Swiss law is concerned, the term "EU Member State" will continue to include the United Kingdom during the transitional period.

In a note published on its website on 9 December 2020, the Federal Office of Justice stated: *"According to Article 126 of the EU-UK withdrawal agreement, there was a transition period until 31 December 2020. Based on Article 129 of the withdrawal agreement, the United Kingdom was to continue to be treated as a state bound by the Lugano Convention until the end of this period. Brexit therefore only has an impact on the Lugano Convention since 1 January 2021."*

Furthermore, the Federal Office of Justice stated: *"The recognition and declaration of enforceability of judgments made before the withdrawal date shall continue to be governed by the Lugano Convention even after the date of withdrawal."*

In contrast, the Federal Department of Foreign Affairs has issued its own note, according to which *"the Lugano Convention will cease (at least temporarily) to be the legal basis for relations between Switzerland and the United Kingdom. Jurisdiction and recognition for proceedings commenced after 1 January 2021 and decisions arising therefrom will therefore in principle again be governed by national law in relations with the UK."*

However, these notes are not binding on Swiss courts.

The first known decision on this issue, a ruling by the Zurich Cantonal Court of First Instance, the *Bezirksgericht*, has thrown the issue into disarray.

On 24 February 2021, the *Bezirksgericht* ruled that the Lugano Convention would not apply to a request for attachment and recognition of a judgment of the High Court of Justice of England and Wales of September 2020 filed on 18 February 2021 on the ground that the United Kingdom was no longer a "party" to the Lugano Convention from 1 January 2021. It appears that no appeal has been lodged against this judgment.

Since then, some cantonal courts have continued to apply the Lugano Convention and others the Private International Law Act.

Federal Court ruling 5A_697/2020 of 22 March 2021

Fortunately, the Federal Court, in its ruling 5A_697/2020 of 22 March 2021, published on 28 July 2021, clarified this issue.

On 26 November 2019, four companies had requested in the Canton of Vaud that a judgment given on 17 October 2019 by the High Court of Justice of England and Wales be recognized and declared enforceable in Switzerland and that an attachment in the amount of GBP 8,000,000 be ordered, relating to co-ownership shares in a building and a bank account belonging to their debtor, who had been ordered to pay this sum by the English judgment as costs.

The debtor objected to the attachment, appealed against the judgment on objection to the attachment of 3 April 2020, and then appealed to the Federal Court against the judgment of the Court of Debt Enforcement and Bankruptcy of the Cantonal Court of the Canton of Vaud of 24 July 2020. In the course of the appeal proceedings before the Federal Court, the appellant wrote to the Federal Court on 29 January 2021, stating that in view of the end of the Brexit transition period, the Lugano Convention no longer applied to the proceedings.

The Federal Court first decided that the contested judgment of 24 July 2020, rendered during the transitional period and dealing with the recognition and enforcement of an English judgment rendered before the Brexit, was rightly based on the Lugano Convention, in accordance with the Exchange of Notes of 28/30 June 2020 between Switzerland and the European Union.

On the question of whether the proceedings before the Federal Court should be governed by the Private International Law Act rather than the Lugano Convention, the Federal Court refers to several scholars and to the Federal Office of Justice, who state that the Lugano Convention continues to apply to the recognition of judgements handed down while it was still in force. The Federal Court further points out that the entire cantonal proceedings and the appeal were also filed before the end of the transitional period and that it is not clear what major public interest, the application of which would not suffer any delay, would justify applying the Private International Law Act for the first time in the proceedings pending before the Federal Court. It concludes that the dispute continues to be governed by the Lugano Convention.

Although the Federal Court relied on three alternative arguments to reject the application of the Private International Law Act, it can be taken for admitted that the Lugano Convention applies to the enforcement and recognition in Switzerland of judgments rendered in the United Kingdom before 1 January 2021.

Conclusion

Based on the Federal Court 5A_697/2020 of 22 March 2021 ruling, the Lugano Convention will thus continue to apply to the enforcement and recognition in Switzerland of judgments rendered in the United Kingdom before 1 January 2021.

However, other questions remain open.

According to the Federal Office of Justice, the authorities and courts seized remain competent for proceedings on the merits initiated under the Lugano Convention and still pending on 1 January 2021, even if their competence is no longer founded under national law. It remains to be seen whether the Swiss courts will respect acquired rights and the general principles of international law.

Another question is that of the law applicable to the recognition in Switzerland of judgments rendered in the United Kingdom as from 2021 if the court action was initiated before the end of the transitional period. While Article 67(2) of the Withdrawal Agreement provides for the application of the Brussels Recast Regulation to the recognition of such decisions, this question remains controversial.

Legal uncertainty and conflicting cantonal practices will likely prevail in the coming months and years on these issues until the Federal Court rules on them.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.