

Employment, choice of court and appearance

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The employment rules of Articles 18 to 21 matter for Ticino because of the large number of cross-border commuters from Italy. An employee may sue the employer in the employer's state of domicile or in the courts of the place where the employee habitually carries out the work. The employer may sue the employee only in the employee's state of domicile.¹ A Ticino company that wants to claim damages from a former employee who lives in Como must therefore go to an Italian court, while the employee can sue the Ticino employer before the Pretura in Ticino. Chapter H.I described the number of these commuters, which makes the rule more than theoretical.

Outside the protected categories, Article 23 gives effect to choice of court agreements if at least one party is domiciled in a contracting state. The agreement must be in writing or evidenced in writing, in a form that accords with the parties' established practices, or in international trade in a form that accords with a usage of which the parties were or ought to have been aware. Such jurisdiction is exclusive unless the parties have agreed otherwise.² Article 24 adds jurisdiction by appearance: a court before which the defendant enters an appearance without contesting jurisdiction becomes competent, subject to the exclusive jurisdictions of Article 22. These cover, among others, rights in rem in immovable property, the validity of decisions of company organs and entries in public registers.

1 Parallel proceedings and the Italian torpedo

Articles 27 to 30 govern parallel proceedings. Where proceedings involving the same cause of action between the same parties are brought in the courts of different contracting states, any court other than the court first seised must stay its proceedings until the jurisdiction of the court first seised is established. Related actions may be stayed or, under conditions, declined.³ *Gasser v MISAT*, decided on 9 December 2003, concerned a dispute between an Austrian and an Italian company. The Court of Justice

held that the court second seised must stay its proceedings even if it was designated in an exclusive choice of court agreement, and even if proceedings before the court first seised are excessively long.⁴ The judgment made the so-called Italian torpedo possible. A party expecting to be sued could file a claim for a negative declaration in a slow court, often in Italy, and block the chosen court for years.

The Brussels Ia Regulation reversed *Gasser* for member states. Under its Article 31(2), the court designated in an exclusive choice of court agreement may proceed even if it was seised second.⁵ The Lugano Convention has not been amended, and *Gasser* still applies between Switzerland and Italy. A Lugano bank that has agreed Lugano jurisdiction with an Italian commercial client cannot rely on its clause to defeat a prior action in Italy. In a dispute that is foreseeable, filing first is therefore often the decisive step. Swiss practitioners prepare their statement of claim, or at least a request for conciliation, which under Swiss law establishes *lis pendens*, before they send a final letter of demand to an Italian counterparty.⁶

2 Provisional measures

Article 31 allows application to the courts of a contracting state for provisional, including protective, measures available under its law, even if the courts of another state have jurisdiction as to the substance.⁷ The Court of Justice has required a real connecting link between the subject matter of the measure and the territorial jurisdiction of the court, and it has restricted interim payment orders where the court lacks jurisdiction on the merits.⁸ For Ticino, the most important provisional measure is the attachment under Articles 271 ff. DEBA, which a Swiss court can grant against the Swiss assets of an Italian debtor regardless of where the merits are tried. The CPC also provides for *ex parte* superprovisional measures in cases of particular urgency (Article 265 CPC), which a Ticino court can order before hearing the opponent.⁹

3 Notes

1. LC 2007, Art. 18 to 21 (above), in particular Art. 19 and 20(1). ↩
2. LC 2007, Art. 23(1) (above); LC 2007, Art. 22 and 24 (above). ↩
3. LC 2007, Art. 27 and 28 (above). ↩
4. Court of Justice, judgment of 9 December 2003, *Erich Gasser GmbH v MISAT Srl*, C-116/02, operative part, points 2 and 3, EUR-Lex,

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62002CJ0116>. ↩

5. Tim Schreiber and Alexander Weiss, The (Recast) Brussels I Regulation Applies, Clifford Chance briefing, 2015, <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2015/06/the-recast-brussels-i-regulation-applies.pdf>. ↩
6. Swiss Civil Procedure Code of 19 December 2008 (CPC), SR 272, Art. 62(1), English text as of 1 January 2025 at Fedlex, <https://www.fedlex.admin.ch/filestore/fedlex.data.admin.ch/eli/cc/2010/262/20250101/en/html/fedlex-data-admin-ch-eli-cc-2010-262-20250101-en-html-1.html>; LC 2007, Art. 30 (above). ↩
7. LC 2007, Art. 31 (above). ↩
8. Court of Justice, judgment of 17 November 1998, Van Uden Maritime v Deco-Line, C-391/95, operative part, EUR-Lex, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61995CJ0391>. ↩
9. CPC, Art. 261(1) and 265(1), bilingual text at [droit-bilingue.ch](https://www.droit-bilingue.ch/it-en/2/27/272-261-266.html), <https://www.droit-bilingue.ch/it-en/2/27/272-261-266.html> and <https://www.droit-bilingue.ch/it-en/2/27/272-265-270.html>. ↩

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