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Dispute Resolution

Schellenberg Wittmer

Swiss Federal Supreme Court Case Law of 2021 on Selected Procedural Law Issues

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In this newsletter, we discuss four selected decisions of the past year, in which the Federal Supreme Court dealt with the impact of Brexit on the applicability of the Lugano Convention, the effects of the withdrawal of an action for negative declaratory relief, the appeal procedure in mutual assistance in criminal matters and the protection of the attorney-client privilege in criminal proceedings.

1 Clarification of the Temporal Scope of the Lugano Convention after Brexit

1.1 Decision 5A_697/2020 of 22 March 2021 (DSC 147 III 491)

Based on **a judgment obtained before the London courts in October 2019** in the amount of GBP 8,000,000, four creditors requested the civil attachment of assets located in Switzerland, thereby seeking the preliminary recognition and enforcement of the judgment. The **civil attachment was ordered in December 2019**; the debtor objected to it. The debtor's objection was rejected in April 2020, which was confirmed by the Cantonal Court of Vaud in July 2020 and by the Federal Supreme Court in March 2021.

The Federal Supreme Court examined the applicability of the Lugano Convention (LC) to the dispute in light of Brexit. It first recalled that the United Kingdom was considered a member of the LC until the end of the **transition period on 31 December 2020**.

The Lugano Convention may still apply to the enforcement of UK civil judgments rendered before 31 December 2020.

The Federal Supreme Court held that the decision on the recognition and enforcement of an English judgment rendered prior to 1 January 2021 had rightly been based on the LC. Likewise, the Court's own examination had to be conducted under the LC, even though the transition period had expired in the meantime. According to several legal authors and the Federal Office of Justice, **the recognition and enforcement of judgments issued during the time period in which the LC was applicable continue, in principle, to be governed by the LC**. In the present case, the English decision predated Brexit, and the cantonal proceedings as well as the receipt of the appeal by the Federal Supreme Court had taken place before the end of the transition period.

In addition, the Federal Supreme Court recalled that in the context of a civil attachment, **a decision on the enforceability** of a "Lugano" judgment, whether made in form of a separate order or as part of the attachment order, **can only be challenged by appeal, and not by way of an objection**. The Federal Supreme Court left open the question of whether the appellant must file a specific motion asking for recognition or whether the judge decides on recognition ex officio.

1.2 Comments

The Federal Supreme Court's considerations contribute to clarifying the temporal scope of the LC in the context of Brexit. In principle, the Court's reasoning should apply **to all decisions rendered in the United Kingdom before 31 December 2020**. However, it should be noted that the Federal Supreme Court did not base the applicability of the LC solely on the date of issuance, but left a certain margin of discretion. Thus, it remains to be seen whether, in certain cases, recognition must nevertheless be sought under the Federal Act on Private International Law (PILA).

2 Effect of the Withdrawal of an Action for Negative Declaratory Relief

2.1 Decision 5A_383/2020 of 22 October 2021 (marked for publication)

In this decision, the Federal Supreme Court dealt with the question of whether the **withdrawal of an action for negative declaratory relief** can be invoked as a definitive title to set aside an objection in terms of Article 80 of the Swiss Debt Enforcement and Bankruptcy Act (DEBA). An (alleged) debtor had brought two actions before the Commercial Court of St. Gallen, requesting a **declaration** that the counterparty **did not have any claim** against it. After consolidation of the two proceedings and a request by the counterparty for payment of security for party costs, the debtor withdrew both actions.

The creditor later applied to the District Court of Lenzburg for the setting aside of the debtor's **objection** against two payment orders which had been issued in debt enforcement proceedings relating to the same claims. The creditor submitted that the debtor's withdrawal of the actions for negative declaratory relief in the original proceedings equals a definitive title suitable to set aside the debtor's objection.

The Federal Supreme Court recalled that declaratory judgments **do not contain an order for performance** and are therefore not enforceable. Hence, as a rule, declaratory judgments do not constitute definitive titles to set aside a debtor's objection in debt enforcement proceedings.

However, the case law of the Federal Supreme Court (DSC 134 III 656) allows for an exception where a debtor's action for the denial of a debt under Article 83 DEBA (*Aberkennungsklage*), a special negative declaratory action in the framework of debt collection proceedings, is dismissed.

According to the Federal Supreme Court, it had only softened the sharp distinction between declaratory judgments and judgments for performance in the context of enforcement proceedings since a court, when dismissing the action for negative declaration brought under Article 83 DEBA, has actually examined the merits of the dispute. Also, the creditor has usually filed a statement of defense and thus a statement on the merits of the case before the judgment is rendered. In the Supreme Court's view, granting this privilege to the creditor even if – as in the case at hand – there is neither **a specific request for performance nor a judicial assessment of the substance of the matter** would not be justified. Therefore, the withdrawal of an action for negative declaratory relief **does not constitute a definitive title to set aside the debtor's objection** against a payment order in debt enforcement proceedings.

2.2 Comments

Pursuant to the Federal Supreme Court, the legal effects of a withdrawal of an action may be limited compared to those of a

judgment dismissing the action. Therefore, if the creditor, facing an action for a negative declaration, wishes to obtain a title allowing it to have the debtor's objection in debt enforcement proceedings set aside, it is well advised to file a counterclaim and demand that the debtor be **ordered to pay** the litigious claim.

The withdrawal of an action for negative declaratory relief does not constitute a definitive title in debt enforcement proceedings.

3 Raising a Public Policy Objection in Mutual Assistance Proceedings in Criminal Matters

3.1 Decision 1C_245/2020 of 19 June 2020

In 2018, the Swiss judicial authorities received a request for mutual assistance in criminal matters from the Brazilian Federal Prosecutor's Office. The Office of the Attorney General of Switzerland ordered the transmission of the bank records in question. The account holder, A. Inc., appealed to the Lower Appeals Chamber of the Federal Criminal Court and eventually to the Federal Supreme Court.

Before the Federal Supreme Court, A. Inc. claimed, inter alia, that the Lower Appeals Chamber had wrongly failed to examine the alleged **violation of Article 1a of the Federal Act on International Mutual Assistance in Criminal Matters (IMAC)**. According to this provision, mutual assistance may be refused if it impairs the sovereignty, security, public order or other essential interests of Switzerland.

In this regard, the Federal Supreme Court recalled that the application of Article 1a IMAC is reserved to the **Federal Department of Justice and Police (FDJP)** and that the Lower Appeals Chamber of the Federal Criminal Court lacks jurisdiction. The decision of the FDJP can subsequently be challenged by an administrative appeal to the Federal Council.

3.2 Comments

The purpose of Article 1a IMAC is to enable the Swiss authorities to refuse mutual assistance for **reasons of political expediency**. Mutual assistance that runs counter to Switzerland's essential interests can be restricted by the FDJP and the Federal Council – even ex officio. The question of whether Switzerland's sovereignty, security, public policy or other essential interests according to Article 1a IMAC are violated is of a purely political nature and must be answered **independently of the legal aspects** of mutual assistance.

The protection of the Swiss economy can be cited as an example of an essential interest of Switzerland. With this in mind, however, mutual assistance can only be restricted if the feared disadvantage affects the Swiss economy as a whole (e.g. a global embargo on Swiss products). Under certain conditions, essential national interests also include banking secrecy, which, however, can only justify a restriction of mutual assistance if the protection of banking secrecy would otherwise be deprived of its substance, which is generally not the case.

Depending on the grounds, there are thus **two parallel options for recourse** against a final decree in mutual assistance matters: one is via the FDJP and thereafter the Federal Council if the objections are political in nature, the second is by way of an ordinary appeal to the Federal Criminal Court and then the Federal Supreme Court for legal challenges. In the event that both options are being pursued, the **legal issues take precedence**. Hence, mutual assistance that has been rejected by the judicial authorities cannot subsequently be approved on the grounds that it is in the national interest. The reverse, however, is possible.

The question of whether the provision of mutual assistance affects essential national interests must be examined by the political authorities.

4 Correspondence with Foreign Lawyers Exempt from Seizure

4.1 Decision 1B_333/2020 of 22 June 2021 (DSC 147 IV 385)

As part of a criminal investigation, the OAG seized extensive data from a company in Switzerland, including **correspondence with lawyers**. The company objected and had the documents sealed. In the course of the unsealing procedure, it was disputed to what extent the **correspondence with foreign lawyers** was protected from seizure.

Following a comprehensive examination of the law, the Federal Supreme Court held that correspondence of the (non-accused) company with one of its lawyers is only protected from seizure if the lawyer in question is authorized to represent the company before Swiss courts under the **Federal Act on the Freedom of Movement for Lawyers (FAFML)**. The company's correspondence with all other lawyers was therefore unsealed and made accessible for the purposes of the criminal investigation.

Lawyers qualifying as FAFML lawyers in this sense include Swiss lawyers listed in the cantonal attorney registry as well as foreign lawyers authorized to represent clients before Swiss courts. Such authorization is subject to two conditions:

the foreign lawyer must (a) **be a citizen of an EU or EFTA member state or the United Kingdom** and (b) **be admitted to practice law there**. Other foreign lawyers do not qualify as FAFML lawyers, which is why correspondence with them does not, in principle, benefit from any protection against seizure. An exception applies, at least, to the lawyers representing the accused (Article 264 para 1 lit. c of the Swiss Criminal Procedure Code, CrimPC).

4.2 Comments

The decision leads **to problematic, sometimes even absurd results**. The distinction based on nationality and place of practice of the foreign lawyer is irrelevant and ignores the constraints of a globalized economy. Nor is it convincing that the foreign lawyer is entitled to refuse to testify under the CrimPC, while his written statements can be denied protection. Finally, the new case law leads to considerable legal uncertainty because the scope of protection against seizure is made dependent on circumstances which are not foreseeable (i.e. the procedural position).

The decision follows seamlessly in the footsteps of other decisions of the Federal Supreme Court in recent years, all of which restricted the scope of protection of the attorney-client privilege. This **development raises concerns**, especially since attorney-client privilege is a fundamental pillar of the rule of law. In the future, the involvement of foreign lawyers in sensitive mandates will have to be considered and structured very carefully.

Correspondence with foreign lawyers often remains unprotected in criminal proceedings.

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