

No-deal Brexit and jurisdiction issues—the Swiss position

11/10/2019

Dispute Resolution analysis: Dr Urs Feller, partner, Marcel Frey, counsel and Michaela Kappeler, associate, at Prager Dreifuss Ltd, Zurich, discuss from the Swiss perspective, the likely impact of a no-deal Brexit on civil justice matters involving UK parties and the approach to jurisdiction clauses, both prior to and after exit day.

Are you aware of any guidance published by the Swiss government, courts, bar or other authorities on the impact of a no-deal Brexit on civil justice matters involving UK parties? If so, please provide a copy or link.

No, there is no specific guidance available regarding civil justice matters involving UK parties. However, there is some guidance available, and some agreements have been signed between Switzerland and the UK, with regard to citizens' rights under the Agreement on the Free Movement of Persons (and after such Agreement ceases to be in force) and with respect to trade, road transport, air transport and insurance (under the umbrella of a 'Mind the gap' strategy and also in case of a [no-deal scenario](#))

After exit day, what regime will the courts of Switzerland apply to jurisdiction clauses that give the English court jurisdiction? Is this different to the approach to jurisdiction clauses that give jurisdiction to courts in the US?

Switzerland is not a Member State of the EU. Therefore, the Lugano Convention on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters from 2007 (Lugano Convention) is currently applicable in most private law cases between Switzerland and EU Members States. Our current understanding is that after exit day the UK will cease to be a party to the Lugano Convention since the UK will no longer be a EU Member State. This results in the non-applicability of the Lugano Convention in the case of jurisdiction clauses that give the English court jurisdiction.

Consequently, the courts of Switzerland will apply the Swiss Private International Law Act (PILA) in cases of an international context. Under PILA, art 5, parties can agree on jurisdiction over an existing or potential dispute concerning pecuniary claims arising from a particular legal relationship. Unless otherwise provided for by the jurisdiction clause, the court agreed upon has exclusive jurisdiction. This means that a Swiss court is not competent in the case of a valid jurisdiction clause that gives the English court jurisdiction unless the other party makes an appearance before the Swiss court without reservation. However, if proceedings concerning the same subject matter are already pending before an English court, the Swiss court has to stay the proceedings if there is an expectation that the English court will, within a reasonable period of time, render a decision recognisable in Switzerland.

The same considerations also apply for jurisdiction clauses giving jurisdiction to courts in the US.

After exit day, what regime will the courts of Switzerland apply to a jurisdictional dispute involving a party domiciled in the UK where proceedings were commenced? On or prior to exit day

As already mentioned, prior to exit day, the Lugano Convention is applicable in most instances. In all other cases (eg wills and successions), the Swiss court already applies PILA. The respective regime (Lugano Convention or PILA) remains applicable even after exit day if the proceedings were commenced prior to exit day. According to the Swiss understanding, the principle of *perpetuatio fori* is applicable to both the Lugano Convention and PILA. This means that after a court action is pending, the territorial jurisdiction of the court remains fixed. This is also supported by the general procedural principles of *droit acquis* (acquired rights), non-retroactivity and legal certainty.

Under the Lugano Convention, if the same cause of action is brought before a different court in another Lugano Convention-bound country, the court of that country has to stay the proceedings until the first court has established its jurisdiction. For the situation under PILA with regards to an action concerning the same subject matter, see above.

After exit day

After exit day, a Swiss court will apply PILA.

Does the answer to the above change if the defendant moves from Switzerland to the UK (or vice versa) after proceedings have commenced?

No, the answer to this question does not change, because of the principle of perpetuatio fori.

Interviewed by Susan Ghaiwal.

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