OPTIONAL CHOICE OF COURT AGREEMENTS

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1. Introduction

Choice of court agreements can be found in almost every international commercial contract.[1] While they formally only determine which courts are prorogated and which courts are derogated, they do in fact often have a direct impact on the outcome of the proceedings.[2] This article intends to give a short overview of the legal sources, requirements, limitations and effects of optional choice of court agreements in Switzerland.

2. Legal sources

Being located in continental Europe, Switzerland is a traditional Civil Law country.[3] As such, the primary sources of law are the laws enacted by the legislator.[4] Among those laws are the Code on

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1 DASSER, 89.
2 DASSER, 89.
3 MÜLLER-CHEN/MÜLLER/WIDMER, 151 et seq.
4 MÜLLER-CHEN/MÜLLER/WIDMER, 161 et seq. As opposed to Common Law Systems, where case law is the typical starting point for legal reasoning; MÜLLER-CHEN/MÜLLER/WIDMER, 222 et seq.

Civil Procedure (CCP)[5] and the Private International Law Act (PILA).[6] They both contain rules on jurisdiction and are therefore relevant legal sources for choice of court agreements. In addition to laws enacted by the Swiss legislator (such as the above-mentioned examples), Swiss courts also rely heavily on international law. This is especially true regarding Switzerland's relationship with the European Union. One of the many contracts governing this relationship is the Lugano Convention (LC)[7], a contract based on the European Union's Brussels I Regulation (EuGVVO)[8]. It includes, among other things, rules on jurisdiction and is, therefore, also a relevant legal source when it comes to choice of court agreements.

3. Agreements about jurisdiction

a. In general

Choice of court agreements are generally permitted and are very common in Switzerland.[9] When determining whether a choice of court agreement is permitted and what the requirements and limitations of its validity as well as its effects are, a distinction must be made between the above-mentioned three legal sources: The Code on Civil Procedure, the Private International Law Act and the Lugano Convention. Each of these legal sources has its own scope of application. Therefore, determining the validity of a choice of court agreement presupposes the determination of the applicable legal source.

The applicable legal source can be determined by following two steps: The first step is to determine whether the choice of court agreement concerns a cross-border transaction.[10] In contract law, a cross-border transaction is usually assumed when one of the following attributes of the parties or the contract involves a cross-border component: Domiciles of the contracting parties, place of performance or place of conclusion of the contract.[11] If none of these criteria involve a cross-border component, the applicable legal source is usually the Code on Civil Procedure. Its scope of application is limited to national transactions.[12]

The second step is only relevant in cross-border transactions. In cross-border transactions, a distinction must be made between the scope of application of the Private International Law Act and the Lugano Convention. The Lugano Convention is only applicable in civil and commercial matters if at least one of the parties has his/her domicile in a member state and the parties select a court of one (or more) of those states.[13] If one of those three conditions (civil/commercial matter, domicile of one party in a member state and selection of a court of a member state) is not met, the validity of the choice of court agreement is determined by the Private International Law Act.

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5 Schweizerische Zivilprozessordnung vom 19. Dezember 2008, SR 272.
6 Bundesgesetz über das Internationale Privatrecht vom 18. Dezember 1987, SR 291.
7 Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, SR 0.275.12
8 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
9 See DASSER, 89.
10 BSK-IPRG/GROLIMUND/BACHOFNER, art. 5 N 5; SHK LugÜ/KILLIAS, art. 23 N 15.
11 SCHNYDER/LIATOWITSCH, 4 et seq.; KREN KOSTKIEWICZ, 82.
12 BSK-IPRG/GROLIMUND/BACHOFNER, art. 5 N 7.
13 BSK-IPRG/GROLIMUND/BACHOFNER, art. 5 N 8 et seq; FURRER/GIRSBERGER/MÜLLER-CHEN/SCHRAMM, 196.

b. Requirements

i. Form

While it's safe to say that a written choice of court agreement signed by both parties is formally valid according to all three legal sources, the same cannot be said for other forms of contract.[14]

According to art. 17 para. 2 CCP *"the agreement must be in writing or in any other form allowing it to be evidenced by text."* This does not mean that the agreement must be contained in one document. The exchange of two separate documents each containing a choice of court clause is sufficient if the parties' consent is clearly expressed thereby.[15] According to the prevailing legal opinion, signature of the written document is not necessary.[16] Other forms allowing evidence by text are email and fax. According to the nature of these electronic forms of contracting, the parties' signature is not required.[17] A mere oral agreement – even if it is confirmed in writing by one party – is, however, not sufficient.

The form required by art. 5 para. 1 PILA is identical to the form required by art. 17 para. 1 CCP.[18]

A more liberal approach is taken by art. 23 LC. Like in transactions governed by the Code on Civil Procedure and the Private International Law Act, a written choice of court agreement is valid under the Lugano Convention. Written form does not require the parties' signature.[19] According to art. 23 para. 2 LC *"any communication by electronic means which provides a durable record of the agreement shall be equivalent to writing."* Therefore, contracts concluded via email or fax containing a choice of court agreement are equivalent to written contracts and are formally valid. In addition to the options mentioned above, the Lugano Convention provides three further forms of contract with which a choice of court agreement can be validly concluded.

First, an oral agreement confirmed in writing by one party.[20] In this case the parties must orally agree on either the choice of court clause itself or on general terms and conditions containing such a clause.[21] The written confirmation following the oral agreement must be in writing or in an electronic form in accordance with art. 23 para. 2 LC.[22]

Second, "*a form which accords with practices which the parties have established between themselves*." This form requires a business relationship between the parties of a certain duration and intensity in which the parties have always concluded their contracts based on a specific choice of court agreement.[23] This form of contract is mainly applicable in cases in which a party sends its general terms and conditions to the recipient *after* the conclusion of the contract (for example with the order confirmation or bill) and the recipient does not object.[24] If the parties have used the same choice of court clause in the course of their business relationship, it can be assumed that the recipient

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14 Sutter-Somm/Hasenböhler/Leuenberger/HEDINGER/HOSTETTLER, art. 17 N 17; BSK-IPRG/GROLIMUND/BACHOFNER, art. 5 N 21; SHK LugÜ/KILLIAS, art. 23 N 93.

15 Sutter-Somm/Hasenböhler/Leuenberger/HEDINGER/HOSTETTLER, art. 17 N 17; ZPO-Komm, Brunner/Gasser/Schwander/FÜLLEMANN, art. 17 N 14.

16 KRAMER/PROBST/PERRIG, 152; Sutter-Somm/Hasenböhler/Leuenberger/HEDINGER/HOSTETTLER, art. 17 N 17; ZPO-Komm, Brunner/Gasser/Schwander/FÜLLEMANN, art. 17 N 14; KuKo-ZPO/HAAS/SCHLUPMF, art. 17 N 17; signature is however recommended to facilitate proof of the parties' consent.

17 Sutter-Somm/Hasenböhler/Leuenberger/HEDINGER/HOSTETTLER, art. 17 N 18.

18 ZPO-Komm, Brunner/Gasser/Schwander/FÜLLEMANN, art. 17 N 32.

19 SHK LugÜ/KILLIAS, art. 23 N 94; as mentioned above, signature is recommended as evidence.

20 FURRER/GIRSBERGER/MÜLLER-CHEN/SCHRAMM, 199 et seq.; SHK LugÜ/KILLIAS, art. 23 N 103.

21 FURRER/GIRSBERGER/MÜLLER-CHEN/SCHRAMM, 200 et seq.; SHK LugÜ/KILLIAS, art. 23 N 104.

22 SHK LugÜ/KILLIAS, art. 23 N 107.

23 SHK LugÜ/KILLIAS, art. 23 N 120.

24 FURRER/GIRSBERGER/MÜLLER-CHEN/SCHRAMM, 200; SHK LugÜ/KILLIAS, art. 23 N 121.

was aware that the contract would be based on general terms and conditions containing such a clause.[25]

Third, "*in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.*" It is not necessary that the usage in question entails a specific choice of court agreement.[26] Art. 23 para. 1 lit. c LC merely refers to the *form* of contract which accords with a certain usage.[27] If the contract containing a choice of court agreement was concluded in such a form and the parties were or ought to have been aware of the usage in question, the choice of court agreement was validly agreed upon. A party's awareness of a usage is generally assumed when it has previously conducted business in the respective trade with either its current partner or a third party.[28]

ii. Consent

A choice of court agreement is a contract. Its conclusion, therefore, requires consent of the parties involved.[29] The question of consent is very closely linked to the question of the required form. If the parties have expressed their intent in one of the forms required (as mentioned above), their consent can often be ascertained from the written documents.[30] However, this is not always the case. Certain aspects of the parties' consent go beyond the mere expression of intent. Questions may arise regarding time limits for offer and acceptance, the interpretation of the contract or defects in consent such as error, duress or fraud to name only a few.[31] This raises the question of the law applicable to such aspects of consent.

Regarding art. 5 PILA, the discussion of this highly controversial question amongst legal scholars has led to three different approaches: According to the first approach, the choice of court agreement is subject to the *lex fori*.[32] According to the second approach, the *lex causae* is relevant.[33] The third approach is based on an analogy with the rules set out for arbitration agreements in art. 178 para. 2 PILA.[34] According to art. 178 para. 2 PILA, an arbitration agreement is valid if it complies with the law chosen by the parties, the law governing the object of the dispute, in particular the law applicable to the principal contract, or with Swiss law. In this case, the choice of court agreement needs to comply with only one of the three laws stated in art. 178 para. 2 PILA in order to be valid. It is unclear whether the *lex fori*-, the *lex causae*- or the analogy with arbitration agreements-approach applies. The Swiss Supreme Court has not yet decided on the issue.[35]

Regarding the scope of application of art. 23 LC, the situation is much clearer: The law applicable to the choice of court agreement is determined by the private international law of the forum state.[36]

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25 SHK LugÜ/KILLIAS, art. 23 N 121.
26 SHK LugÜ/KILLIAS, art. 23 N 128.
27 SCHNYDER/LIATOWITSCH, 316.
28 SHK LugÜ/KILLIAS, art. 23 N 132.
29 BGE 132 III 268, 274; BGE 122 III 439, 443.
30 BSK-IPRG/GROLIMUND/BACHOFNER, art. 5 N 37.
31 BSK-IPRG/GROLIMUND/BACHOFNER, art. 5 N 39; SHK LugÜ/KILLIAS, art. 23 N 139.
32 FURRER/GIRSBERGER/MÜLLER-CHEN/SCHRAMM, 195.
33 WALTER/DOMEJ, 127; BSK-IPRG/GROLIMUND/BACHOFNER, art. 5 N 39.
34 REISER, 66 et seq.
35 However, the Swiss Supreme Court (BGer 4C.189/2001 of 1 February 2002, Cons. 5. et seq.) has stated that it does not consider applying the *lex fori* arbitrary.
36 ECJ, 3.7.1997, C-269/95, Benincasa v. Dentalkit Srl., No 25; FURRER/GIRSBERGER/MÜLLER-CHEN/SCHRAMM, 200 et seq., SHK LugÜ/KILLIAS, art. 23 N 140.

c. Limitations

Choice of court agreements are not permitted in all fields of law. To determine the limitations of the parties' freedom of contract, once again, a distinction must be made between the three relevant legal sources.

Art. 17 para. 1 CCP states that a choice of court agreement is permitted unless the law provides otherwise. Freedom of contract is considered the rule, limitations thereof the exception.[37] Exceptions can be found throughout the chapter of the Code on Civil Procedure regulating jurisdiction. They concern various fields of law such as family law (art. 23 et. seq. CCP), consumer contracts (art. 32 CCP), rental contracts (art. 33 CCP) and employment contracts (art. 34 CCP).

A slightly different approach is taken by art. 5 PILA. According to art. 5 para. 1 and 2 PILA, choice of court agreements are limited to disputes concerning pecuniary claims and are void if one party is denied in an abusive manner a court to which that party is entitled under Swiss law (see below 8. re. art. 5 para. 2 PILA). In addition to these two general limitations, further limitations for various fields of law can be found throughout the entire Private International Law Act, such as for consumer contracts (art. 114 para. 2 PILA) or real estate (art. 97 PILA).[38]

Unlike the Private International Law Act, art. 23 LC does not set any general limitations to choice of court agreements. The general limitations are already given by the scope of application of the Lugano Convention which is limited to civil and commercial matters.[39] Like the Code on Civil Procedure and the Private International Law Act, the Lugano Convention does, however, name certain fields of law in which freedom of contract regarding choice of court agreements is limited, such as employment contracts, insurance contracts or consumer contracts.

Although the limitations to choice of court agreements vary among the different legal sources, there are certain similarities between them (for details see below 10.).

4. Recent Changes

The legal treatment of choice of court agreements has changed considerably in the past few decades for numerous reasons. On the one hand, new laws were enacted; the Private International Law Act in 1989 and the Code on Civil Procedure in 2011. On the other hand, Switzerland signed the revised Lugano Convention in 2007 which came into effect in 2011.[40]

Before 1989, there was no single codification of private international law. Rules on private international law were spread out[41] over various laws such as the Code of Obligations (CO)[42], the Civil Code (CC)[43] and the Code regarding the private law affaires of settled persons and foreign residents.[44] In addition to this, there was no federal law on civil procedure at the time. Until the enactment of the federal Code on Civil Procedure in 2011, civil procedure was governed by

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37 Sutter-Somm/Hasenböhler/Leuenberger/HEDINGER/HOSTETTLER, art. 17 N 13.

38 BSK-IPRG/GROLIMUND/BACHOFNER, art. 5 N 17.

39 SCHNYDER/LIATOWITSCH, 315.

40 Botschaft zum Bundesbeschluss über die Genehmigung und die Umsetzung des revidierten Übereinkommens von Lugano über die gerichtliche Zuständigkeit, die Anerkennung und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen, BBl 2009, 1777, 1778 et. seq.

41 Botschaft zum Bundesgesetz über das internationale Privatrecht vom 10. November 1982, BBl 1983 I 263, 265.

42 Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht) vom 30. März 1911, SR 220.

43 Schweizerisches Zivilgesetzbuch vom 10. Dezember 1907, SR 210.

44 Bundesgesetz vom 25. Juni 1891 betreffend die zivilrechtlichen Verhältnisse der Niedergelassenen und Aufenthalter (BS 2 737), SR 211.435.1.

cantonal[45] laws.[46] This meant that the rules governing private international law were not only spread out over various federal laws, but also over different levels of government.[47] With international trade increasing constantly, the necessity to find a solution to the complex legal situation became apparent.[48] The solution was the Private International Law Act, which was enacted on 1 January 1989.

Before 1989, choice of court agreements were mainly governed by the cantonal laws on civil procedure.[49] According to many of those laws, choice of court agreements could only be concluded in writing. Written form in this case meant a written document signed by the parties, as prescribed by art. 13 para. 1 CO.[50] The formal requirements prescribed today by art. 5 para. 1 PILA and art. 17 para. 2 CCP are more liberal, since they allow other forms of contract as long as they can be evidenced by text.

The most recent change was the signature of the revised Lugano Convention by Switzerland in 2007. It was enacted on 1 January 2011 together with the Code on Civil Procedure. The most notable change regarding choice of court agreements is the new art. 23 para. 2 LC which states that *"any communication by electronic means which provides a durable record of the agreement shall be equivalent to writing.*"[51] Like the Code on Civil Procedure and the Private International Law Act, the revised Lugano Convention led to somewhat more liberal formal requirements.

Unlike the European Union, Switzerland has not signed the Hague Choice of Court Agreements Convention of 2005. At this point it is unclear whether Switzerland intends to sign the convention at some point in the future or not. So far, no steps towards signing the convention have been initiated in Switzerland.[52]

5. The Effect of Choice of Court Agreements

Choice of court agreements can be divided into two types of agreements: optional choice of court agreements and exclusive choice of court agreements. The Code on Civil Procedure, the Private International Law Act and the Lugano Convention distinguish between optional and exclusive choice of court agreements and, therefore, acknowledge the two possible effects of the agreements; however, none of these three legal sources hold separate provisions for the two types of agreements. Hence, all provisions relevant to exclusive choice of court agreements apply to its optional counterpart likewise. A distinction is, therefore, only (but nevertheless) necessary with regard to the effects of the agreements.

Under the Code on Civil Procedure, the Private International Law Act and the Lugano Convention, all choice of court agreements are presumed to be exclusive unless otherwise stated (see art. 17 para. 1 CCP; art. 5 para. 1 PILA; art. 23 para. 1 LC).[53] Hence, if the parties don't

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45 Cantons are administrative subdivisions of the Swiss Confederation.

46 SUTTER-SOMM, 9. Before the enactment of the federal Code on Civil Procedure, there was, however, a federal Code on Jurisdiction in Civil Matters (so-called *Gerichtsstandsgesetz* from 24 March 2000, former SR 272) which contained provisions on choice of court agreements.

47 Botschaft IPRG (Fn 41), 265.

48 Botschaft IPRG (Fn 41), 270.

49 VOGEL, 85.

50 VOGEL, 85; art. 13 para. 1 CO: *"A contract required by law to be in writing must be signed by all persons on whom it imposes obligations."*

51 SHK LugÜ/KILLIAS, art. 23 N 134.

52 DASSER, 95.

53 BSK ZPO/INFANGER, art. 17 N 20; BSK IPRG/GROLIMUND/BACHOFNER, art. 5 N 43; BSK LugÜ/BERGER, art. 23 N 2, 61; SHK LugÜ/KILLIAS, art. 23 N 145.

agree to the contrary, the choice of court agreement is exclusive. Such rule on the effect of the agreement enables a high degree of clarity already at the conclusion of the agreement.[54] If a party wishes to challenge the exclusive effect presumed by law (by suing in front of a presumptively derogated court), it needs to prove that an optional effect was agreed upon.[55]

In order for the choice of court agreement to be optional, it is not necessary to state the intended optional effect explicitly; however, the intention of the parties needs to be clearly expressed in the agreement.[56] Thus, it is sufficient to say that *"the party A can bring action in front of the court X in addition to the courts designated by law"* or that *"court X is competent in addition to the courts designated by law"*.[57] It is, however, not sufficient to say that *"action can be brought in front of the court X or Y"*[58], as it is not clear that the courts designated by law remain in place.

If the choice of court agreement opts for an optional effect, the agreement operates as prorogation to the court(s) designated by agreement; however, it does not derogate the court(s) designated by law.[59] Based on the optional choice of court agreement, the parties can, hence, bring action in front of the court(s) designated by agreement or in front of the court(s) designated by law.

If, however, the choice of court agreement is exclusive, it operates as prorogation to the court(s) designated by agreement and, simultaneously, as derogation of the court(s) designated by law.[60] Based on the exclusive choice of court agreement, the parties can, therefore, only bring action in front of the court(s) designated by agreement.

6. Jurisdictional Competence of Prorogated Swiss Courts

a. Local or Factual Proximity

Whether or not a Swiss court prorogated by choice of court agreement, regardless of its status as exclusive or optional, will deem itself jurisdictionally competent and consequently take on the case, used to be (and partially still is) dependent on the local and factual proximity of the court.[61] Under the former Code on Jurisdiction in Civil Matters,[62] courts prorogated by choice of court agreement had the right to decline the submission to their jurisdiction if the necessary local or factual proximity was missing (*forum non conveniens*).[63] This right of refusal was problematic for two reasons: First, it was impossible to choose a court that was neutral, even though neutrality can turn a court particularly suitable. Second, it led to reverse discrimination, since equivalent provisions on the international level (art. 23 LC; art. 5 PILA) were less restrictive. As a consequence, the new Code on Civil Procedure refrains from requiring such local or factual

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54 BSK LugÜ/BERGER, art. 23 N 61; Reithmann/Martiny/HAUSMANN, recital 8.113.
55 Reithmann/Martiny/HAUSMANN, recital 8.115; BSK LugÜ/BERGER, art. 23 N 62.
56 Reithmann/Martiny/HAUSMANN, recital 8.115.
57 BSK IPRG/GROLIMUND/BACHOFNER, art. 5 N 43a.
58 Dissenting opinion see CHK IPRG/SCHRAMM/BUHR, art. 5 N 39. The option to choose between two derogated courts does not deem the agreement optional, as the designated options are the only ones remaining.
59 SHK LugÜ/KILLIAS, art. 23 N 146.
60 BSK ZPO/INFANGER, art. 17 N 20; BSK IPRG/GROLIMUND/BACHOFNER, art. 5 N 43; BSK LugÜ/BERGER, art. 23 N 61; SHK LugÜ/KILLIAS, art. 23 N 145.
61 Cp. BSK ZPO/INFANGER, art. 17 N 2; BSK IPRG/GROLIMUND/BACHOFNER, art. 5 N 49.
62 See footnote 46.
63 BSK ZPO/INFANGER, art. 17 N 2.

proximity, which is why, under art. 17 CCP, the courts prorogated by agreement have an obligation to accept the submission to their jurisdiction.

The same is true if the Lugano Convention applies.[64] Consequently, a Swiss court prorogated by agreement has the obligation to accept the submission to its jurisdiction based on art. 23 LC if (1) it's a civil or commercial matter; and if (2) at least one party to the agreement has his/her domicile in a member state of the Lugano Convention.[65]

If one of these two conditions is not met, hence, if the Lugano Convention does not apply, a Swiss court will decide if it will deem itself jurisdictionally competent based on the Private International Law Act. Unlike the Code on Civil Procedure and the Lugano Convention, the Private International Law Act requires local or factual proximity of the court designated by agreement.[66] According to art. 5 para. 3 PILA, the court designated by agreement must accept the submission to its jurisdiction if at least one party to the agreement has (1) his/her domicile; (2) his/her main whereabouts; or (3) his/her place of business at the location of the court, or (4) if Swiss law applies to the matter in dispute.[67] As for the latter, the application of Swiss law can be derived from objective conflict of law rules or from subjective choice of law agreements.[68] If none of these four conditions apply, the required local or factual proximity is missing and, hence, a Swiss court can – but is not required to – decline the submission to its jurisdiction (*forum non conveniens*).[69] The court applies its discretionary power to make such decision.[70] This right of refusal of art. 5 para. 3 PILA aims to protect Swiss courts from overloading.[71] Critics of art. 5 para. 3 PILA primarily point out that the right of refusal leads to legal uncertainty and is, therefore, to be interpreted restrictively.[72]

b. Lis Pendens

If the prorogated court is the first to be concerned with the proceeding, it will be able to rule on the validity of the choice of court agreement right away. If, however, the proceeding is initially brought before a derogated court and the prorogated court gets involved with the proceeding only later on, the question arises whether the prorogated court needs to await the decision of the derogated court (*lis pendens*).

Under all three legal sources – the Code on Civil Procedure (art. 59 para. 2 lit. d CCP, art. 126 para. 1 CCP), the Lugano Convention (art. 27 LC) and the Private International Law Act (art. 9 para. 1 PILA) – the prorogated court, that gets involved with the proceeding only later on, will as a general principle need to stay the proceeding until the derogated court rules on its jurisdiction.[73] It needs to do so *ex officio*.[74] Under the Code on Civil Procedure that applies to

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64 Cp. BSK LugÜ/BERGER, art. 23 N 57.

65 See BSK LugÜ/BERGER, art. 23 N 11 et seq., with further notes on the issue of interpretation regarding art. 23 para. 1.

66 BSK IPRG/GROLIMUND/BACHOFNER, art. 5 N 49.

67 See also BSK IPRG/GROLIMUND/BACHOFNER, art. 5 N 49.

68 Botschaft 1983 I 263, 302; see also CHK IPRG/SCHRAMM/BUHR, art. 5 N 40.

69 BSK IPRG/GROLIMUND/BACHOFNER, art. 5 N 49; CHK IPRG/SCHRAMM/BUHR, art. 5 N 40.

70 BSK IPRG/GROLIMUND/BACHOFNER, art. 5 N 49.

71 Botschaft 1983 I 263, 302; BSK IPRG/GROLIMUND/BACHOFNER, art. 5 N 49; CHK IPRG/SCHRAMM/BUHR, art. 5 N 40.

72 BSK IPRG/GROLIMUND/BACHOFNER, art. 5 N 49; dissenting opinion see REISER, 136.

73 BSK ZPO/GEHRI, art. 59 N 17; ZPO-Komm, Brunner/Gasser/Schwander/MÜLLER, art. 59 N 42; BSK LugÜ/MABILLARD, art. 27 N 55; vgl. BSK IPRG/GROLIMUND/BACHOFNER, art. 5 N 50a; vgl. BSK

national transactions only, both the derogated and the prorogated court are Swiss courts; thus, there will be no issue with regard to the duration of the proceeding and the recognition of the decision of the derogated court.

Under the Lugano Convention that applies to cross-border transactions, the prorogated Swiss court will need to stay the proceeding until the foreign court rules on its jurisdiction (art. 27 LC), even if the proceedings of the foreign court are known to be unreasonably long.[75] The parties to the choice of court agreement have, therefore, no guarantee that the court designated by agreement will be the first to concern itself with the proceedings; thus, so-called *torpedo law-suits*[76] are still possible.[77]

Under the Private International Law Act that applies to cross-border transactions, too, the general principle that the prorogated Swiss court must stay proceedings due to *foreign lis pendens* holds a limitation: If the foreign court will not likely and within a reasonable amount of time make a decision that is admissible under Swiss law (art. 25 PILA), *foreign lis pendens* must be ignored and the Swiss court must take on the case right away (art. 9 para. 1 PILA).[78]. Due to this rule, *torpedo law-suits* can be avoided.[79]

c. Anti-Suit and Anti-Enforcement Injunctions

Anti-suit injunctions are a means used by courts to restrain the commencement or continuation of proceedings in front of another court. In the context of choice of court agreements, such injunctions are of particular interest, as they could serve the enforcement of the agreement. While such anti-suit injunctions are particularly widespread in anglo-american jurisdictions, they are not granted under Swiss law. The Code on Civil Procedure and the Private International Law Act do not hold respective provisions; however, they hold provisions on *foreign lis pendens* and the actions Swiss courts must take *ex officio* if *foreign lis pendens* applies (art. 59 para. 2 lit. d CCP, art. 126 para. 1 CCP and art. 9 para. 1 PILA).[80] Thus, it can be implicitly derived from these provisions that anti-suit injunctions are prohibited under the Code on Civil Procedure and the Private International Law Act.[81] As for the Lugano Convention, there is no explicit provision, either; however, the European Court of Justice addressed the issue explicitly and held that anti-

IPRG/BERTI/DROESE, art. 9 N 24. This is also true under the former Brussels I Regulation, paralleling the provisions of the Lugano Convention, see BSK LugÜ/BERGER, art. 23 N 58.

74 BSK ZPO/GEHRI, art. 59 N 14; BSK LugÜ/BERGER, art. 23 N 58; cp. BSK IPRG/GROLIMUND/BACHOFNER, art. 5 N 50a; vgl. BSK IPRG/BERTI/DROESE, art. 9 N 24.

75 BSK LugÜ/BERGER, art. 23 N 58; cp. ECJ, 9. 12. 2003, C-116/02, Gasser v. MISAT Srl., No 73 et seq. Cases of the ECJ are relevant for Switzerland within the application of the Lugano Convention, since the Lugano Convention is to be interpreted like the former Brussels I Regulation; see hereto the preamble of the LC.

76 I.e. law-suits that are intentionally brought before a derogated court in order to protract the proceedings; cp. BSK LugÜ/BERGER, art. 23 N 58.

77 Under the new Brussels I Regulation, however, such *torpedo law-suits* are not possible anymore, since any derogated court that is concerned with the case will need to stay their proceeding until the prorogated court decides on its jurisdiction (art. 31 para. 2 nEuGVVO). See BSK LugÜ/BERGER, art. 23 N 58.

78 BSK IPRG/GROLIMUND/BACHOFNER, art. 5 N 50a; BSK IPRG/BERTI/DROESE, art. 9 N 10, 20, 22 et seq.

79 CHK IPRG/BUHR/GABRIEL/SCHRAMM, art. 9 N 18.

80 Cp. STACHER, ZZZ 2006, 61, 65 et seq.

81 Cp. STACHER, ZZZ 2006, 61, 65 et seq.

suit injunctions cannot be granted.[82] Thus, a Swiss court cannot grant an anti-suit injunction in order to strengthen the prorogation.

Anti-enforcement injunctions are a means to restrain an application for enforcement of a judgment made at specific courts. Like anti-suit injunctions, anti-enforcement injunctions can be of particular interest in the context of choice of court agreements as such injunctions could be granted to restrain an application for enforcement of a judgment given by a court other than those nominated in the agreement. Under Swiss law, there is no tradition of issuing anti-enforcement injunctions as there is no legal basis to do so. Thus, anti-enforcement injunctions cannot be granted.

d. Decisions of Foreign Courts

If a foreign court renders a decision despite the fact that a Swiss (or any other) court was prorogated by agreement, it is questionable whether such decision will be recognized and enforced in Switzerland. The answer to this question is fairly simple: The fact that the decision was rendered by another court than that prorogated by agreement does not harm its recognition and enforcement since choice of court agreements can be altered. Thus, if the lawsuit is brought in front of another court than that prorogated by agreement, it is considered an offer to alter the agreement.[83] If the opposing party responds to such proceedings by pleading to the charge, then the jurisdiction of such court is established; hence, the offer to alter the agreement is accepted (so-called *Einlassung*, art. 18 CCP, art. 24 LC, art. 6 PILA).[84] As a consequence, the Swiss court will recognize and enforce the foreign decision as long as all further requirements for recognition and enforcement are given (art. 25 et seq. PILA, art. 32 et seq. LC; see however below 9. re. *exceptio fori prorogati*).

If the foreign court applied the Lugano Convention when rendering its decision, the Swiss court will even be bound by the decision of the foreign court; it will, hence, skip the process of recognition and enforce the decision right away.[85]

7. Jurisdictional Competence of Derogated Swiss Courts

If a Swiss court is competent by law but its competence is derogated by choice of court agreement (i.e. by exclusive choice of court agreement), the question arises whether or not the Swiss court is bound by the derogation of such agreement. If, despite the choice of court agreement, the case is brought before the derogated Swiss court, such Swiss court cannot stay the proceedings but needs to rule on its competence to take on the case. The court will do so based on the statutory provisions on jurisdiction (CCP, LC, PILA). Only if the opposing party raises the *exceptio fori prorogati* will the court take into consideration the choice of court

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82 ECJ, 27 April 2004, C-159/02, Turner v. Grovit, nr. 31; see also BSK LugÜ/BERGER, art. 23 N 58. According to BERGER, it, consequently, needs to be prohibited to start an action in front of a prorogated or derogated court for a declaratory judgment regarding the validity of a choice of court agreement. See BSK LugÜ/BERGER, art. 23 N 58. However, such prohibition is not necessary as the action would lack the necessary legitimate interest in the proceeding anyway. See BSK LugÜ/BERGER, art. 23 N 58; dissenting opinion to the latter: GEIMER/SCHÜTZE, art. 23 EuGVVO N 131.

83 Hence, no damages for breach of agreement can be awarded.

84 See BSK ZPO/INFANGER, art. 18 N 1 et seq.; BSK IPRG/VASELLA, art. 6 N 1 et seq.; BSK LugÜ/BERGER, art. 24 N 1 et seq.

85 See BSK IPRG/DÄPPEN/MABILLARD, art. 29 N 8; BSK LugÜ/SCHULER/MARUGG, art. 33 N 1 et seq.

agreement.[86] In the latter case, the Swiss court needs to rule on the choice of court agreement comprehensively; therefore, it cannot limit itself to a summary inspection on whether the prorogated foreign court is competent. If the Lugano Convention applies and the prorogated foreign court is from a member state of the Convention, such court will even be bound to the finding of the Swiss court. If, however, the prorogated foreign court is not from a member state of the Convention, such court will not be bound by the finding of the Swiss court; rather, it will rule on the choice of court agreement based on its own national law (including international private law).[87]

8. Discrepancy Between Prorogated and Derogated Swiss Courts

Under Swiss law, choice of court agreements in favour of Swiss courts and choice of court agreements in favour of foreign courts are treated equally in that they need to fulfill the same requirements in order to be valid. Hence, a choice of court agreement in favour of foreign courts is valid if the subject matter at hand qualifies for choice of court agreements, if all formal requirements for entering a choice of court agreement are met and if the agreement is concluded validly (see above 3.b.).

There is, however, one difference between choice of court agreements in favour of Swiss courts and choice of court agreements in favour of foreign courts that applies under the Private International Law Act: According to art. 5 para. 2 PILA, choice of court agreements in favour of foreign courts are considered invalid if a Swiss court is derogated in an abusive fashion (art. 5 para. 2 PILA); the agreement is, therefore, subject to control against abuse.[88] This provision only applies to exclusive choice of court agreements, as their optional counterparts do not lead to a derogation of courts. Derogation in an abusive fashion is likely given if e.g. the agreement is deemed to be unconscionable.[89] The provision of art. 5 para. 2 PILA is, however, to be interpreted restrictively as the legislator shall e.g. protect presumptively weaker parties by exclusive jurisdiction.[90]

9. Proceedings in Front of Courts not Designated by Agreement

Even if the choice of court agreement is permissible, all formal requirements are met and the agreement was concluded validly, the parties can start proceedings in front of another court than prorogated by agreement. This is not considered a breach of the agreement; rather it is considered an offer to alter it.[91] If the opposing party responds to such proceedings by pleading to the charge, then the jurisdiction of such court is established and the offer to alter the agreement is accepted (so-called *Einlassung*, art. 18 CCP, art. 24 LC, art. 6 PILA, see above 6.d).[92] If, however, the opposing party responds to the proceedings by raising the *exceptio fori prorogati*,

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86 BSK LugÜ/BERGER, art. 23 N 60. Only if another court is exclusively competent by law can the court dismiss the case *ex officio*; in such case, it is even obliged to do so.

87 See BSK LugÜ/BERGER, art. 23 N 58 et seq.

88 BSK IPRG/GROLIMUND/BACHOFNER, art. 5 N 48.

89 BSK IPRG/GROLIMUND/BACHOFNER, art. 5 N 48; DUTOIT, art. 5 N 13.

90 BSK IPRG/GROLIMUND/BACHOFNER, art. 5 N 48.

91 Hence, no damages for breach of agreement can be awarded.

92 See BSK ZPO/INFANGER, art. 18 N 1 et seq.; BSK IPRG/VASELLA, art. 6 N 1 et seq.; BSK LugÜ/BERGER, art. 24 N 1 et seq.

the court needs to examine whether a valid choice of court agreement was entered into, and if so, it needs to dismiss the case and the parties need to start proceeding in front of the court prorogated by agreement. If a valid choice of court agreement was concluded and the case is, indeed, brought before the prorogated court, the jurisdiction of such court is established and, consequently, the parties cannot contest jurisdiction of such court (see however above 6.a re. *forum non conveniens*).

10. Choice of Court Agreements Involving Presumptively Weaker Parties in Switzerland

Under Swiss Law, optional choice of court agreements involving presumptively weaker parties (such as employees, consumers, tenants and insureds; see art. 35 CCP; art. 8 et seq., 15 et seq., 18 et seq. LC; and art. 114 PILA) are treated differently to optional choice of court agreements in commercial contracts in that prior to the dispute, presumptively weaker parties cannot waive the competence of a court that is competent by law; only the presumptively stronger party can.[93] In commercial contracts, all parties can effectively undertake such waiver prior to the dispute. Such difference is legitimized by the need of presumptively weaker parties to be protected against giving up a jurisdiction that, later on, turns out to be unfavourable to them.

The definition of the presumptively weaker party depends on the applicable law: Under the Code on Civil Procedure, consumers (art. 35 para. 1 lit. a CCP), tenants (art. 35 para. 1 lit. b, c CCP) and employees (art. 35 para. 1 lit. d CCP) are considered weak; under the Lugano Convention, insureds (art. 13 LC), consumers (art. 17 LC) and employees (art. 21 LC) are considered weak; and under the Private International Law Act, consumers (art. 114 para. 2 PILA) are considered weak.

As for the effect of choice of court agreements, the presumption that all agreements are considered exclusive unless otherwise stated (see above 5.) is put into perspective: KILLIAS states that choice of court agreements that involve presumptively weaker parties and appear to be exclusive shall only be exclusive for the presumptively stronger party. As for the presumptively weaker party, the agreement shall be optional, so that the court(s) designated by agreement and the courts designated by law shall both be competent.[94]

11. Asymmetrical Choice of Court Agreements

Asymmetrical choice of court agreements are optional choice of court agreements in which the option is drafted only in favour of one of the parties.[95] As Swiss law provides no specific legal treatment for optional choice of court agreements, there is no specific legal treatment of asymmetrical choice of court agreements either. Nevertheless, asymmetrical choice of court agreements are permitted within the above-mentioned boundaries (see 3.c.).[96] These boundaries are especially relevant for contracts that involve a presumptively weaker party (see 10.).

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93 BSK ZPO/KAISER JOB art. 35 N 2; BSK LugÜ/OETIKER/JENNY, art. 13 N 18; BSK LugÜ/GEHRI, art. 17 N 9; BSK LugÜ/MEYER/STOJILIKOVIC, art. 21 N 5.

94 SHK LugÜ/KILLIAS, art. 23 N 147, 149.

95 SHK LugÜ/KILLIAS, art. 23 N 147.

96 BSK IPRG/GROLIMUND/BACHOFNER, art. 5 N 43a; SHK LugÜ/KILLIAS, art. 23 N 145.

12. Evaluation and Reform

The main issue to be considered when determining whether the legal treatment of optional choice of court agreements is appropriate is the protection of the presumptively weaker parties. As already mentioned, Swiss law does not provide specific provisions for optional choice of court agreements. The limitations applicable to exclusive choice of court agreements also apply to optional ones. In our view, this identical treatment of optional and exclusive choice of court agreements is justified. Specific provisions would only be necessary if optional choice of court agreements put the presumptively weaker parties at a greater risk of being denied a jurisdiction favourable to them. This is, however, not the case. The presumptively weaker party cannot waive the competence of a court that is competent by law regardless of the qualification of the choice of court agreement. Therefore, the protection of presumptively weaker parties is ensured without the need for a distinction between optional and exclusive choice of court agreements.

One of the main problems that arises regarding choice of court agreements is the treatment of so-called "*torpedo law-suits*" in the Lugano Convention.[97] Within the European Union, this problem has been partially solved by the introduction of the new art. 31 para. 2 EuGVVO.[98] A similar provision has not been introduced into the Lugano Convention. For the time being, there is no indication that the contracting parties intend to adapt the Lugano Convention to the revised Brussels I Regulation. Should a reform take place in the foreseeable future, it will most likely be initiated by Swiss courts rather than the Swiss legislator.[99]

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[97] See footnote 76.

[98] BSK LugÜ/BERGER, art. 23 N 58; SCHLOSSER, 598.

[99] See SCHLOSSER, 601 et seq.