

Regulatory Alert 21/2021

Recognition and enforcement of UK civil law judgements in Switzerland after Brexit

Geneva, 06.08.2021

1. References

1.1. Decision

- > Decision of the Swiss Federal Court of March 22, 2021, 5A_697/2020 (civil law), published on July 28, 2021

1.2 Key words

- > Recognition and enforcement of UK civil law judgements in Switzerland
- > Brexit
- > Transition period
- > Lugano Convention
- > Swiss Private International Law
- > Non-retroactivity

1.3 Reference texts

- > RS 0.122.1; Exchange of notes of 27/30 January 2020 between Switzerland and the EU
 - > BRP Alert EU 4/2021
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2. Context

During its membership of the European Union, the UK was subject to the Brussels recast regulation and was a member of the Lugano Convention in respect of private international law. However, following the end of the transition period, December 31st 2020, the Brussels recast regulation has ceased to apply and the UK has left the Lugano Convention.

For proceedings commenced before the end of the transition period, the following solutions were agreed:

- > Between the EU and the UK: The Withdrawal Agreement states that the Brussels recast regulation continues to apply for jurisdiction of proceedings introduced and the enforcement of decisions rendered before Dec 31st, 2020.
 - > Between a Lugano Member State and the UK: The Lugano Convention does not contain any provisions on the rules applicable in case of withdrawal by a Member State and there are in particular no transitional provisions applicable to this scenario. Therefore, management of such issues is the responsibility of the individual Lugano Member State involved:
 - The UK decided to continue to apply the Lugano Convention to proceedings introduced before the end of the implementation period and to the enforcement of the respective decisions, even if they occur at a later date.
 - Switzerland decided and manifested, by exchange of notes of 28/30 January 2020 between Switzerland and the EU, to continue to apply the Lugano Convention for
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jurisdiction in proceedings between the UK and itself introduced before December 31st, 2020. However, the rules to be applied to the subsequent recognition and execution of such decisions, after January 1st 2021, remained unclear and have since been the object of discussions in academic research and publications.

Summarizing the relevant facts for the present alert in a nutshell, the decision of the Swiss Federal Court, which was rendered in March 2021 and published on July 28, 2021, concerns - among many other things- the private international rules applicable to the recognition and enforcement in Switzerland of a decision rendered by the High Court of Justice of England and Wales dated 17 October 2019, which ordered a debtor to pay to the applicants an amount of GBP 8 million plus interest. Based on the beforementioned decision, on November 26, 2019, the applicants (and future respondents to the appeal before the Swiss Federal Court) requested the seizure of assets in the Canton of Vaud, Switzerland. The debtor (and future plaintiff) opposed and the last cantonal instance, the Cantonal Court of the Canton of Vaud (Court of bankruptcy and insolvency proceedings), rejected their opposition on July 24, 2020. On August 28, 2020, the plaintiff appealed against this decision to the Swiss Federal Court in Civil Matters. By letter of January 29, 2021, the plaintiff requested that the procedure no longer be based on the rules of the Lugano Convention, but on Swiss Private International Law, as the transition period had, in the meantime, ended.

3. Content

In its decision, the Swiss Federal Court analysed the opinion of leading legal authors on international private law in Switzerland on the subject. While according to the information gathered by the Federal Court, some of these authors based their opinion on the transitional provisions of the Lugano Convention for its entry into force (Article 63 of the Convention) and others on the general principles of non-retroactivity and legal certainty, the authors quoted by the Federal Court had come to the conclusion that, in principle, the recognition and enforcement of judgments rendered while the Lugano Convention was in force should continue to be governed by the Lugano Convention. The same position was taken by the Swiss Federal Office of Justice in its statement on the impact of Brexit on the Lugano Convention in April 2021.

The Swiss Federal Court considered the following: The decision by the High Court of Justice of England and Wales was rendered before Brexit and the whole cantonal procedure, including the appeal to the Swiss Federal Court took place before the end of the transition period. Taking into consideration the principle of non-retroactivity, the application of which is justified in particular if the new law to be applied would be stricter than the current one, and there not being any major public interest, which would require the application of the rules of Swiss Private International Law instead of those of the Lugano Convention, the Swiss Federal Court ruled that the Lugano Convention was still applicable to the proceedings at hand.

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4. Comment

The present decision by the Swiss Federal Court is encouraging news for different reasons. Even if the rules of Swiss Private International Law on recognition and enforcement are only slightly stricter than those of the Lugano Convention, the pragmatic decision of the Federal Court is a statement in favour of legal certainty and continuity. This being said, it has to be pointed out that the present decision also has a political dimension. As outlined in BRP Alert EU 4/2021, the EU continues to block the accession of the UK to the Lugano Convention as an independent Member State. The decision of the Swiss Federal Court sets a welcome counterpoint to the EU approach, which is purely political and impairs legal certainty and increases costs as well as the length of proceedings in international litigation.

5. Practical implications

The present decision by the Swiss Federal Court has set the necessary precedent for Swiss recognition and enforcement proceedings concerning UK judgments rendered before 31 December 2020 to continue to be governed by the Lugano Convention.

We are at your disposal for any questions you may have.

Best regards,

BRP Bizzozero & Partners SA

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