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Enforcement of Judgments 2021

Switzerland
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Trends and Developments

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Post-Brexit Enforcement of UK Judgments in Switzerland

Paradoxically, the main development in 2021 regarding the enforcement of judgments in Switzerland occurred neither in 2021 nor in Switzerland.

Indeed, the main development regarding the enforcement of judgments in Switzerland is the consequences of the Brexit referendum that took place in the United Kingdom on 23 June 2016.

After reviewing the long-term consequences of the inapplicability of the Lugano Convention to the enforcement of United Kingdom judgments in Switzerland (*see* Isolation?), two decisions regarding the applicability of the Lugano Convention to past judgments will be reviewed (see Transitioning out of Lugano).

Isolation?

French poet Alphonse Lamartine wrote in "Isolation": "One single being is missing and your world is deserted!" ("*Un seul être vous manque et tout est dépeuplé!*", "*L'isolement*", *Méditations poétiques*, 1820).

Over the past decades, a great number of litigants chose the High Court of England and Wales to litigate their disputes, taking advantage of the efficient judicial system and an array of common law tools; in particular, in fraud-related tort actions.

On the Continent, Switzerland holds a key position in the enforcement of foreign judgments. It is indeed the main offshore banking centre in the world, with more than a quarter, or USD2.3 trillion, of the world's foreign assets under management; one of the world centres for family office services; the world's No 1 commodity trading and trade finance hub, with 35% of oil, 60% of metals and 50% of sugar and cereals; and one of the main shipping centres, with 22% of global movements of commodities going through Swiss shipping companies. Switzerland is therefore a jurisdiction of choice to enforce judgment over Swiss assets or to obtain intelligence or evidence over assets abroad.

The Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007 and its 1988 predecessor allowed litigants to use the efficiency of the United Kingdom judiciary process to obtain judgments that could easily be enforced in Switzerland.

Under the Lugano Convention, it was thus, for example, possible to bring claims in London against various defendants, including ones domiciled in Switzerland, when at least one of the defendants was domiciled in England and the claims were so closely connected that it was expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from a separate proceeding (Article 6(1), Lugano Convention).

In addition, even though Switzerland is not a common law jurisdiction, case law was developed, allowing the enforcement of worldwide freezing orders through the application of the Lugano Convention.

In many ways, the United Kingdom and Switzerland formed a sort of "holy alliance" regarding the enforcement of complex claims.

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With Brexit, the Lugano Convention has ceased to apply to the United Kingdom, at least regarding judgments issued from 1 January 2021.

Many practitioners believed that this situation would be temporary, and that the United Kingdom's 8 April 2020 application to accede to the Lugano Convention would be accepted by the European Union, as it was by the other state parties, Switzerland, Norway and Iceland.

However, on 22 June 2021, the European Union informed, through a note verbal, the depository of the Lugano Convention that it would not give its consent to the United Kingdom's accession request to the Lugano Convention.

Consequently, for the foreseeable future, the recognition and enforcement in Switzerland of judgments issued in the United Kingdom will be governed by the provisions of the Private International Law Act (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.

This has immediate practical consequences, as, for example, the following United Kingdom judgments or orders may no longer be recognised in Switzerland:

- judgments against several defendants to the extent that there was no jurisdiction under PILA against some of the defendants;
- judgments relating to the infringement of intellectual property rights against parties domiciled in Switzerland (Article 111(1)(b), PILA);
- tort judgments against parties domiciled in Switzerland (Article 149(2)(f), PILA); and
- interlocutory orders, notably worldwide freezing orders.

Litigation strategies will therefore need to be adapted.

Transitioning out of Lugano

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

The relevant transitional provision of the Lugano Convention is Article 63(1), which reads: "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 instruments 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, at its Article 67, 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 in relation 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.

In a brief note published on its website on 9 December 2020, the Federal Office of Justice affirmed: "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."

On the other hand, the Federal Office of Foreign Affairs published its own note, according to which, "the Lugano Convention will cease to form the legal basis for Swiss-UK relations, at least temporarily. The jurisdiction for and recognition of proceedings initiated after 1 January 2021 and decisions arising therefrom will in principle, therefore, be governed once again by national law in relation to the UK."

However, these notes have no binding effects on Swiss courts.

The court decision on record dealing with this issue appears to be that of the cantonal court of first instance of Zurich, the *Bezirksgericht*.

On 24 February 2021, the *Bezirksgericht* ruled that the Lugano Convention would not apply to a request for attachment and recognition of a High Court of Justice of England and Wales judgment 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 the applicants did not appeal this judgment.

This decision was debated among practitioners.

The Federal Court has now shed some light on the issue, in a decision 5A_697/2020 dated 22 March 2021, but only made public on 28 July 2021, and which is meant to be published in the Official Record of leading precedents of the Federal Court.

The case dealt with the enforcement of a judgment by the High Court of Justice of England and Wales dated 17 October 2019, the enforcement and recognition of which in Switzerland had been sought in the context of an attachment request filed in the Canton of Vaud on 26 November 2019. After the dismissal of its objection to the attachment order on 3 April 2020 and of its appeal against that judgment on 24 July 2020, the debtor appealed to the Federal Court on 28 August 2000. In the context of the appeal proceedings, the debtor wrote on 29 January 2021 to the Federal Court that the enforcement of the High Court judgment was no longer governed by the Lugano Convention but by the rules of PILA.

Invited to file determinations, the Federal Office of Justice indicated that the recognition of United Kingdom judgments issued before 1 January 2021 continued to be governed by the Lugano Convention.

The Federal Court ruled that the decision of the Court of Appeal, dated 24 July 2020, during the transition period regarding a judgment rendered before Brexit, rightly applied the Lugano Convention.

On the issue of whether the proceedings before the Federal Court, which were continuing after the end of the transition period, should be governed by PILA or the Lugano Convention, the Federal Court decided for the latter, for three reasons:

- the English order was rendered before Brexit took effect;
- all the cantonal proceedings and the filing of the appeal took place before the end of the transition period; and
- there would be no public interest to apply for the first time PILA before the Federal Court, taking notably into account that the principle of non-retroactivity should apply to Articles 196ff of PILA.

The Federal Court therefore did not firmly decide that the enforcement of United Kingdom judgments issued before the end of the transition period should still be governed by the Lugano Convention if the enforcement proceedings are begun after that date, but all the scholars it quoted and the Federal Office of Justice support that position.

It is therefore likely that the Lugano Convention will continue to apply to judgments rendered in the United Kingdom before 1 January 2021, contrary to the decision of the Zurich *Bezirksgericht*.

Monfrini Bitton Klein was founded in Geneva by Enrico Monfrini in 1978 and has become renowned in international business law, complex litigation and arbitration. The asset recovery practice of the firm started at the end of the 1990s with the representation of foreign governments, companies, individuals and liquidators of bankruptcies, and victims of fraud and Ponzi schemes. In 2017, the firm changed its name to Monfrini Bitton Klein and became a litigation-only practice in order to offer conflict-free services to its clients, focusing on asset recovery, white-collar crime, anti-corruption, cross-border bankruptcy, and enforcement of foreign judgments and arbitral awards. MBK is the representative for Switzerland of ICC FraudNet, the leading global network of fraud and asset recovery lawyers, and has access around the world to hundreds of specialised correspondent lawyers, private investigators, forensic accountants, insolvency practitioners and litigation funders.

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