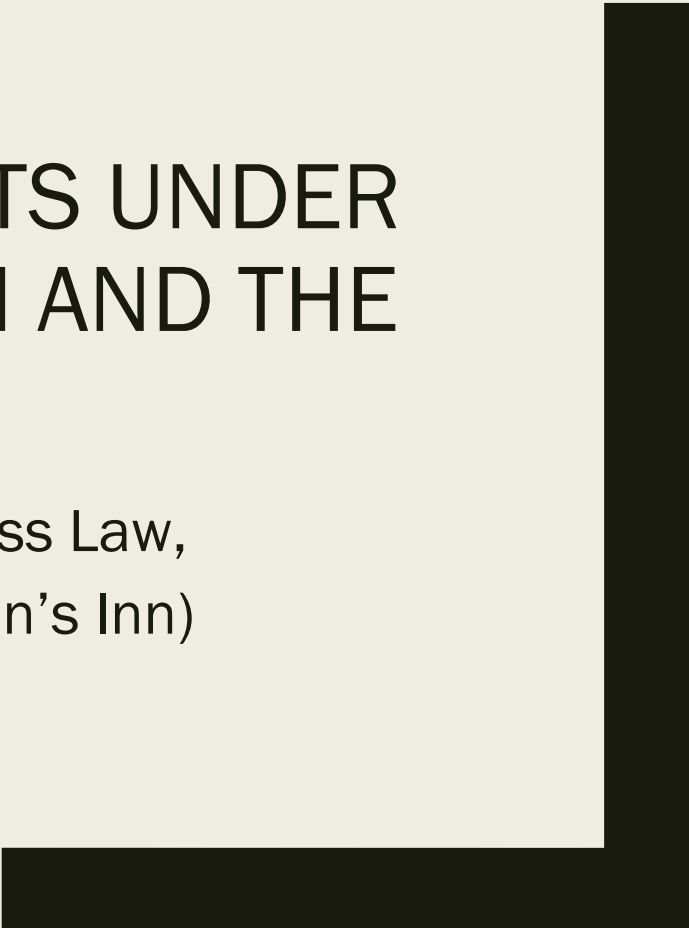


CHOICE OF COURT AGREEMENTS UNDER THE BRUSSELS IA REGULATION AND THE HAGUE CONVENTION

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Outline

- Nature, Validity and Interpretation
- Enforcement
- Asymmetric Choice of Court Agreements
- Conclusions

Nature, Validity and Interpretation

- The substantive and procedural aspects of a choice of court agreement warrant the classification of a 'hybrid' contract. The dual nature of the choice of court agreement is manifested both as a private law contract and via the clause's procedural (jurisdictional) effects.
- Interpretation: Whether the clause is 'exclusive' or 'non-exclusive' and whether the claims in the proceedings are within the scope of the clause?
- Formal validity is regulated by the instrument itself (i.e. Hague Convention or the Brussels Ia Regulation), which provide uniform and autonomous rules.
- Substantive validity is subject to the law of the chosen forum including its private international law rules. Article 25 of the Brussels Ia Regulation is aligned with the Hague Convention.
 - *Renvoi – proof of foreign law*
 - *Uncoordinated choice of law rules may increase litigation risk in multi-state transactions - uncertainty and decisional disharmony*
 - *Analogical application of the Rome I Regulation as a solution*
- The scope of the choice of law rule on substantive validity – autonomous concept of consent developed by the CJEU should not be eroded.
- The choice of law rule should be applied where the intrinsic contractual validity of the agreement is challenged (fraud, misrepresentation, duress or mistake), lack of authority or lack of capacity but not in extrinsic cases such as illegality or public policy.
- Example of application of the choice of law rule: Should the compatibility of asymmetric choice of court agreements with the Brussels Ia Regulation be characterized as an issue of the substantive validity of the choice of court agreement or should it be characterized as falling under the autonomous concept of consent? Choice of law implications.

Enforcement

- The enforcement of choice of court agreements is governed by the autonomous rules of the instruments - Article 31(2) of the Brussels Ia Regulation: Reverse *lis pendens* rule; Articles 5 and 6 of the Hague Convention.
- Under the English common law regime and to the extent permitted by the autonomous system of the instruments, anti-suit injunctions, damages, and anti-enforcement injunctions may enforce the breach of a choice of court agreement. English courts are no longer constrained by CJEU case law from granting anti-suit injunctions to restrain proceedings in the courts of EU Member States.
- Outside the scope of the Hague Convention, English courts retain the power to decline jurisdiction based on a choice of court agreement, by staying proceedings if there are strong countervailing reasons. The power to stay proceedings may also be used to give effect to a foreign exclusive choice of court agreement, including where the chosen court is in an EU Member State.
- Common law remedies for breach of choice of court agreements synergise the enforcement of exclusive choice of court agreements under the Hague Convention.
- Enforcement of English award of damages for breach of a choice of court agreement in the Greek courts - Request for a preliminary ruling from the Areios Pagos (Greece) lodged on 23 September 2021 — *Charles Taylor Adjusting Limited, FD v Starlight Shipping Company, Overseas Marine Enterprises INC* (Case C-590/21).
- Convergence of sorts? The German Federal Court of Justice has recently granted the remedy of damages for breach of a choice of court agreement: BGH, III ZR 42/19, 17.10.2019.

Asymmetric Choice of Court Agreements

- Asymmetric choice of court agreements bind one party to sue exclusively in the primary non-exclusive forum but allows the other party to commence proceedings in that court or in any other court of competent jurisdiction.
- The Court of Appeal in *Etihad Airways v Flother* confirmed that the protective cover of Article 31(2) of the Brussels Ia Regulation extends to asymmetric choice of court clauses. Cf. French decisions refer to the ‘high degree of predictability’ that such clauses should ensure and unless such clauses limit the option offered to one of the parties by a specific connecting factor or rule of jurisdiction they may not be enforced.
 -where a court of a Member State on which an agreement as referred to in Article 25 confers *exclusive* jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.
- Doubts as a matter of EU law are not of significance now that the UK is outside the EU and English courts have traditionally enforced these clauses.
- The Court of Appeal’s obiter view in *Etihad Airways v Flother* was that there were strong indications that the intention was to exclude asymmetric choice of court clauses from the Hague Convention. This detracts from previous High Court authorities.
- Article 3(a) of the Hague Convention defines an exclusive choice of court agreement as:
 - an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, *the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts*
- The exclusion of asymmetric choice of court clauses from the Hague Convention is evident from the Explanatory Report: [105]–[106]
 - *the agreement must be exclusive irrespective of the party bringing the proceedings.*

Conclusions

- Post-Brexit, two issues are likely to arise which could lead to a CJEU reference from a Member State court.
 - *Whether asymmetric choice of court agreements are exclusive choice of court agreements for the purposes of the Convention. There is no definitive English ruling on the point and the issue may be brought before the Court of Justice of the European Union (CJEU) on a preliminary reference from a Member State court after Brexit.*
 - *The other contentious issue that could be addressed by the CJEU on a preliminary reference from the courts of a Member State is the date the Hague Convention entered into force in the UK. The CJEU could either vindicate the stance of the UK government that 1 October 2015 is when the UK joined the Convention by virtue of its EU membership or confirm the position adopted by the European Commission that 1 January 2021 is when the UK joined the Convention as an independent Contracting State.*
- The Hague Judgments Convention 2019 offers two specific provisions which complement the Hague Choice of Court Convention.
 - *Article 5(1)(m) of the Hague Judgments Convention makes special provision for the recognition and enforcement of judgments based on non-exclusive choice of court agreements including unilateral or asymmetric choice of court agreements.*
 - *The Hague Judgments Convention also provides an exception to the recognition and enforcement of judgments procured in breach of a choice of court agreement. Article 7(1)(d) of the Hague Judgments Convention will reduce the venue and enforcement risk arising from pre-emptive torpedo proceedings by refusing to recognise or enforce any judgment given in breach of a choice of court agreement. Cf. Section 32 of the CJA 1982.*