



Transnational civil litigation and International commercial arbitration

Choice of Court Agreements

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CHOICE OF COURT AGREEMENTS

Introductory remarks

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- **Choice of court agreements:** they are agreements through which the parties confer jurisdiction over all or certain disputes which have arisen or which may arise between them to certain court(s). They must not be confused with choice of law agreements
 - **Effects:** by these kind of agreements parties depart from ordinary jurisdiction rules and submit themselves to a jurisdiction of a given State which might not have jurisdiction over the parties and the subject matter according to these applicable ordinary rules
 - **Form:** they are usually concluded in form of clauses of a main contract to which they refer
 - Most civil law jurisdictions regard a choice of court agreement as a procedural agreement. English common law regards a choice of court agreement as a contract just as any other contract on substantive law from which rights and obligations arise. The promise not to sue in any other than the chosen forum (in the regular event of an exclusive choice of court agreement) can be enforced directly by way of an anti-suit injunction or indirectly by the threat of damages for breach of the choice of court agreement

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Types of agreements

- **Exclusive:** meaning that the parties agree to submit to the jurisdiction of one country's courts alone to determine disputes between them, with the exclusion of any other competent courts or jurisdictions.
- **Non-exclusive:** meaning that the parties agree that a dispute may be resolved in the jurisdiction indicated in the clause (e.g. the Italian Courts), but without prejudice to the right of each of them to bring proceedings before the courts of another competent jurisdiction.
- **Unilateral – one-sided – asymmetrical:** such a clause binds one party to initiate proceedings in one given court, whilst the other party may choose to bring proceedings before *«any other court of competent jurisdiction»*

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Examples

- «The courts of England have **exclusive** jurisdiction to settle any disputes arising out of or in connection with this Agreement (including a dispute relating to non-contractual obligations arising from or in connection with this Agreement, or a dispute regarding the existence, validity or termination of this Agreement) (a 'Dispute')»
- «Each of the parties hereto agrees that all disputes between them arising out of, connected with, related to this agreement whether may be resolved **non-exclusively** by the courts of Italy, being understood that parties may bring proceedings before any other competent court»
- «The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute relating to non-contractual obligations arising from or in connection with this Agreement, or a dispute regarding the existence, validity or termination of this Agreement) (a "Dispute"). This Clause **is for the benefit of the Lender only**. As a result, the Lender shall not be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction»

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Regulation Brussels I-bis – Article 25, paragraph 1

If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

The agreement conferring jurisdiction shall be either: (a) in writing or evidenced in writing; (b) in a form which accords with practices which the parties have established between themselves; or (c) 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.

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Regulation Brussels I-bis – Article 25, paragraph 5 – Separability principle

An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.

Separability principle means that the choice of court agreements must be seen as separate agreement in respect of the main contract in which they are included. The separability principle relies on the assumption that for the purposes of determining the validity and enforceability choice of court agreements these must be treated as a separate agreement. That does not mean that these are be treated as separate agreement for all the purposes. The concept of separability simply reflects the parties' presumed intention that their agreed procedure for resolving disputes should remain effective in circumstances that would render the substantive contract ineffective. Its purpose is to give legal effect to that intention, not to insulate choice of court agreements from the substantive contract for all purposes.

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Choice of court agreements in insurance, consumer and employment matters

- Brussels I-bis contains special rules for choice of court agreements conclude with respect of a dispute in insurance, consumer or employment matters.
- These special rules are aimed at giving protection to the weaker party
- Choice of court agreements are valid in these matters only if (i) they are entered into after the dispute has arisen or (ii) they allow the weak party to bring proceedings in courts other than those indicated by the rules set out by Brussels I-bis for this special kind of contracts, or (iii) they are entered at the time where the contract has been concluded between parties that are both domiciled in the same member state conferring jurisdiction to the court of such member state
- <https://www.youtube.com/watch?v=hSuFuDsJBn8&t=33s>

HAGUE CONVENTION 2005

- The Hague Convention on Choice of Court Agreements was adopted on 30 June 2005 and entered into force on 1 October 2015. The European Union (on behalf of all member states except Denmark), Denmark, Mexico, Singapore, Ukraine and the United Kingdom are parties to the convention. China, Israel, North Macedonia, Ukraine and the United States signed the convention, but so far they did not ratify it.
- It applies in **international** cases to **exclusive** choice of court agreements concluded in civil or commercial matters (save for opt-in clause provided for in art. 22)
- For jurisdictional purposes a case is **international** unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State. Article 26 regulates the interplay between the convention and Brussels I-bis
- The convention shall not apply in consumer and employment cases and in all other cases listed in article 2

HAGUE CONVENTION 2005

- The convention imposes on contracting state the obligation to recognize both **positive** and **negative** effects of a choice of court agreement
- **Positive effect:** the courts of a Contracting State designated in an exclusive choice of court (the **chosen court**) agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that.
- **Negative effect:** a court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies, without prejudice to the cases listed in article 6 (lett. a-e)
- A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be **recognized** and **enforced** in other Contracting States in accordance with the rules set out in Chapter III of the convention. Recognition or enforcement may be refused only on the grounds specified in this Convention

STUDYING MATERIALS

- In addition to this **PPT** presentation, students should:
- Read the relevant provisions of Regulation EU n. 1215/2012
- Read the relevant provisions of the Hague Convention on choice of court agreements 2005
- Read the case on choice of court agreements and consumers discussed in class (LawTrain – pp. 39-45)