

## Company & Commercial - Switzerland

### Standard form contract available online constitutes valid prorogation of jurisdiction

Contributed by **BADERTSCHER Rechtsanwälte AG**

October 21 2013

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#### Introduction

On July 1 2013 the Federal Supreme Court<sup>(1)</sup> clarified that the Lugano Convention 2007 (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) offers the possibility to choose Switzerland as a neutral jurisdiction for companies domiciled in any of its member states (EU member states, Norway, Iceland and Switzerland), even if the companies are not domiciled in Switzerland. The court also clarified that standard form contracts available on demand only by fax are insufficient to fulfil the conditions of Article 23 of the convention for that purpose. However, contracts available only online are sufficient.

#### Facts

X AG, established in Austria, planned a distribution centre and concluded a service contract with Y GmbH, established in Germany, to construct pallet racks in Austria. In an email dated October 14 2010 Y sent two contracts to X for two different parts of the distribution centre. On the last page of the contract proposals, a clause of the payment conditions stipulated that the standard form contract could be requested by fax. The standard form contract included a clause conferring exclusive jurisdiction to the Zurich Commercial Court. One of the two service contracts was later amended, and Y then informed X that its standard form contract was now available online. The standard form contract contained a similar jurisdiction prorogation clause.

On June 26 2012 Y initiated proceedings against X in Zurich before the Zurich Commercial Court for payment of €667,603.30 under the service contracts. X admitted to signing the contracts and being bound by them. The court admitted its jurisdiction, thereby rejecting the defendant's arguments that the prorogation clause had not become part of the contract because it was unavailable to X at the time when the contracts with Y were concluded. For that reason, the defendant appealed to the Federal Supreme Court.

#### Decision

The Federal Supreme Court first stated that if at least one of the parties is domiciled in a contracting state, the convention applies. In this case, both parties were domiciled in member states. The court then explained that a jurisdiction prorogation must be agreed on and must be in writing or evidenced in writing, or at least be either an established practice between the parties (resulting from their customs) or in international trade or commerce. If an established practice in international trade or commerce exists, the parties are considered to be aware of it if it is widely known in such trade or commerce. Electronic communication which provides a durable record is equivalent to writing. The court held that under the convention and in light of the case law, the jurisdiction prorogation must not be part of the specific contract document itself, but can also be added by a standard form contract for as long as there is an indication that the standard form contract has become part of the main contract.

In this respect, the European Court of Justice (ECJ) had ruled before that when a party refers to an offer which has been sent to it and in which a standard form contract is referred to, the jurisdiction prorogation agreement is 'in writing' in the sense of the convention.<sup>(2)</sup> This ruling stressed that the formal requirements for valid jurisdiction prorogation clauses are high and that they must be interpreted restrictively. But the ECJ did not decide on clauses available only online in this case.

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According to the Federal Supreme Court, the stipulator of a standard form contract must give the other contracting party the possibility to learn about its contents, whereby it is irrelevant whether the other party then takes notice of it. This means that the other party need not be aware of the jurisdiction prorogation clause, but it must have had the opportunity to take notice of it (ie, the covenant must have been made available).

In this case, as for the first contract at hand, a standard form contract attached to an email can hardly be distinguished from the one which provides an email link to it. If parties exchange emails it becomes obvious that both parties have internet access and can therefore click on such an email link immediately.

However, for the second contract the standard form contract was unavailable online. The defendant could have requested a copy only by fax. As this would have required further action from the other party, the court held that prorogation clauses in standard form contracts available only by fax do not fulfil the formal conditions of the convention and thus are null and void.

## Comment

This decision clarifies the formal conditions for exclusive jurisdiction prorogation agreements under the convention by all commercial parties active in international cross-border dealings. It also clarifies that a jurisdiction prorogation can be agreed by only one party placing the contract standard form online, if the parties concluded the contract by email. However, standard form contracts made available on demand only by fax are insufficient for a valid jurisdiction prorogation under the convention. Thus, companies are advised to study standard form contracts made available to them via internet links carefully.

Before concluding an international contract including email links to standard contract clauses, or before bringing an action to a Swiss court based on such standard contract jurisdiction prorogation clauses, companies are strongly advised to seek legal advice as the possible places of jurisdiction may have great influence on the applicable law to the dispute, its duration and all related costs.

*For further information on this topic please contact [Markus Dörig](#) or [Jeannette Wibmer](#) at [BADERTSCHER Rechtsanwälte AG](#) by telephone (+41 44 266 20 66), fax (+41 1 266 20 70) or email ([doerig@b-legal.ch](mailto:doerig@b-legal.ch) and [wibmer@b-legal.ch](mailto:wibmer@b-legal.ch)).*

## Endnotes

- (1) Federal Court, 4A\_86/2013.
- (2) ECJ C-159/97, ECR 1999 I-1597.

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