

BRIEFING MAY 2022

BREXIT AND THE RECOGNITION AND ENFORCEMENT OF UK JUDGMENTS IN SWITZERLAND – AN UPDATE

Three recent Swiss cantonal court decisions have shed light on the intertemporal application of the Lugano Convention after Brexit with respect to the recognition and enforcement of UK judgments in Switzerland. Despite these recent court decisions, a number of questions remain unanswered, as highlighted in this briefing.

This briefing is an update to the briefing on Brexit and the Recognition and Enforcement of UK Judgments in Switzerland of September 2021¹.

POST-BREXIT RECOGNITION AND ENFORCEMENT SCENARIOS

Up to the expiry of the Brexit transition period on 31 December 2020 as prescribed by the EU-UK withdrawal agreement, the UK was to be treated as belonging to the EU, also for the purposes of the Lugano Convention. With the expiry of this transition period (now more than one year ago), some questions arise regarding the applicability of the Lugano Convention in recognition and enforcement proceedings of a UK judgment in Switzerland.

There are three possible scenarios, which can be distinguished as follows:

- > the UK judgment was rendered *on or before* 31 December 2020, and the request for recognition and enforcement of this judgment in Switzerland was made *on or before* that date, with part of the recognition proceedings still ongoing on that date (*scenario 1*);
- > the UK judgment was rendered *on or before* 31 December 2020, and the request for recognition and enforcement of this judgment in Switzerland was made *after* that date (*scenario 2*); and
- > the UK judgment was rendered *after* 31 December 2020 but in proceedings already pending *before* that date, and the recognition and enforcement of this judgment in Switzerland was (naturally) requested after 31 December 2020 (*scenario 3*).

¹ <https://www.baerkarrer.ch/en/publications/brexit-and-the-recognition-and-enforcement-of-uk-judgements-in-switzerland>

So far, the Swiss Federal Supreme Court („SFSC“) has only considered and decided the first scenario (with some limitations), which will briefly be recapped below. The second scenario has now been subject to three cantonal court decisions, which will be presented in this briefing. The third scenario, however, has not yet been dealt with by any published Swiss decisions.

SCENARIO 1 – RECAP OF SFSC DECISION OF 22 MARCH 2021

In a landmark decision of 22 March 2021 (147 III 491, which is the published version of 5A_697/2020 outlined in our earlier briefing²), the SFSC ruled for the first time that the Lugano Convention continued to apply to the recognition and enforcement of UK judgments that had been issued and for which recognition and enforcement was requested *prior* to 31 December 2020, even if the recognition proceedings in front of the SFSC were still ongoing on that date (same conclusion in SFSC decision 4A_560/2021 of 3 February 2022). The *cantonal* recognition and enforcement proceedings had been concluded in this case before the end of the transition period while appeal proceedings in front of the SFSC were still pending in 2021.

The SFSC specifically did not comment on whether the Lugano Convention also applies if the cantonal proceedings (first instance or appeal proceedings) were still ongoing on 31 December 2020. The SFSC also did not address whether the Lugano Convention would apply to the case where the recognition and enforcement was requested *after* the end of the transition period for a UK judgment rendered before the end of the transition period (*scenario 2*). This case has so far only been decided by cantonal courts, as will be shown in the following.

SCENARIO 2 – CONTRADICTORY CANTONAL DECISIONS

Three decisions by cantonal courts in Switzerland have shed light on the varying practice of courts in cases in which the recognition and enforcement is sought *after* 31 December 2020 of a UK judgment rendered *before* this date. The cantonal courts came to different conclusions.

The District Court (*Bezirksgericht*) of Zurich had to decide in its decision of 24 February 2021 (accessible online³; the file number was not disclosed) whether to apply the Lugano Convention to the recognition and enforcement of a UK judgment rendered in September 2020, i.e. before the end of the Brexit transition period on 31 December 2020, where the recognition and enforcement were requested after that date. This decision was rendered before the landmark case of the Federal Supreme Court of 22 March 2021 (147 III 491) described above, which, however, in any case decided a different scenario.

In its decision, the District Court noted that the Lugano Convention did not regulate its intertemporal application where a state ceases to be a party to the Convention. The District Court further noted that article 63 Lugano Convention only governs the application of the Convention in new member states, and not the situation at hand, i.e., the application of the Convention to a state that is no longer a party.

The court thus rejected the application of the Lugano Convention, openly disagreeing with the assessment of the Swiss Federal Office of Justice at the time.

The High Court (*Obergericht*) of the Canton of Bern in its decision of 4 November 2021 (ZK 21 274, accessible online⁴) came to a different conclusion. In this case, the UK judgment

² <https://www.baerkarrer.ch/en/publications/brexit-and-the-recognition-and-enforcement-of-uk-judgements-in-switzerland>

³ https://www.arrestpraxis.ch/fileadmin/redaktion/arrestpraxis/media/2021-02-24_Urteil_BGZ__Audienz__redacted.pdf

⁴ <https://www.zsg-entscheide.apps.be.ch/tribunapublikation/?dec=aa9e550416f749368b580ced87cdf212&index=OG&locale=de>

was rendered on 19 June 2020, thus also before the end of the transition period, and the recognition and enforcement of the judgment was requested after that point in time, namely on 8 April 2021.

The High Court first noted that the United Kingdom had left the European Union on 31 January 2020, and that the Brexit Withdrawal Agreement provided for a transition period until 31 December 2020. The United Kingdom thus remained a party to the Lugano Convention until the expiry of such transition period.

The court then openly disagreed with the reasoning of the District Court of Zurich in the decision of 24 February 2021. It considered that the existence and timing of the recognition and enforcement proceedings in Switzerland could not be decisive for the application of the Lugano Convention due to the mutual and automatic *ipso iure* recognition of judgments issued in contracting states. It thus concluded that as long as the UK judgment was issued before 31 December 2020, the enforcement of the judgment in Switzerland must be governed by the Lugano Convention. In the High Court's view, this conclusion was also justified for reasons of legal certainty, predictability and the prohibition of retroactivity.

The High Court of Bern clearly held that the issuance of the UK judgment was the decisive point in time for the question of the applicability of the Lugano Convention in Swiss recognition and enforcement proceedings.

The High Court also had to determine whether the appeal of the UK judgment in the UK had an effect on the application of the Lugano Convention in the enforcement proceedings in Switzerland. It found that the finality of the UK judgment is not decisive for the declaration of enforceability in Switzerland. A declaration of enforceability would only be inadmissible if the judgment had been set aside or modified by the appellate court in the UK. As this was not the situation in the present case (i.e. the judgment was confirmed), the court affirmed the application of the Lugano Convention.

In a newer decision of 2 February 2022 (accessible online⁵; the file number was not disclosed), the Cantonal Court (*Kantonsgericht*) of Zug had to decide the same scenario, which was whether the Lugano Convention applied to the

enforcement of a decision rendered by the High Court of Justice in London, England on 20 November 2020, thus *before* the end of the transition period. The request for recognition and enforcement was made on 1 February 2022, i.e. *after* the Brexit transition period.

The Cantonal Court of Zug argued that in application of the transitional provision of article 63(1) Lugano Convention and considering that the decision was rendered in the UK before the expiry of the transition period, the Lugano Convention still applied to the enforcement of the decision in Switzerland.

In coming to this conclusion, the Cantonal Court of Zug also summarily referred to the decision of the SFSC of 22 March 2021 (147 III 491), even though the decision dealt with a different scenario (see our comments on decision of SFSC of 22 March 2021 outlined above in scenario 1).

SCENARIO 3 – NO DECISIONS THUS FAR

A final scenario is where a UK judgment was rendered *after* 31 December 2020 in proceedings that were pending before this date, and the recognition and enforcement of this judgment in Switzerland is – naturally – also sought after this date.

The SFSC has not yet decided whether the Lugano Convention would apply to this scenario, and the question remains controversial among legal commentators.

KEY TAKEAWAYS AND OPEN ISSUES

With regard to the recognition and enforcement of UK judgments in Switzerland, the SFSC ruled in its decision of 22 March 2021 (147 III 491) that the Lugano Convention continues to apply to the recognition and enforcement of UK judgments issued *on or before* 31 December 2020, at least where the cantonal recognition proceedings were completed before the end of the transition period, and only the Supreme Court proceedings are still ongoing on that date. It is unclear whether this also applies if the cantonal recognition and enforcement proceedings were still ongoing on 31 December 2020.

⁵ https://www.arrestpraxis.ch/fileadmin/redaktion/arrestpraxis/media/KG_Zug__02.02.2022.pdf



Whether the Lugano Convention also continues to apply in the case where a UK judgment was rendered on or before 31 December 2020, but recognition proceedings were initiated *after* that point in time has so far only been decided by cantonal courts. While the first instance court of Zurich denied the application of the Lugano Convention in a decision of 24 February 2021, the second instance court of the Canton of Bern in its decision of 4 November 2021 as well as the first instance court of Zug in a recent decision of 2 February 2022 answered this question in the affirmative.

A third scenario in which the question of the application of the Lugano Convention is even more controversial and unclear is that of the recognition and enforcement of a UK judgment rendered *after* 31 December 2020 in proceedings that were commenced before that date.

Until there is a decision by the SFSC also on the latter two scenarios, there will still be considerable uncertainty when making requests for the recognition and enforcement of UK judgments in Switzerland based on the Lugano Convention.



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