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Brexit - what consequences for the Lugano Convention?

The Lugano Convention governs the jurisdiction, recognition and enforcement of judgments in civil and commercial matters in cases between parties domiciled or having their seat in different Member States. The Lugano Convention not only determines the jurisdiction of the authorities, but above all facilitates the recognition and enforcement in Switzerland of civil judgments rendered in a State bound by the Lugano Convention or of Swiss judgments in a State bound by the Lugano Convention. It is therefore of great practical relevance.

To date, the European Union, Norway, Iceland, Denmark (excluding the Faroe Islands and Greenland) and Switzerland are bound by the Lugano Convention.

The United Kingdom was bound by the Lugano Convention only because of its status as a Member State of the European Union. However, as it is well known, the United Kingdom recently left the European Union, leaving the question of the applicability of the Lugano Convention open. The Federal Court recently had the opportunity to provide clarifications in relation to these issues (Ruling 5A_697/2020* of 22 March 2021 published on 28 July 2021).

This contribution aims to answer some key questions related to the effects of Brexit on the Lugano Convention.

When will the Brexit affect the Lugano Convention?

The arrangements for the UK's exit from the European Union are governed by an agreement of 24 January 2020. This agreement provides for a transition period until 31 December 2020 during which the United Kingdom would be considered as a State bound by the Lugano Convention.

As Switzerland is not a member of the EU, it sought to clarify this situation. This resulted in an exchange of diplomatic notes with the European Union, which indicated that the United Kingdom would be considered an EU Member State until the end of the transitional period ending on 31 December 2020.

As a result, from 1 January 2021, the UK is no longer formally bound by the Lugano Convention.

What law applies to proceedings pending before 1 January 2021?

The Federal Office of Justice (FOJ) is of the opinion that the recognition and declaration of enforceability of judgments issued before ¹ January 2021 will continue to be governed by the Lugano Convention even after 31 December 2020 (FOJ, Consequences of Brexit on the Lugano Convention, [<https://www.bj.admin.ch/bj/fr/home/wirtschaft/privatrecht/lugue-2007/brexit-auswirkungen.html>]).

Furthermore, courts with jurisdiction under the Lugano Convention that are seized of main proceedings initiated before 31 December 2020 at the latest remain competent, even if their jurisdiction would be excluded under national law. According to the FOJ, this rule results from the general principles of international law and civil procedure (vested right, principle of non-retroactivity, principle of legal certainty), which are partly reflected in Art. 1 Tit. fin. of the Civil Code (RS 210 / CC) and in Art. 196 Private International Law Act (RS 291 / PILA) and which also inspired Art. 63 Lugano Convention. For the United Kingdom, this is a result of the legislation implementing the Brexit (Sec. 92 Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019)

What law applies to proceedings commenced from 1 January 2021?

National law, i.e. in Switzerland the PILA, will determine the jurisdiction of the courts and the recognition and enforcement of decisions for proceedings commenced after 1 January 2021.

Perspectives

The United Kingdom applied on 8 April 2020 to join the Lugano Convention. Member States will have to unanimously accept the United Kingdom's accession.

The European Union, through the European Commission, has spoken out against the UK's accession to the Lugano Convention, stating that: "(...) *the Lugano Convention is an accompanying measure of the internal market and is linked to the EU-EFTA/EEA context. With regard to all other third countries, the consistent policy of the European Union is to promote cooperation under the multilateral Hague Conventions. The UK is a third country with no particular link to the internal market. There is therefore no reason for the EU to deviate from its general approach towards the UK. (...)*" (Communication from the Commission to the European Parliament and the Council of 4 May 2021 – Evaluation of the United Kingdom's application for accession to the 2007 Lugano Convention [https://ec.europa.eu/info/sites/default/files/1_fr_act_fr_0.pdf])

If the United Kingdom does not accede to the Lugano Convention, the conduct of proceedings against natural or legal persons established in the United Kingdom will be more complicated, in particular with regard to the enforcement of judgments.

Source : <https://www.wg-avocats.ch/en/news/contract-law/brexit-lugano-convention/>