

Newsletter No.

98

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On 1 January 2011, the Swiss Code of Civil Procedure («CPC») and the revised Lugano Convention («LC») entered into force (see NewsLetter No. 95 of November 2010). As a result, civil procedure before cantonal courts throughout Switzerland is now governed by the CPC, and jurisdiction and enforcement of judgements in relation to European Union countries are now governed by the revised LC. Both the LC and the CPC govern jurisdiction and jurisdiction clauses that fall within their respective scopes.

A Jurisdiction Clause Should Be Clear and Tailor-Made

The purpose of a jurisdiction clause (or choice of court agreement) is to establish which court will resolve a potential dispute. To achieve this, a jurisdiction clause must comply with the relevant rules and be clearly worded. In practice, this is frequently not the case. Rather than providing a clear and binding basis for determining the competent court, poorly drafted clauses may open the door for defendants to raise objections to jurisdiction, causing delays and unnecessary complications. Moreover, a jurisdiction clause should be tailor-made to fit the particular needs and circumstances of a given case.

Changes under the Revised LC and the CPC

The revised LC and the CPC bring certain changes to the rules regarding jurisdiction and jurisdiction clauses (e.g., with regard to consumer matters in an international context) but nothing that would be considered «fundamental». However, it is important to be aware of the relevant changes.

Old Clauses and New Rules

What happens with jurisdiction clauses that were made under the old rules? Under the CPC, the basic rule is that a jurisdiction clause that was valid under the rules that were in force at the time when the clause was entered into remains valid. In essence, the validity of such a clause is governed by the old rules and its effect by the new rules of the CPC. Under the revised LC, the validity of a jurisdiction clause is governed by the rules that are in force when the action is brought before a court.

No Right to Decline Jurisdiction in Domestic Cases

Prior to 1 January 2011, Swiss courts were entitled to decline jurisdiction in domestic disputes on the grounds that there was no sufficient connection between the dispute and the respective court. The CPC has, at long last, abolished this entitlement: Swiss courts no longer have the right to decline jurisdiction in a domestic case brought before them on the basis of a (valid) jurisdiction clause even if there is no connection between the dispute and the

court whatsoever. Such right never existed under the LC. In contrast, under the Swiss Private International Law Act («PILA») it is still possible for Swiss courts to decline jurisdiction (if neither of the parties has its seat in the respective Canton and if Swiss law is not the applicable law). In practice, however, the PILA will rarely come into play since in most international cases the rules of the revised LC will apply. It does not matter whether a jurisdiction clause was entered into before the new rules came into force: The right of Swiss courts to decline jurisdiction in domestic cases ceased to have effect on 31 December 2010 once and for all.

Presumption of Exclusivity

Generally, the presumption is that the parties wanted the chosen court to have exclusive jurisdiction. Still, it is generally advisable to expressly state in the clause itself that the chosen court shall have exclusive jurisdiction.

The Parties May No Longer Expressly (Directly) Choose the Zurich Commercial Court

Previously, parties often agreed that jurisdiction should lie with the Zurich Commercial Court. Under the old rules, such an agreement was possible as long as certain conditions were met. As of 1 January 2011, this is no longer the case: Under the new rules it is no longer possible to validly agree that the Zurich Commercial Court (in contrast to, e.g., the Zurich District Court) should have jurisdiction over a dispute. However, the parties may still agree that Zurich should be the legal venue.

In general, the Zurich Commercial Court is competent, as long as (i) the dispute relates to the business of at least one of the parties, (ii) the parties are registered with the Swiss commercial register or with a foreign equivalent and (iii) the amount at stake is at least CHF 30,000. If only the defendant is registered, but all other conditions are met, the claimant may choose between the Zurich Commercial Court and a District Court.

If these aforementioned conditions are met, it is still generally advisable to have the Zurich Commercial Court deal with a case, given the advantages possessed by that court, which include expertise and swift procedure, particularly with a view to the court's standard approach of facilitating an amicable settlement on the basis of a preliminary case assessment. This can be done by agreeing on Zurich as the legal venue. If the above conditions are met, the Zurich Commercial Court will assume jurisdiction.

What happens if the jurisdiction clause expressly provides for the Zurich Commercial Court, which, as mentioned previously, is no longer a valid choice? In this situation, there is a risk that a defendant may argue that had it known the parties could no longer validly choose the Zurich Commercial Court directly, it would have chosen a legal venue other than Zurich. In other words, the defendant could argue that given the invalidity of the parties' agreement as to the Zurich Commercial Court, the entire jurisdiction clause was invalid, including the choice of legal venue.

Unfortunately, the general answer to the above question is the classic lawyerly response: «It depends – it may be a problem, it may not.» In fact, there is uncertainty in some cases since the rules are not clear in all aspects, and no case law has yet been established. The answer depends on the particular circumstances of a given case, whether

the Zurich Commercial Court is, pursuant to the general rules, competent to hear the case or not, and whether the clause was entered into before or after 1 January 2011. To make a long legal story short, the more likely (but not guaranteed) answer in most cases is: If the above-mentioned general conditions for the competence of the Zurich Commercial Court are met, that court will have jurisdiction. If, however, the above conditions are not met (e.g., because both parties are not registered with a commercial register), the Zurich Commercial Court must decline jurisdiction, but the Zurich District Court would be likely to accept the case. As mentioned previously, however, there has not yet been any case law on these issues.

Recommendation

To sum up: A jurisdiction clause should be tailored to fit the concrete circumstances of the case and comply with the relevant rules. One should therefore carefully consider whether the clause actually fits the case as well as the changes brought about by the CPC and the revised LC. If the parties wish for potential disputes to be brought before the Zurich Commercial Court, they should keep in mind that they can no longer validly do so directly, but rather by choosing Zurich as the legal venue.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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