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Case Study

AGREEMENT ON THE RIGHT TO CHOOSE THE COURT: PECULIARITIES OF LEGAL REGULATION AND CASE-LAW

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ABSTRACT

Background: *The present article provides a detailed analysis of legislative regulation—both national and international—and case-law concerning the choice of court in cross-border disputes. In international business relations, the issue of which jurisdictional body that have jurisdiction over potential future disputes often arises. In addressing this subject, the authors meticulously unravel the intricate issues surrounding the application of the forum selection agreement, including issues related to derogation from such an agreement and the imposition of liability for actions taken in breach of it. A significant portion of the analysis is dedicated to examining the doctrinal approaches and court practices of Ukraine, which is in the nascent stages of introducing 'contractual mechanisms' for choosing a court. Furthermore, an analysis of case law from the Court of Justice of the European Union, and national courts of European countries reveals the absence of uniform approaches to this issue.*

Methods*: The study employed analytical, normative and comparative methods. The method of statutory research is used to characterise the statutory instruments relating to the procedure for selecting a competent court and the specifics of an exclusive agreement. In addition, the comparative method is reflected in the study of international and national legal regulation of the choice of court that will be authorised to hear cross-border disputes. By choosing the method of legal analysis and synthesis, the author provides a reasonable assessment of the case law of both national courts of the European Union, Ukraine, and the Court of Justice of the European Union.*

Results and Conclusions: *According to the research, the authors determine that utilising the Hague Convention on Choice of Court Agreements by parties in foreign economic relations will, firstly, enhance the objectivity of resolving disputes between the parties, and secondly, bolster and advance the global business community.*

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1 INTRODUCTION

The development of international trade and foreign economic relations between business entities necessitates clear regulation of their interaction. Despite the existence of heterogeneous legal systems, each party to such relations seeks to have an opportunity to effectively protect their rights in case of their violation. In response, international institutions and legal schools have endeavoured to establish a unified definition of "cross-border law" and to develop common legal approaches to the procedure for resolving cross-border disputes. For an extended period, scholarly debate has been shaped by two contradicting theories regarding the interpretation of "transboundary law": the theory of fragmentation and the theory of constitutionalism.

With regard to the theory of fragmentation, its proponents argue that transboundary law should be viewed as a non-hierarchical order, explained exclusively through the relationship between general and specialised branches of international law. In contrast, advocates of the constitutionalism theory, in describing the legal nature of transboundary law, identify a constant transformation of the global legal order from a horizontal structure to a hierarchical one.[1]

Despite the existence of such approaches to the definition of transboundary law, one of the key issues that remains to be fully researched is the establishment of courts and jurisdictional international bodies that are recognised as authorised institutions for dispute resolution in the international arena. Ultimately, it is the will of the subjects of international law that will determine the further effectiveness of such institutions. A fairly valid scientific point of view holds that the establishment of international courts and the existence of competition between them contribute to a shift away from a legal order characterised by intergovernmental agreements, while the rise of judicial constitutionalism reinforces the principles of the rule of law and legal certainty.

The current state of development of private international law demonstrates a commitment to harmonising laws and creating legal platforms for cross-border disputes. It is thanks to the choice of the vector of legal syncretism that the international community has developed several international legal acts over the past 20 years, which have become the driving force for the development of the types and methods of resolving such disputes.

A notable manifestation of such harmonisation was the adoption of the Convention on Choice of Court Agreements on 30 June 2005 at the Hague Conference on Private International Law.[2] This instrument enables parties to a contract, through a mutually agreed

1 Sai Ramani Garimella and Poomintr Sooksripaisarnkit, 'Jurisdiction under the Hague Convention on Choice of Court Agreements: A Critique' (2017) 57(3-4) The Indian journal of international law 309, doi:10.1007/s40901-018-0081-z.

2 The Hague Convention of 30 June 2005 on Choice of Court Agreements' (*Hague Conference on Private International Law*, 13 March 2024) <https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court> accessed 20 February 2025.

clause, to designate a specific court in a contracting state that "shall have jurisdiction to determine the dispute."[3] A court chosen by the parties cannot refuse to consider such a dispute on the grounds of conflict of laws in cross-border disputes, except in cases where the subject matter falls within the exclusive jurisdiction of another state's court.

The emergence of such an international mechanism—allowing contractual parties to select a court that will satisfy their needs and requirements—has led to new scientific approaches, according to which the 2005 Coventry reduces the effect of the doctrines of *lis alibi pendens* and *forum non conveniens*.[4]

This Convention is a prime example of the universal unification of private international law. Although adopted in 2005, it was largely ratified and transposed into national legal systems after 2015. Its scope of application currently includes all EU member states, as well as Mexico, Montenegro, Singapore, and Ukraine. Israel, North Macedonia, China and the USA have signed the Convention but not yet ratified it.[5]

2 CHOICE OF COURT BY THE PARTIES TO THE DISPUTE: GENERAL APPROACHES TO CHOICE OF COURT AGREEMENT

In the course of foreign economic activity, it is common for counterparties to such foreign economic agreements to determine, in advance, the jurisdictional authority competent to resolve any potential disputes. These bodies may include either national courts or extrajudicial bodies, such as arbitration, mediation or other alternative dispute resolution instruments. The parties' selection of a particular dispute resolution mechanism carries distinct procedural and legal consequences. Accordingly, such an agreement between the parties is set out either in an arbitration or mediation clause, or in an agreement that designates the court authorised to hear the dispute.

Such a plurality of dispute resolution methods affords parties the autonomy to select the forum they consider most trustworthy. Notably, international commercial arbitration—although not subject to national jurisdiction—provides disputing parties greater autonomy, including the choice of substantive and procedural law, the arbitrators, the language, and

3 Convention on Choice of Court Agreements (30 June 2005) <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98> accessed 20 February 2025.

4 Trevor Hartley and Masato Dogauchi, 'Explanatory Report on the 2005 Hague Choice of Court Agreements Convention' (*Hague Conference on Private International Law*, 8 November 2013) <https://www.hcch.net/en/publications-and-studies/details4/?pid=3959> accessed 20 February 2025.

5 Ronald A Brand, 'United States Signs the Hague Judgments Convention' (*Transnational Litigation Blog*, 31 March 2022) <https://tlblog.org/united-states-signs-the-hague-judgments-convention/> accessed 20 February 2025.

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the place of arbitration. These attributes often render arbitration particularly attractive as a dispute resolution method.[6]

Concerning the choice of a national court of a particular country to resolve a dispute between the parties, the existence of clear international legal regulation of this issue is an indisputable prerequisite for giving preference to the autonomy of the parties' will, regardless of the legal regulation in national legislation. Art. 1 of the Convention on Choice of Court Agreements stipulates that a case is international if the parties are not residents of the same Contracting State and the relations between the parties, as well as all other circumstances relating to the dispute, regardless of the location of the chosen court, are not connected only with that State. A case is also considered international where recognition or enforcement of a foreign judgment is sought.

In accordance with Art. 5(1) of the Convention, any subsequent actions taken by the parties in violation of the Convention shall be interpreted in favour of the court (or courts) of the Contracting State specified in the exclusive agreement on the choice of court.

However, despite such declaratory approaches provided for in Art. 1, in certain cases, national courts in Contracting States may, in specific circumstances, deviate from the general approaches governing the jurisdictional body to resolve the dispute due to the lack of connection between the State and the parties or the subject matter of the dispute itself—even in the presence of an exclusive agreement.

In relation to the choice of contractual jurisdiction, it should be noted that this right clearly corresponds to the impossibility of applying general approaches to the choice of court in cases with a foreign element (i.e., conflict of laws). Contractual jurisdiction should be applied not only when the parties have clearly agreed on the name of the court that will be authorised to hear the dispute, but also when such a court can be reasonably inferred from the contract's context. In this case, compliance with the formal requirements for choice of court agreements is presumed.

3 FORM OF EXPRESSION OF THE CHOICE OF COURT AGREEMENT

Art. 3(c) of the Convention provides a rather unclear definition of the form of such a choice of court agreement, namely, in writing or concluded by any other means of communication that ensures the availability of information so that it is suitable for further reference. Before a detailed analysis of the form of expression of such an agreement, it is important to examine its regulation and interpretation within the European Union.

6 Serhii Kravtsov, 'The Definitive Device of the Term "International Commercial Arbitration"' (2022) 12(3) Juridical Tribune 346, doi:10.24818/TBJ/2022/12/3.03.

Peculiarities of the forum selection agreement in the European Union.

Regarding the conclusion of a choice of court agreement in the European Union, the formal requirements are not only governed by Art. 3 of the Convention, but also by Art. 25 of the Brussels I Regulation. It is therefore anticipated that a forum selection agreement may be concluded in all forms of written reproduction of agreements. This includes contemporary means of communication that are prevalent in international trade and business, such as electronic correspondence.[7]

Interaction of international and European regulations.

The coexistence of universal and purely European legal regulation of this issue gives rise to its dualistic nature, which in turn has raised a number of problematic issues before the national courts of the European Union and the Court of Justice of the European Union. One such unresolved issue is: what are the peculiarities of application of the choice of court agreement in the case when the parties to the dispute are residents of the same EU country, but have agreed to consider potential disputes in the national court of another EU country?

This issue has been the subject of discussion among many schools of thought, but remains unsettled. To address this ambiguity, the European Court of Justice delivered a ruling on 8 February 2024 in Case C-566/22, aiming to provide clarification on the possible application of Art. 25 of the Brussels I Regulation in such circumstances.[8]

In the case, a Slovak citizen (the lender) and a legal entity domiciled in Slovakia (the debtor) entered into a loan agreement, which provided that in the event of a dispute that could not be resolved through negotiations, the dispute "shall be resolved by a court of the Czech Republic having substantive and territorial jurisdiction". The lender assigned its receivables to the Slovak company *Inkreal*. Due to the debtor's failure to repay the debt, the new creditor was forced to apply to the Nejvyšší soud (Supreme Court of the Czech Republic) as the court of first instance with a claim for debt recovery and determination of the competent Czech court to hear the claim.

The plaintiff argued that the jurisdiction transfer agreement was valid and complied with the requirements of Art. 25(1) of Regulation No. 1215/2012 and that no other special or exclusive jurisdiction of the court existed under the Regulation. However, the Czech Supreme Court raised doubts about the application of Regulation No. 1215/2012, particularly concerning whether the case contained a sufficient foreign element to trigger the Resolution. For this reason, the Supreme Court of the Czech Republic suspended the proceedings and referred the following issue to the CJEU for a preliminary ruling:

7 Regulation (EU) no 1215/2012 of the European Parliament and of the Council of 12 December 2012 'On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)' [2012] OJ L 351/1.

8 Case C-566/22 *Inkreal v Dúha reality* (CJEU, 8 February 2024) <https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-566/22&jur=C> accessed 20 February 2025.

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

"From the point of view of the international element required for the application of Regulation No. 1215/2012, can the application of this regulation be based solely on the fact that two parties domiciled in one EU Member State have agreed to the jurisdiction of the courts of another EU Member State?"

Systematising the legal position of the CJEU in this case, the following conclusions can be drawn:

Regarding the nature of cross-border proceedings.

Although Regulation No. 1215/2012 refers to "civil matters with cross-border effects" and "cross-border legal proceedings" in Arts. 3 and 26, it does not provide a clear definition of "the international element", which is a prerequisite for the regulation's applicability. However, guidance can be found in Art. 3(1) of Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006, which establishes a European payment order procedure. This article defines the equivalent concept of "cross-border legal proceedings" as "those in which at least one of the parties has his or her domicile or habitual residence in a Member State other than the Member State in which the proceedings take place".

The primary concern the court must address in such cases is whether the dispute falls within the scope of "cross-border proceedings" as established in Regulation (EC) No. 1896/2006.

Regarding the determination of the appropriate court.

Art. 25 of Regulation (EU) No. 1215/2012 must be understood in the context of its overarching aims: preserving party autonomy and enhancing the effectiveness of exclusive choice of court agreements. As noted in paras. 15, 19, and 22, the Regulation seeks to standardise jurisdictional rules in civil and commercial matters through a framework that ensures predictability. This predictability promotes legal certainty by enabling claimants to easily identify the applicable court and allowing defendants to reasonably foresee the court where they might face liability. Legal certainty also necessitates that national courts can readily determine their jurisdiction without needing to evaluate the case's substantive issues.

In this regard, Art. 25(1) affirms that jurisdictional agreements like the one in question fall within its scope, supporting the Regulation's aim of ensuring legal certainty and consistency. Enforcing such agreements reduces the risk of simultaneous legal proceedings and conflicting rulings across Member States, in line with the objective of consistent application of justice as stated in para. 21 of the Regulation.

Moreover, the implementation of Art. 25(1) reflects the principle of mutual trust among Member States' legal systems. As para. 26 notes, this confidence and access to justice underpin the aim of reinforcing the European region of freedom, security, and justice.

While Art. 1(2) of the Convention on Choice of Court Agreements specifies that "a case is considered international if the parties are residents of different Contracting States and all elements concerning the dispute, regardless of where the chosen court is located, are linked solely to that State," the EU legislature opted not to incorporate a comparable provision in Regulation No. 1215/2012. Instead, it focuses on preserving and enhancing the area of freedom, security, and justice through measures related to judicial cooperation in civil matters that have cross-border implications, as stated in para. 3.

In the case discussed, the court concluded that Art. 25(1) of Regulation (EU) No. 1215/2012 applies to a jurisdiction agreement in which both parties—though domiciled in the same Member State—choose to submit their disputes to the courts of another Member State, even if the contract has any connection to that state.

Thus, it can be concluded that the issue of legal regulation of choice of court agreements in the EU has its specifics and patterns of development. Within the EU, priority is given to EU instruments such as Regulation No. 1215/2012. However, when a dispute involves a foreign element that is not domiciled in the EU, the Convention on Choice of Court Agreements should take precedence.

4 PECULIARITIES OF CHOICE OF COURT AGREEMENT FORM: UKRAINIAN EXPERIENCE

Until 2023, the choice of court in Ukraine was governed solely by bilateral state agreements or by the relevant conflict of laws clauses of the Ukrainian Law on Private International Law[9] in the case-law of the national courts. The ratification of the Hague Convention on Choice of Court Agreements—a unique instrument allowing parties to choose the competent jurisdiction they believe is best to handle disputes—was an irreversible step towards the recognition of the primacy of international law over national law.

The consequences of ratifying the Convention are extremely significant for Ukraine. First, as stated in the Preamble, the expansion of legal cooperation is one of the factors in the development of international trade and investment, and accordingly, foreign investors and the business community may feel more protected in the legal field. Second, given the high level of distrust of the judiciary (according to a survey by the Kyiv International Institute of Sociology, only 12% of Ukrainians trust the courts and only 9% trust prosecutors, compared to 63% and 67% who do not[10]), the Convention offers a potential opportunity to overcome this barrier by reducing parallel proceedings and potentially increasing predictability and

9 Law of Ukraine no 2709-IV of 23 June 2005 "On Private International Law" <https://zakon.rada.gov.ua/laws/show/2709-15#Text> accessed 20 February 2025.

10 'Dynamics of Trust in Social Institutions in 2021-2024' (*Kyiv International Institute of Sociology*, 9 January 2025) <https://www.kiis.com.ua/?lang=ukr&cat=reports&id=1467&page=1> accessed 20 February 2025.

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

certainty in international litigation. Third, the Convention provides more clearly defined mechanisms for the recognition and enforcement of foreign judgments issued by Ukrainian courts and vice versa, avoiding reliance on the principle of reciprocity.

In the doctrine of international civil procedure and law enforcement practice, the prevailing view is that the choice of court is a prerogative of the contracting parties.[11] However, the case law of Ukrainian courts shows that there is no uniform approach to resolving this issue. For example, in one case, the plaintiff (a Russian company) filed a claim with the Kyiv Commercial Court to declare a surety agreement concluded between the defendants invalid. The claim alleged that the agreement contained signs of fictitiousness as it was concluded without the intention of creating legal consequences stipulated by this agreement, but rather to fabricate debt and manipulate bankruptcy proceedings to the detriment of independent creditors. The initial issue faced by the court was determining the appropriate court. The plaintiff invoked a clause in the agreement stating that any disputes arising from the performance of this contract—including its interpretation, amendment, supplementation or cancellation—would first be resolved through negotiation, and only in the absence of agreement would the case be referred to the competent court. The parties recognised the Economic Court of Kyiv Region as the competent court for the consideration of disputes arising from the performance of the contract and Ukrainian substantive law as applicable.

The court of first instance, citing the agreement on the choice of court and the relevant rules of procedural law—specifically Art. 31 of the Code of Commercial Procedure of Ukraine—determined that the case materials should be transferred to the Commercial Court of Kyiv Region. However, upon appellate review, this conclusion was rejected. The appellate court reasoned that the plaintiff was not a party to the legal relations of the parties within the obligations under the Surety Agreement, and neither the principal nor the surety agreement contained an arbitration clause covering third-party disputes. Consequently, the court of first instance erred in transferring the claim based on territorial jurisdiction. Furthermore, the appellate court further noted that the phrase "by a court established by law" refers not only to the court's legal basis for existence but also to its compliance with certain rules governing its activities, i.e., it covers the entire organisational structure of courts, including issues within the jurisdiction of certain categories of courts.[12]

In this case, it can be argued that the Russian company, which filed a claim with the jurisdictional body provided for by the contract (to which it was not a party), deliberately

11 Mukarrum Ahmed, *The Nature and Enforcement of Choice of Court Agreements : A Comparative Study* (Hart Publishing 2020) 3-5; Afifah Kusumadara, 'Jurisdiction of Courts Chosen in the Parties' Choice of Court Agreements: An Unsettled Issue in Indonesian Private International Law and the Way-Out' (2022) 18(3) Journal of private international law 424, doi:10.1080/17441048.2022.2148905.

12 Case no 910/20620/21 (Northern Commercial Court of Appeal, 14 December 2023) <https://reyestr.court.gov.ua/Review/115703939> accessed 20 February 2025.

abused its procedural rights by convincing the lower courts that it was appropriate to consider the case in the courts of Ukraine.

In another case, it was determined that, in accordance with the terms of the International Supply Agreement, any disputes, controversies or claims arising out of or in connection with the Agreement would be considered by the commercial court at the buyer's location, namely the Commercial Court of Dnipropetrovska oblast, Ukraine. However, according to the register of legal entities, the buyer's location was dualistic, as, despite being located in another region of Ukraine (Vinnytsia), its postal address was in another region, Dnipro. The Court of Appeal's position in this case proved to be very controversial, as it overturned the decision of the first instance court which had transferred the case to the Commercial Court of Vinnytsia. The appellate court argued that the parties to the international supply agreement had determined the jurisdiction at the place of the buyer's business, the Commercial Court of Dnipro. The court's own interpretation of the factual circumstances of the case led to a weakening of the right to a fair trial.[13]

According to Art. 1 of the Law of Ukraine on the State registration of legal entities and individual entrepreneurs,[14] the place of residence of a legal entity is the address of the entity or of the person acting on its behalf in accordance with the legal instrument or legal basis. Moreover, under Art. 93(1) of the Ukrainian Civil Code, the place of residence of a legal person is the actual place of business or the place from which the day-to-day management of the activities of the legal person (in particular, the management) is carried out. Under Art. 9(2)(10) of the Law of Ukraine on the State registration of legal entities, individual entrepreneurs and public organisations, information on the place of residence of legal persons is one of the elements to be included in the Unified State Register. Under Art. 97 of the Ukrainian Civil Code, a company is administered by its subsidiaries. The governing bodies of a company are its general assembly of its members and its governing body, unless otherwise specified by law. Art. 98 of the Ukrainian Civil Code provides that the general meeting of the shareholders of a company is entitled to take decisions on all matters related to the company's activities, including matters that are the responsibility of other company bodies. Therefore, when distinguishing between the terms "location" and "postal address" of a legal entity, priority should be given to the term postal address.

Another example illustrating the role of a jurisdictional body in dispute resolution is found in a case involving a seafarer, a citizen of Ukraine, who was insured while working under an employment contract and subsequently filed a claim for damages. The claim identified two defendants: the seafarer's direct employer (a foreign company) and an employment

13 Case no 904/5555/23 (Central Commercial Court of Appeal, 8 January 2024) <https://reyestr.court.gov.ua/Review/116147220> accessed 20 February 2025.

14 Law of Ukraine no 755-IV of 15 May 2003 'On the State Registration of Legal Entities and Individual Entrepreneurs' <https://zakon.rada.gov.ua/laws/show/755-15#Text> accessed 20 February 2025.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

intermediary. The peculiarity of this case was the presence of a clause in the Agreement stipulating that its terms and conditions were subject to the applicable provisions of the vessel's flag state, and that any disputes arising from the agreement were to be resolved in accordance with that law. It was established in the course of the case that the vessel *Aetolia* was flying the flag of Barbados. The Supreme Court, in reviewing the decisions of the courts of first instance and appeal, noted that the absence of a reference to a specific Barbados court in the seafarer's employment agreement did not negate the existence of a valid agreement on contractual jurisdiction.[15]

These examples demonstrate the parties' intent to designate a specific court as competent to hear the dispute. However, there are cases when the parties to a contract, when choosing the contractual type of jurisdiction, do not explicitly name such a court, but refer to the choice of law that they consider appropriate to apply in the dispute. On the one hand, such actions by the parties to the dispute are aimed at selecting a jurisdictional body, as the autonomy of will takes precedence over other rules. On the other hand, the existence of such a situation, by analogy, can be compared to a non-rehabilitating pathological arbitration agreement, the existence of which indicates the invalidity of the choice of arbitration as an alternative dispute resolution method.

In this context, the practice of Ukrainian national courts has shown a degree of inconsistency. For example, when considering a claim for debt collection, the court of first instance refused to open proceedings in the case, citing the contractual clause whereby disputes, claims arising in connection with the agreement, if not resolved by the parties through negotiations, were to be resolved in accordance with the procedure established by the legislation of Ukraine.[16] In other words, in the agreement, the parties only made a choice of law (the law of which state is applicable to legal relations with a foreign element), and did not determine the jurisdiction of the relevant case to the courts of Ukraine. The materials of the claim did not contain any other evidence that the parties had consented to consider disputes arising from this agreement in the courts of Ukraine. By cancelling this decision of the court of first instance, the Court of Appeal believes that the parties' choice of Ukrainian law as the law governing their relations under the agreement means that they have chosen the national legislation of Ukraine, and not individual legislative acts governing the relevant relations of the parties, including until the resolution of the dispute arising between the parties in this case.[17]

15 Case no 947/18611/21 (Civil Court of Cassation of the Supreme Court, 3 May 2023) <https://reyestr.court.gov.ua/Review/110749272> accessed 20 February 2025.

16 Iryna Izarova and others, 'Case Management in Ukrainian Civil Justice: First Steps Ahead' (2022) 40 Cuestiones Políticas 927, doi:10.46398/cuestpol.4072.56.

17 Case no 911/2332/22 (Judge Northern Commercial Court of Appeal, 14 February 2023) <https://reyestr.court.gov.ua/Review/109270533> accessed 20 February 2025.

Such an interpretation raises concerns as it directly contradicts the basic principles of private international law. In the above case, the courts, trying to understand the real will of the parties to the dispute, substituted the concepts of "forum selection agreement" and "choice of law agreement". The latter definition is reflected in the 2015 Principles on Choice of Law in International Commercial Contracts,[18] which reveals its essence.

Both the Convention and the national statutes of member states empower parties engaged in foreign economic contracts to choose their desired court, reflecting a strong adherence to the principles underlying private international law. Although the parties are endowed with a broad spectrum of powers, the principles of international civil procedure and the rulings of domestic courts present several challenging issues: the repercussions of violating the parties' court selection agreement, the determination of liability for such violations, and the presence of extraordinary situations that permit national courts to disregard the court selection agreement.

5 DEROGATION FROM THE AGREEMENT

As previously articulated, a choice of court agreement represents a definitive expression of the concerted actions by two or more parties regarding the selection of a specific jurisdictional authority deemed a "court established by law." The inherent contradiction within this agreement lies in its inability to be governed by the principles of private international law that are applicable to contractual agreements.

It is reasonable to concur with the doctrinal perspective that, in the context of enforcing clauses pertaining to forum selection in contracts, courts within Anglo-American legal systems rely upon a distinct set of rules that have evolved over an extended period. For scholars specialising in conflict of laws or practitioners in commercial law, the specialised regulations governing the enforcement of jurisdiction clauses appear almost self-evident. However, considering the contractual foundation of jurisdiction clauses, these distinctive mechanisms for the enforcement of a contractual agreement are both unexpected and present a significant analytical conundrum.[19]

It is accurately observed within scholarly discourse that to enhance predictability for the involved parties and mitigate uncertainty, it is advisable for the parties to incorporate a forum selection clause within their contractual agreements. Nevertheless, in the event that a dispute emerges, there is no assurance that either party will initiate a claim in the

18 Hague Conference on Private International Law, *Principles on Choice of Law in International Commercial Contracts* (HCCH 2015) <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135> accessed 20 February 2025.

19 Shahar Avraham-Giller, 'The Court's Discretionary Power to Enforce Valid Jurisdiction Clauses: Time for a Change?' (2022) 18(2) Journal of Private International Law 209, doi:10.1080/17441048.2022.2101189.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

designated court. The omission to commence litigation in the specified court may result in various repercussions, predominantly pertaining to procedural jurisprudence.[20]

It is not uncommon for parties to disregard the execution of such an agreement and choose a court they perceive as more "favourable" to their interests. The consequences of such actions, however, are far from uniform. There is no definitive or universally applicable answer, as each legal system may set its own substantive and procedural law filters to determine the legal nature of the forum selection agreement. In this case, the authors refer to such an agreement as a specific type of procedural agreement or as a part of the contract law of a particular country. The classification chosen will directly influence the legal outcomes in cases where a party breaches the forum selection agreement.

In other words, a judicial body that engages with a case stemming from a contract that includes a forum selection clause is obligated to ascertain whether to persist with the legal proceedings or to enact the repercussions of the prorogation clause. Naturally, a litigant who is disinclined to transfer the proceedings to the designated court as per the stipulations of the agreement and who initiates a claim in an inappropriate jurisdiction, in contravention of the forum selection clause, may proffer certain arguments that will constitute irrefutable justifications for non-compliance. These typically include failure to adhere to the formal requirements of the agreement, the establishment of such an agreement under coercion, fraudulent inducement, error, and similar factors.[21] Other effective tools that a party may use include the application of the doctrine of bad faith and violation of public policy.[22]

In US case law, it is acknowledged that there are no clear approaches to determining the criteria for the validity of a forum selection agreement. As can be seen, analysing the case law, scholars have identified seven approaches (methods) to the possibility of derogation from the forum selection agreement.[23] This paper argues that this categorisation may lead to a misunderstanding of the legal character of forum selection agreements. Although it is still appropriate to distinguish those approaches to the disclosure of this issue that were highlighted in *Bremen v. Zapata Off-Shore Co.*[24]

20 Peter Hay, 'Forum Selection Clauses–Procedural Tools or Contractual Obligations? Conceptualization and Remedies in American and German Law' (2021) 35(1) Emory International Law Review 1 <https://scholarlycommons.law.emory.edu/eilr/vol35/iss1/1> accessed 20 February 2025.

21 Hannah L Buxbaum, 'The Interpretation and Effect of Permissive Forum Selection Clauses Under US Law' (2018) 66(1) The American Journal of Comparative Law 127, doI:10.1093/ajcl/avy013.

22 Tanya J Monestier, 'When Forum Selection Clauses Meet Choice of Law Clauses' (2019) 69(2) American University Law Review 325.

23 John F Coyle and Katherine C Richardson, 'Enforcing Inbound Forum Selection Clauses in State Court' (2021) 53 Arizona State Law Journal 65, doi:10.2139/ssrn.3691233.

24 Alona E Evans, 'M/S Bremen and Unterweser Reederei, GMBH v Zapata Off-Shore Co 40 USLW 4672' (1972) 66(4) American Journal of International Law 864, doi:10.2307/2198518.

The US Supreme Court, upon deliberation of this particular case, arrived at the determination that given that the jurisdiction clause constitutes a contractual obligation, it follows that if such a clause is incorporated within the contract, it is *prima facie* valid and must be adhered to, barring three mutually exclusive conditions:

- the initial condition pertains to instances where the jurisdiction or subject matter clause contravenes public policy;
- the subsequent condition involves scenarios where the establishment of the jurisdiction clause was adversely affected by fraudulent activities or undue external pressures;
- the tertiary category arises when the clause is deemed "unreasonable" or "unjust".

In accordance with this judicial precedent, the United States Supreme Court, along with numerous other national courts, has adopted this interpretive framework, as it effectively encapsulates the foundational principles that were subsequently articulated in the text of the 2005 Hague Convention.

6 CONCLUSION

The 2005 Hague Convention constitutes the most consequential international accord pertaining to the regulatory framework governing choice of court agreements. It represents a significant milestone achieved by the Hague Conference on Private International Law ("HCCH") in the domain of choice of court agreements within the context of international commercial litigation, and has exerted a constructive influence on the evolution of global transactions. The Convention establishes an international infrastructure designed to foster international trade and investment by promoting judicial collaboration in matters of jurisdiction as well as the recognition and enforcement of judgments concerning choice of court agreements.

The Convention is distinguished by its aspiration to attain "full harmonisation of the Contracting States' regulation", with the principal aim of enhancing legal certainty for parties engaged in international commercial endeavours. Specifically, the Convention endeavours to augment the effectiveness of choice of court agreements across various legal systems by instituting a "coordinated regulatory framework" that encompasses these systems.

Ukraine's ratification of the 2005 Hague Convention serves a dual function. On the one hand, it facilitates the broadening of international trade relationships, while on the other hand, it serves as one of the most efficacious alternatives to the conventional determination of jurisdiction, which is deemed "appropriate" in the context of cross-border dispute resolution.

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Keywords: *choice of court, agreement, Hague Convention on Choice of Court Agreements, exclusive agreement.*

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Тематичне дослідження

УГОДА ПРО ПРАВО ВИБОРУ СУДУ: ОСОБЛИВОСТІ ПРАВОВОГО РЕГУЛЮВАННЯ ТА СУДОВОЇ ПРАКТИКИ

Ірина Маліновська, Людмила Лейба, Вікторія Панченко та Ірина Череватенко

АНОТАЦІЯ

Вступ. *У цій статті подано детальний аналіз законодавчого регулювання – як національного, так і міжнародного – та судової практики щодо вибору суду в транскордонних спорах. У міжнародних ділових відносинах часто виникає питання про те, який орган має юрисдикцію щодо потенційних майбутніх спорів. Розглядаючи цю тему, автори ретельно розкривають складні питання, пов'язані із застосуванням угоди про вибір суду, зокрема питання, пов'язані з відхиленням від такої угоди та покладенням відповідальності за її порушення. Значна частина аналізу присвячена вивченню доктринальних підходів та судової практики України, яка перебуває на початковій стадії впровадження «договірних механізмів» вибору суду. Крім того, аналіз судової практики Суду Європейського Союзу та національних судів європейських країн показує відсутність єдиних підходів до цього питання.*

Методи. *У дослідженні використовувалися аналітичний, нормативний та порівняльний методи. Метод законодавчого дослідження використовується для характеристики нормативних актів, що стосуються процедури вибору компетентного суду та особливостей виключної угоди. Крім того, порівняльний метод було застосовано у дослідженні міжнародного та національного правового регулювання вибору суду, який буде уповноважений розглядати транскордонні спори. Обираючи метод правового аналізу та синтезу, автор надає обґрунтовану оцінку судової практики як національних судів Європейського Союзу, України, так і Суду Європейського Союзу.*

Результати та висновки. *Згідно з дослідженням, автори визначають, що використання Гаазької конвенції про угоди про вибір суду сторонами у зовнішньоекономічних відносинах, по-перше, підвищить об'єктивність вирішення спорів між сторонами, а по-друге, зміцнить та розвине світову бізнес-спільноту.*

Ключові слова: *вибір суду, угода, Гаазька конвенція про угоди про вибір суду, виключна угода.*