

# NEWS

NEW LANDMARK DECISION  
OF THE FEDERAL  
SUPREME COURT ON THE  
APPLICATION OF THE  
LUGANO CONVENTION IN  
THE RELATIONSHIP BETWEEN  
SWITZERLAND AND THE UK  
AFTER BREXIT  
(JUDGMENT 5A\_697/2020 OF  
22 MARCH 2021, PUBLISHED  
AT THE END OF JULY 2021).

## FACTS AND PROCEDURAL HISTORY OF THE CASE

Based on article 271(1)(6) Swiss Debt Enforcement and Bankruptcy Act (**DEBA**) and a judgment of the High Court of Justice of England and Wales dated 17 October 2019, the four companies B. PLC, C. JSC, D. LLP and E. LLP filed an asset freeze request against A. with the judge of the district of Aigle on 26 November 2019. The asset freeze requests (there have apparently been two of them) were granted on 3 December 2019. The objection, which was lodged by A., was dismissed on 3 April 2020.

Subsequently, A. filed an appeal with the higher cantonal instance. The latter also dismissed the appeal on 24 July 2020. On 28 August 2020, A. then filed a complaint in civil matters and a subsidiary constitutional complaint with the Federal Supreme Court. The highest court in Switzerland also dismissed the appeal in its judgment of 22 March 2021.

## CONSIDERATIONS

A. argued in the appeal proceeding before the Federal Supreme Court that the question of the recognition and enforcement of the English judgment of 17 October 2019 must, as of 1 January 2021, be assessed according to the Federal Act on Private International Law (**PILA**) and no longer according

to the Lugano Convention (consideration 6.1.2).

Switzerland, together with the members of the European Union, Iceland, Norway and Denmark (excluding the Faroe Islands and Greenland), is a party to the Lugano Convention of 30 October 2007 (Lugano Convention), which entered into force for Switzerland on 1 January 2011. The Lugano Convention is of paramount importance to Switzerland when it comes to international civil procedure matters. Due to the United Kingdom's withdrawal from the European Union, there is uncertainty about the temporal scope of the Lugano Convention, i.e. whether and to what extent the Convention is still applicable to judgments rendered before the withdrawal.

In a recently published landmark decision, the Federal Supreme Court had the opportunity to assess the applicability of the Lugano Convention in more detail. Although, the Federal Supreme Court refrained from a comprehensive treatment of the problem, the decision gives some indication as to how case law will likely develop in the future.

to the Lugano Convention (consideration 6.1.2).

The United Kingdom has left the European Union as of 31 January 2020. The agreement of 24 January 2020 on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (**Withdrawal Agreement**) regulated the withdrawal modalities, providing, inter alia, for a transitional period until 31 December 2020 (**Transitional Period**), during which the United Kingdom will continue to be bound by the obligations arising from the international agreements concluded by the EU (art. 126, 129 para. 1 Withdrawal Agreement). Pursuant to the exchange of diplomatic notes of 28/30 January 2020 between Switzerland and the European Union<sup>1</sup>, it was agreed that for Swiss law the term "EU Member State" would continue to include the United Kingdom during the Transitional Period. However, as of 1 January 2021, the United Kingdom is no longer deemed a contracting state to the Lugano Convention (see art. 1(3) Lugano Convention).

The Federal Supreme Court came in its landmark decision to the conclusion, that the Lugano Convention applies to the case at hand, as the deci-

<sup>1</sup> SR 0.122.1.

sion of the lower Swiss court was issued during the Transitional Period and concerned an English judgment that was issued before UK's withdrawal from the EU (31 January 2020; consideration 6.1.1). The Lugano Convention itself does not address the consequences of a state leaving the convention. According to the Federal Office of Justice and, in principle, also the legal literature, English judgments handed down before 1 January 2021 should be recognised and enforced according to the Lugano Convention also after 31 December 2020. Since in the case at hand both, the English judgment and the entire cantonal proceeding, was issued or took place before the end of the Transitional Period, the Federal Supreme Court did not see any substantial public interest that would justify applying the PILA for the first time in the proceeding before the Federal Supreme Court (consideration 6.1). In a relatively brief consideration, the Federal Supreme Court stated that in the interpretation of the transitional provisions of the PILA (art. 196 et seq. PILA) the prohibition of retroactivity must be taken into account and that in certain cases one may deviate from the intertemporal provisions of the PILA, namely if the new law is stricter than the old one (consideration 6.1.2.).

#### **PREVIOUS CASE LAW, SCOPE OF THE DECISION AND APPLICATION TO OTHER CONSTELLATIONS**

In the cited decision, the Federal Supreme Court omitted to clarify the temporal scope of application of the Lugano Convention in an *obiter dictum*. However, it can be assumed that the Federal Supreme Court is probably more inclined towards a recognition-friendly practice and therefore interprets the scope of application of the less strict Lugano Convention broadly, thereby reducing the temporal scope of application of the PILA. Consequently, it can be assumed that the recognition and enforcement of an English judgment will generally be governed by the Lugano Convention if the English judgment of first instance was issued before 1 January 2021, i.e. at the latest during the Transitional Period. The initiation of the recognition and enforcement proceedings in Switzerland is therefore not the decisive factor, even if the Federal Supreme Court has not expressly stated this. This view also appears to be held

by the doctrine and the Federal Office of Justice, which was cited by the Federal Supreme Court in its decision.<sup>2</sup>

In a judgment dated 15 September 2020, i.e. still during the Transitional Period, the Zurich High Court ruled that the United Kingdom must be treated as a state bound by the Lugano Convention during the Transitional Period until 31 December 2020.<sup>3</sup> It thus upheld the decision of the District Court of Hinwil dated 24 February 2020, according to which the Lugano Convention applies to the recognition and enforcement of an English judgment from 2018.<sup>4</sup> However, when initiating recognition and enforcement proceedings **after** the expiry of the Transitional Period, the District Court of Zurich now appears to have taken a different view in another recent decision.

Shortly before the Federal Supreme Court judgment was handed down, the Zurich District Court ruled that the Lugano Convention was not applicable if the proceedings in Switzerland in which recognition and enforcement were sought had been commenced **after** the expiry of the Transitional Period (consideration 2.2). This was held despite the English judgment being handed down **before** the expiry of the Transitional Period (consideration 2.2).<sup>5</sup> The District Court thus focuses on the initiation of the recognition and enforcement proceedings in Switzerland and not on the date of the English judgment. According to this view, all proceedings initiated after 1 January 2021 in which the question of recognition of an English judgment arises would have to be assessed in accordance with the PILA (consideration 2.2)

The prevailing opinion in the legal literature and the Federal Office of Justice base their view on the one hand on the aforementioned prohibition of retroactivity in the PILA. On the other hand, they argue that the recognition of a foreign judgment is ultimately a matter of extending its effect to the territory of Switzerland and that this effect should be assessed in accordance with the law applicable at the time of the foreign judgment and not at the time of the (rather random) date of an application for recognition and enforcement.<sup>6</sup>

<sup>2</sup> See: <https://www.bj.admin.ch/bj/de/home/wirtschaft/privatrecht/lugue-2007/brexit-auswirkungen.html> (visited 31 August 2021) and for the doctrine footnote 6.

<sup>3</sup> High Court judgment RV200011-O of 15 September 2020, consideration 4.

<sup>4</sup> The High Court judgment was set aside by the Federal Supreme Court and remanded for reconsideration, but not because of the question of the applicability of the Lugano Convention: BGer 4A\_551/2020 of 26 February 2021, E. B.b.

<sup>5</sup> Judgment of the District Court of Zurich, 24 February 2021, available at: <https://www.arrestpraxis.ch/entscheide/art-271-schkg/abs-1-ziff-6/> (visited 31 August 2021).

<sup>6</sup> SIEVI NINO, Die praktischen Auswirkungen des Brexits auf die Anwendung des Lugano-Übereinkommens, ZZZ 54/2021, 541 et seq., 548, who does not consider the United Kingdom to be among the states bound by the Lugano Convention during the Transitional Period (loc. cit, 544); ARNOLD CHRISTIAN, Das Exequaturverfahren im Anwendungsbereich des Lugano-Übereinkommens vom 30. Oktober 2007 aus schweizerischer Sicht, RJL 72, 2020, para. 103; MARKUS ALEXANDER R./HUBER-LEHMANN MELANIE, Rechtsprechung zum Lugano-Übereinkommen 2019, SRIEL 2020, 295 et seq., 298.

This view seems to be shared by the Federal Supreme Court, at least in the case at hand, which is why it can be assumed that a **judgment** that was issued **during the Transitional Period** and thus during the applicability of the Lugano Convention must also meet the **requirements of the Lugano Convention** and not the stricter standard of the PILA for recognition and enforcement - regardless of when the application for recognition and enforcement was filed in Switzerland.

It is not entirely clear how constellations are to be assessed in which an appeal has been lodged against the English judgment and the judgment is subsequently amended or confirmed by an appellate decision. The question arises as to whether, in subsequent recognition and enforcement proceedings, the date of the judgment of first-instance or the date of the appellate decision should be decisive.<sup>7</sup> The Federal Supreme Court left this question unanswered in its decision, although the English Court of Appeal did not decide until 8 February 2021 and thus

after the expiry of the Transitional Period (see facts of the case, consideration E.). The reason for this is probably that the Court of Appeal did not admit the appeal (consideration E.), rendering it irrelevant for the Federal Supreme Court's assessment. This suggests that the initiation of appeal proceedings does not in itself have any influence on the question of the subsequent applicability of the Lugano Convention to the recognition and enforcement of a judgment, at least insofar as the appeal is not admitted.

It remains open whether the Lugano Convention also applies if the proceeding before the court of first instance in the United Kingdom was initiated before 1 January 2021, but a first judgment is handed down only after 31 December 2020. In the absence of judicial clarification, the issue remains contentious to date.<sup>8</sup> However, in view of the arguments put forward, it seems likely that the PILA would apply.

<sup>7</sup> On this point: SIEVI, *op. cit.*, 548.

<sup>8</sup> For the application of the Lugano Convention: MARKUS ALEXANDER R./RUPRECHT IVAN, *Rechtsprechung zum Lugano-Übereinkommen* (2020), SRIEL 2021, 313 et seq., 316.



**CYRILL SÜESS**  
Attorney-at-Law, lic. iur. HSG  
LL.M. Queen Mary University of London  
Partner



**RICHARD M. MEYER**  
Attorney-at-Law, MLaw UZH  
Associate

**BIANCHISCHWALD LLC**  
mail@bianchischwald.ch  
bianchischwald.ch

**GENEVA**  
5, rue Jacques-Balmat  
P.O. Box 1203  
CH-1211 Geneva 1  
**P** +41 58 220 36 00  
**F** +41 58 220 36 01

**ZURICH**  
St. Annagasse 9  
P.O. Box 1162  
CH-8021 Zurich  
**P** +41 58 220 37 00  
**F** +41 58 220 37 01

**LAUSANNE**  
12, avenue des Toises  
P.O. Box 5410  
CH-1002 Lausanne  
**P** +41 58 220 36 70  
**F** +41 58 220 36 71

**BERN**  
Elfenstrasse 19  
P.O. Box 1208  
3000 Bern 16  
**P** +41 58 220 37 70  
**F** +41 58 220 37 71