

A Post-Brexit Guide To UK-Swiss Disputes

By **Janine Alexander and Sébastien Collart** (March 5, 2021, 5:11 PM EST)

The Brexit transition period ended on Dec. 31, 2020, or "Exit Day."^[1] Since Jan. 1, the courts of England and Wales are no longer covered by the EU rules for establishing jurisdiction and for mutual recognition and enforcement of judgments between member states contained in the Brussels Regulation.

Brexit also resulted in the U.K. no longer being party to the Lugano Convention, which establishes unified rules regarding jurisdiction and the mutual recognition and enforcement of judgments between the EU member states other than Denmark as one entity — previously, but now no longer, including the U.K. — and Norway, Denmark, Iceland and Switzerland.

The aim of the Lugano Convention is to prevent parallel proceedings and irreconcilable judgments in two countries because their courts take different views as to which court has jurisdiction, and to ensure mutual respect for the judgments of other participating countries without substantive review of the merits of the claim under a different national law.

Therefore cross-border disputes involving parties and assets in England, Wales and Switzerland are also affected by Brexit.^[2]

As things now stand, the position for cross-border disputes between the U.K. and Switzerland is the same as that between the U.K. and the EU member states in that the key issues of jurisdiction, and recognition and enforcement of foreign judgments in civil and commercial cases are governed by each country's national laws, with the exception of any international treaties in force in both states.

That position will remain until either all the Lugano Convention members agree that the U.K. may rejoin in its own right or a separate agreement is reached between the U.K. and Switzerland.

At present, while Switzerland has indicated its consent for the U.K. to accede to the Lugano Convention, the EU has not and is expressing some concerns about potential anomalies arising from the U.K.'s position outside the EU.

Consequently, for now, the Swiss courts will apply the provisions of the Federal Private International Law Act, or PILA, and the U.K. will apply its common law rules.



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Swiss Law Position

Jurisdiction

For proceedings initiated under the Lugano Convention before Jan. 1, the courts and authorities involved when the cases were introduced, despite the fact they could no longer have jurisdiction under national law, shall remain competent and their jurisdiction shall not change, in accordance with the general principles of international and civil procedural law, e.g., legal certainty, *droits acquis*, prohibition of retrospective legislation.[3]

However in proceedings initiated on or after Jan. 1, any dispute regarding the Swiss court's jurisdiction will be dealt with in accordance with Swiss law, by the application of the provisions of PILA, under which the relevant rules and principles depend on the type of proceedings concerned.

The general principle is that the Swiss judicial or administrative authorities at the defendant's domicile have jurisdiction unless specific provisions of PILA provide otherwise.[4]

In contractual matters for instance, such as breach of contract, Swiss courts at the defendant's place of business also have jurisdiction for claims relating to an obligation arising out of the operation of such place of business.[5] When the characteristic obligation of the contract must be performed in Switzerland, the claim may also be brought before the Swiss Court at the place of performance.[6]

Recognition and Enforcement of UK Judgments

The recognition and enforcement in Switzerland of U.K. judgments rendered before Exit Day will continue to follow the Lugano Convention regime.[7] The recognition and enforcement in Switzerland of U.K. judgments rendered post Exit Day in proceedings initiated post Exit Day shall be subject to the provisions of PILA.

The courts' position is still uncertain regarding the recognition and enforcement in Switzerland of U.K. judgments rendered after Exit Day in proceedings initiated before Exit Day. If the Swiss courts apply the above-mentioned general principles of international and civil procedural law, they could conclude that the Lugano Convention provisions apply.

This was the initial view of the Swiss Federal Office of Justice[8] but such position has been criticized. Otherwise, the provisions of PILA shall solely apply.

The recognition and enforcement process for foreign judgments under the regime of PILA is more complicated than under the Lugano Convention as decisions are subject to additional substantial scrutiny. The following conditions must be met for recognition of a U.K. judgment under PILA, the mandatory preliminary process parties must follow before enforcing the judgment.[9]

- The jurisdiction of the U.K. court rendering the decision was established.
- No ordinary judicial appeal is available against the decision in the U.K. or the decision is otherwise final.[10]
- There are no grounds for refusal in Switzerland, such as when:[11]

- The decision is evidently incompatible with Swiss public policy;
- A party has not been duly summoned;
- The decision was rendered in violation of fundamental principles of Swiss procedural law, such as the right to be heard; or
- Proceedings on the same matter and involving the same parties were first initiated in Switzerland.

Consequently, PILA provisions can, in certain cases, prevent the recognition and enforcement of U.K. judgments that would otherwise be enforceable under the Lugano Convention creating additional uncertainty for parties seeking to enforce in Switzerland.

For example, it is possible that the Swiss court may determine, under Swiss law, that the English court did not have jurisdiction when the English court has concluded that it did. This is a key departure from the position under the Lugano Convention that was based on the principle that the jurisdiction of the originating court was not subject to review as a condition of enforcement.[12]

It is likely that the enforcement of U.K. freezing injunctions preventing the disposal of assets worldwide would be refused by Swiss courts under the PILA provisions. Where the Lugano Convention allows for the recognition and enforcement of all judgments which are enforceable in the member state where the decision was rendered, PILA provisions require judgments to be final in order to be enforceable.

Therefore parties considering issuing proceedings in England with the intention of enforcing a judgment in Switzerland should first seek Swiss legal advice to understand how the Swiss court will approach the question of jurisdiction in the particular case and to ensure that the judgment obtained in England will in fact be enforceable in Switzerland.

English Law Position

Jurisdiction

For proceedings issued before Jan. 1, the courts of England and Wales will continue to apply the Lugano Convention rules in relation to any dispute as to establishing jurisdiction in U.K.-Swiss matters.

For proceedings issued on or after Jan. 1, jurisdiction in U.K.-Swiss commercial cases will be determined according to the national law of England and Wales.

In cross-border cases brought in the English court, jurisdiction is, as a matter of practicality, dealt with at the outset of proceedings in the course of the procedure for obtaining permission to serve proceedings outside England and Wales.

In order to obtain permission, in addition to considering the merits of the proceedings to ensure there is a real prospect of success on the claim, the court will also consider whether the claimant has a good arguable case that the proceedings fall within at least one of a number of jurisdictional gateways.

Examples of provisions potentially relevant in commercial cases include:

- The defendant is domiciled within England and Wales.

- The defendant is a necessary and proper party to a claim brought against one or more other defendants over whom the court has jurisdiction.
- The claim involves a contract made within the jurisdiction, or allegedly breached within the jurisdiction.
- The claim involves a contract governed by English law or where the parties have agreed that English courts should have jurisdiction.
- The claim involves a tort allegedly committed within the jurisdiction or the damage was sustained within the jurisdiction.
- The claim is for an injunction restraining a party from doing something within the jurisdiction.
- The claim relates to a trust governed by English law or including a choice of court provision in favor of the court of England and Wales, or to a constructive trust created by acts committed in the jurisdiction, or relating to assets within the jurisdiction.

The same principles apply in relation to disputes about jurisdiction in proceedings with an international element but where it has been possible to serve them on the defendant(s) within England and Wales, or where the court was sufficiently persuaded that there was a good arguable case to give permission to serve the proceedings outside the jurisdiction but the defendant continues to dispute that the court has jurisdiction.

The court may also conclude that although it has jurisdiction, based on the principle that there is another court more appropriate or convenient to hear the claim, i.e., *forum non conveniens*.

Recognition and Enforcement of Swiss Judgments

Judgments obtained in proceedings issued before Jan. 1 will still be subject to the Lugano Convention Rules — from the drafting of the relevant regulations it appears^[13] that this is intended to include judgments handed down after Jan. 1.

Judgments in proceedings issued on or after Jan. 1 will be subject to the common law principles applicable to judgments from the courts of all countries not party with the U.K. to an international convention or bilateral treaty.

To enforce a judgment of the Swiss court in England and Wales the enforcing party must issue separate proceedings claiming the amount owed as a debt. The judgment must be final, be for a definite sum and not be in relation to taxes, a penalty or penal damages — as opposed to compensatory.

The English court will not enforce judgments where the original court lacked jurisdiction according to the principles of English law — again, a key departure as between England and Switzerland from the position under the Lugano Convention — nor where the judgment was obtained by fraud, is contrary to public policy or in breach of the requirements of natural justice.

Next Steps and Solutions to Consider

While the current position creates some additional uncertainty and potentially additional cost and scope for satellite litigation, in most cases, at least involving money judgments, the rules of national law in

each country will apply to provide a broadly similar result to the Lugano Convention.

However, differences are possible particularly for judgments which are not straightforward claims for damages and therefore parties should seek advice from lawyers in each jurisdiction before starting proceedings, particularly if it will be necessary or potentially necessary to enforce a judgment of the English court in Switzerland or vice versa.

The key areas where advice on the law of the other jurisdiction will be necessary are likely to be whether a different conclusion may be reached as to which court is the most appropriate court to hear the proceedings, and also whether, the court in which the judgment is to be enforced will be likely to accept that the court hearing the matter had jurisdiction to do so. There are also risks in relation to public policy and what is meant by the requirements of natural justice in each country.

Pending the U.K.'s desired accession to the Lugano Convention, or in the absence of that a bilateral treaty between the U.K. and Switzerland, parties may wish to consider carefully the dispute resolution provisions in their present and future contracts encompassing transactions involving U.K. and Swiss parties.

Swiss law is generally favorable in respecting choice of court provisions and so this can be helpful in creating more certainty in cases involving contractual relationships.

If a party is concerned about the potential need to enforce a judgment solely against assets in one jurisdiction or the other then at present and subject to consideration of the other relative advantages and disadvantages, arbitration may be a better option to specify as the means of dispute resolution considering that the 1958 New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which the U.K. and Switzerland are parties, is unaffected by Brexit and continues to govern the recognition and enforcement of arbitration awards.

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[1] Article 126 of 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 January 24, 2020 (the "EU-UK Withdrawal Agreement");

[2] This article deals only with the position between the Swiss Courts and the Courts of England and Wales – it does not deal with litigation involving the Courts of other parts of the UK.

[3] Swiss Federal Office of Justice («FOJ») notice of December 9, 2020 (<https://www.bj.admin.ch/bj/en/home/wirtschaft/privatrecht/lugue-2007/brexit-auswirkungen.html>) (last consulted on February 4, 2021);

[4] Article 2 PILA;

[5] Article 112 para. 2 PILA;

[6] Article 113 PILA;

[7] Swiss Federal Office of Justice («FOJ») notice of December 9, 2020
(<https://www.bj.admin.ch/bj/en/home/wirtschaft/privatrecht/lugue-2007/brexit-auswirkungen.html>)
(last consulted on February 4, 2021);

[8] Swiss Federal Office of Justice («FOJ») notice of December 9, 2020
(<https://www.bj.admin.ch/bj/en/home/wirtschaft/privatrecht/lugue-2007/brexit-auswirkungen.html>)
(last consulted on February 4, 2021);

[9] Article 25 PILA;

[10] Article 25 lit. b. PILA;

[11] Article 25 lit. c. and art. 27 PILA;

[12] Article 25 lit. a. PILA. The validity of the jurisdiction of the UK court is to be examined in light of the indirect jurisdiction rules provided by Swiss international private law, i.e. PILA, see art. 26 PILA. The Swiss courts will therefore determine if, from a Swiss international private law perspective, the jurisdictional link is sufficient for the UK courts to exert jurisdiction over a given case. The Lugano Convention regime, on the other hand, is based on the principle that the jurisdiction of the court of the State of origin may not be reviewed (art. 35, para. 3 Lugano Convention);

[13] The Civil Jurisdiction and Judgments (Amendment)(EU Exit) Regulations 2019