

IMPACT OF BREXIT ON ASSET RECOVERY IN SWITZERLAND

Matthias Gstoehl and Pierre-Yves Marro

JUDGMENT OF THE ZURICH DISTRICT COURT

- 1 On 24 February 2021, a Swiss Court dealt for the first time with the effects of Brexit on asset recovery in Switzerland. The judgment¹ of the Zurich District Court² (“**District Court**”) concerns an application for the declaration of enforceability of a London High Court of Justice judgment of September 2020 and the granting of a corresponding attachment order. The applicant had filed its request on 18 February 2021, basing it on the Lugano Convention.
- 2 According to the District Court, the Lugano Convention applies if both States involved—here, the UK and Switzerland—are bound³ by the Convention. The District Court noted that the UK had formally withdrawn from the EU (effective 1 February 2021) and thus from the Lugano Convention (effective 1 January 2021)^{4,5}.
- 3 The District Court concluded that, under the circumstances, the declaration of enforceability was no longer governed by the Lugano Convention. Hence, the District Court rejected the application for enforceability and decided on the attachment in separate proceedings.

¹ Available at https://www.arrestpraxis.ch/fileadmin/redaktion/arrestpraxis/media/2021-02-24_Urteil_BGZ_Audienz_redacted.pdf.

² I.e., the court of first instance with general jurisdiction for the city of Zurich.

³ The District Court repeatedly stated in its judgment that the UK used to be a contracting party to the Lugano Convention. However, this is incorrect; the UK used to be *bound* by the Lugano Convention due to its EU membership.

⁴ See Article 126 of the Withdrawal Agreement, O.J. L 29/7 (2020).

⁵ In April 2020, the UK applied to join the Lugano Convention in its own right. While the EU vetoed the UK’s accession, Switzerland and all other contracting parties declared their support for the UK’s accession; see www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007.

OBSERVATIONS

- 4 In support of its request, the applicant had invoked the summary assessment published by the Swiss Federal Office of Justice (“**FOJ**”) in December 2020 regarding the impact of Brexit on the Lugano Convention (“**FOJ Assessment**”)⁶. The applicant cited a passage⁷ in the FOJ Assessment pertaining to the continued application of the Lugano Convention to British judgments rendered before the withdrawal date.
- 5 The District Court first noted that the FOJ Assessment only reflected the FOJ’s legal assessment, which is not binding on Swiss courts. The District Court then observed that the FOJ Assessment contained conflicting passages: On the one hand, it states that from 1 January 2021 onwards, the recognition and declaration of enforceability of judgments are no longer governed by the Lugano Convention but by Swiss national law.⁸ On the other hand, the FOJ states that the Lugano Convention continues to apply to British judgments rendered before the withdrawal date, regardless of when recognition and declaration proceedings are commenced in Switzerland.⁹ Highlighting the contradiction between the two statements, the District Court rejected the latter statement.
- 6 Another aspect of the FOJ Assessment, which the District Court did not address, is the FOJ’s consideration of Article 67(2) of the EU-UK Withdrawal Agreement (“**Agreement**”)¹⁰.¹¹ Under this provision, the Brussels Ia Regulation No 1215/2012 continues to apply to the recognition and enforcement of judgments rendered in legal proceedings instituted before 31 December 2020. The FOJ argues that the same should also apply to the Lugano Convention because it is “largely parallel” to the Brussels Ia Regulation.¹² In our view, this argument is moot: What the EU and the UK

⁶ FOJ, Impact of Brexit on the Lugano Convention, published online on 9 December 2020, available at <<https://www.bj.admin.ch/bj/en/home/wirtschaft/privatrecht/lugue-2007/Brexit-auswirkungen.html>>.

⁷ FOJ (above, fn. 6), Section “Situation as of 1 January 2020”, third bullet point.

⁸ See FOJ (above, fn. 6), Section “Situation as of 1 January 2020”, introductory sentence.

⁹ FOJ (above, fn. 6), Section “Situation as of 1 January 2020”, third bullet point.

¹⁰ O.J. L 29/7 (2020).

¹¹ FOJ (above, fn. 6), Section “Situation as of 1 January 2020”, third bullet point, footnote 3.

¹² FOJ (above, fn. 6), Section “Situation as of 1 January 2020”, third bullet point, footnote 3.

stipulated in their Agreement has no bearing on the Lugano Convention, as it concerns a different international treaty with different parties.

7 In addition, the District Court held that the Lugano Convention contains transitional rules set out in Article 63. However, the District Court also held that this provision only addresses the accession of contracting parties to—but not the withdrawal from—the Lugano Convention.

8 A literal interpretation of the provision does not warrant a different conclusion, and there is no precedent that has held otherwise. Besides, there is no principle under Swiss or international law that calls for the continued application of an international treaty, such as the Lugano Convention, after it has lapsed or when its temporal preconditions are not met.

9 In our view, the District Court’s reasoning in the matter at hand is correct.

PRACTICAL IMPLICATIONS FOR ASSET RECOVERY?

10 For all cases in which the Lugano Convention does not apply, an applicant loses the benefits of procedural simplifications to enforce foreign judgments under the Convention, including generally reduced court fees. Instead, the declaration of enforceability must conform to the Swiss Private International Law Act (“PILA”), in particular, its Articles 25 to 29.

11 In short, the preconditions for a declaration of enforceability are as follows: the judgment in question was rendered in the State in which the defendant had its domicile (here, in the UK) or by a court based on a jurisdiction clause; further, there are no means to appeal the judgment; finally, the judgment does not contravene Swiss public order. While they will need to be demonstrated in each case, these preconditions will typically not be problematic with respect to British judgments.

12 Under the PILA, a declaration of enforceability may be requested either in separate proceedings, which are only about obtaining a declaration, or within attachment proceedings. In the latter case, a declaration of enforceability, or its dismissal, will only be examined on an interlocutory basis, without *res judicata* effect.

13 Long story short: Given the above, the judgment of the District Court will have limited implications in practice, if one discounts the additional hurdle of demonstrating that the preconditions under the PILA are met. When in

doubt whether the Lugano Convention or the PILA applies, a cautious applicant will base its request for a declaration of enforceability on both set of rules.

Contact the authors:

Matthias Gstöhl, Partner, mgstohl@lalive.law

Pierre-Yves Marro, Associate, pymarro@lalive.law