

BRIEFING SEPTEMBER 2021

BREXIT AND THE RECOGNITION AND ENFORCEMENT OF UK JUDGMENTS IN SWITZERLAND – FIRST LANDMARK CASE

The Swiss Federal Supreme Court ruled in a recent milestone decision that the recognition and enforcement of UK judgments that had been issued prior to 31 December 2020 continue to be governed by the Lugano Convention, even though the recognition proceedings had not yet been completed but were still ongoing at that date.

While this is the first landmark decision of the Swiss Supreme Court dealing with Brexit issues and the impact on the recognition and enforcement of the UK judgments rendered prior to Brexit, several issues still remain to be confirmed.

ISSUES AT STAKE - POST-BREXIT CHALLENGES

The Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007 applies to the jurisdiction, recognition and enforcement of judgments in civil and commercial law matters between member states of the EU and, inter alia, Switzerland. It aims to ensure that judgments rendered in other member states are recognised and enforced according to unified and simplified rules in other member States.

The UK was a member State of the Lugano Convention until its withdrawal from the EU. The impact of Brexit on the enforcement of UK judgments has been discussed at length since UK judgments could significantly lose their usefulness post-Brexit by failing to benefit from the Lugano Convention. It had been agreed within the ambit of the agreement on the transitional phase that the Lugano Convention would also continue to apply during such period. However, as of 1 January 2021, the UK is no longer bound by the Lugano Convention, so raising questions around how the recognition proceedings would be dealt with should the UK judgment have been rendered prior to Brexit and/or the recognition proceedings having started prior to it. The value of the Lugano Convention obviously lies in the automatic recognition and easy process to favour enforcement. Such advantages do not exist under the Swiss Federal Act on Private International Law (the „PILA“) which is the fallback framework in the absence of any bi- or multilateral treaties. The PILA shall then govern the recognition and enforcement of UK judgments post-Brexit and pending any acceptance of

the UK as a part of the Lugano Convention as an individual member state. While the UK has filed such a request, the admission procedure has not yet completed.

Pending such acceptance of the UK, a question remains: what sets of rules, of the Lugano Convention or the PILA, shall govern the recognition and enforcement of a UK judgment rendered from 1 January 2021 and also before 31 December 2020?

The Swiss Federal Supreme Court (the „SFSC“) has at least partially answered this question in the decision that is discussed in this briefing.

RULING

In a landmark decision dated 22 March 2021, 5A_697/2020, where the legal reasoning was published this summer, the SFSC has taken a position on the consequences of Brexit on the recognition and enforcement in Switzerland of judgments rendered in the UK prior to the end of the transitional period.

In the case that came before the SFSC – which was successfully led by Bär & Karrer on behalf of the creditor –, an attachment had been ordered on Swiss assets, based on the enforcement of an English judgment rendered on 17 October 2019.

The SFSC first examined whether the Lugano Convention still applied to the ongoing proceedings after the debtor raised, shortly after Brexit in January 2021 and while the proceedings were then pending before the Swiss Supreme Court, new arguments to advance the view that a new era had started as of 1st January 2021 and that the Swiss Supreme Court was no longer to apply the Lugano Convention to rule on a case that had started back in 2019.

Whilst the UK, as a member of the EU, used to be a member state covered by the Lugano Convention, this is no longer the case from 1 January 2021 following Brexit. The details of Brexit are regulated in the Withdrawal Agreement dated 24 January 2020, which provided for a transitional period until 31 December 2020, in which the UK was treated as a state bound by the Lugano Convention. As the Lugano

Convention applies between Switzerland and the EU, and since Switzerland agreed to grant the same transitional status to the UK, it follows that the Lugano Convention remained in place until 31 December 2020 to help rule on the recognition and enforcement of UK judgments.

However, as of 1 January 2021, the Lugano Convention no longer applies to the UK. The question then arises as to what consequences this would have on the recognition and enforcement in Switzerland of judgments rendered in the UK before 31 December 2020. The debtor in this case attempted to argue that the ongoing proceedings were now, as of 1 January 2021, to be ruled outside of the Lugano Convention and therefore subject only to the general rules of the PILA.

The SFSC stressed that the Lugano Convention does not specifically regulate the situation in which a state ceases to be bound by it and contains no transitional law provision applicable in this respect. Consequently, to assess such an issue, the SFSC drew on the views of scholars, as well as on the Federal Office of Justice (the „FOJ“), to examine any previous determinations on the topic which had concluded that the recognition and enforcement of judgments rendered in the UK while the Lugano Convention was in force were to continue to be governed by that Convention even after 31 December 2020.

The SFSC then ruled that, in the present case, not only was the UK judgment on which the attachment is based issued before Brexit, but the entire cantonal proceedings – as well as the lodging of the appeal before the SFSC – also took place before the end of the transitional period. It could therefore see no reason why the applicable regulation should have changed during the course of the proceedings. Furthermore, the SFSC stressed that there was no major public interest that would justify applying the PILA for the first time in the proceedings presented before the SFSC.

Consequently, the SFSC held that the recognition and enforcement of the English judgment at stake was still to be governed by the Lugano Convention irrespective of the occurrence of Brexit while the case was pending before the Swiss Supreme Court and before a final and binding judgment had been issued in Switzerland.



KEY TAKEAWAYS

The SFSC clearly ruled for the first time that the Lugano Convention was to continue to apply to the recognition and enforcement of UK judgments that had been issued prior to 31 December 2020 even if the recognition proceedings were still ongoing at that date. The Lugano Convention is then to continue to be applied irrespective of the entry into force of Brexit in the course of the recognition proceedings as the UK judgment had been issued prior to that date.

It seems that this precedent will likely pave the way for the general principle to be that – also according to the scholars’ and the FOJ’s views the SFSC relied on - the recognition of a judgment issued in the UK whilst the Lugano Convention was still applicable will continue to be governed by the Lugano Convention even after 31 December 2020. However, there is a need to highlight an important caveat.

The SFSC reached its conclusion in this case while stressing that not only had the UK judgment at stake been issued prior to Brexit but: (i) the recognition and enforcement proceedings had started prior to 31 December 2020 and (ii) the entire cantonal proceedings had taken place prior to the same date. It can therefore not be entirely excluded that the SFSC may come to a different conclusion if the circumstances were different, and in particular if the proceedings were to have started after 31 December 2020.

There is no obiter dictum in that landmark decision that would clearly specify that any decision rendered in the UK prior to Brexit will continue to be subject to the Lugano Convention if the recognition and enforcement process is started after Brexit or whether the recognition and enforcement would only be subject to the Lugano Convention provided that the proceedings started prior to Brexit.

We consider – along with most scholars and the FOJ – that such recognition and enforcement shall remain subject to the Lugano Convention for any UK judgment rendered prior to Brexit irrespective of the starting date of the recognition and enforcement proceedings. However, given the lack of any clear obiter dictum in this landmark decision, practitioners will have to be cautious until a further decision of the SFSC confirms such a conclusion.

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