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**Choice of Court Agreements in International Civil and Commercial Law:
A Comparative Study of Chinese Law, the 2005 Hague Choice of Court
Convention and the Brussels I Recast Regulation**

Long Jiao

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College of Social Sciences
University of Glasgow
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Abstract

This dissertation focuses on choice of court agreements in international civil and commercial law. It introduces the terminology regarding choice of court agreements, describes different types of choice of court agreements, and examines the scopes of choice of court agreements in Chapter 2. Based on the principle of party autonomy, choice of court agreements have been an important basis of jurisdiction in many legal systems. This dissertation undertakes a detailed examination of choice of court agreements in three legal contexts, namely, Chinese law, the 2005 Hague Choice of Court Convention and the Brussels I Recast Regulation, in Chapter 3, 4 and 5 respectively. In each context, the dissertation considers severability, applicable law, and the formal and essential validity of choice of court agreements, and explores the situation when there is a breach of the choice of court agreement. The 2005 Hague Convention is a great international effort to establish harmonized jurisdiction rules on choice of court agreements. Article 25 of Brussels I Recast is a good regional example for regulating choice of court agreements within the EU. Chinese law and judicial practices also increasingly respect choice of court agreements between the parties. As the UK and the EU are negotiating Brexit and China signed the 2005 Hague Convention but has not ratified it yet, finally, in Chapter 6, this dissertation not only examines the relationship between the 2005 Hague Convention and Brussels I Recast in terms of the UK, but also reviews the relationship between Chinese law and the 2005 Hague Convention. More importantly, this dissertation recommends some law reform measures for the future of Chinese law, which would seek to enhance the enforcement of choice of court agreements in the Chinese legal system.

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Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption

Convention of 30 June 2005 on Choice of Court Agreements

Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters

Convention on the Recognition and Enforcement of Foreign Arbitral Awards

1996 UNCITRAL Model Law on Electronic Commerce

United Nations Convention on Contracts for the International Sale of Goods (CISG)

Chinese Legislation

1991 Civil Procedure Law of the People's Republic of China

2007 Civil Procedure Law of the People's Republic of China

2012 Civil Procedure Law of the People's Republic of China

2017 Civil Procedure Law of the People's Republic of China

2018 Constitution of the People's Republic of China

1999 Contract Law of the People's Republic of China

2019 Electronic Signature Law of the People's Republic of China

2008 Interpretation of the Supreme People's Court concerning Some Issues on the Application of the Arbitration Law of the People's Republic of China

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Notice of the Supreme People's Court on Adjusting the Standards for Jurisdiction of the Higher People's Courts and the Intermediate People's Courts over the Civil and Commercial Cases of First Instance

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Author's Declaration

“I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.”

Printed Name: Long Jiao

Signature: _____

1 Introduction

1.1 Background

With the rapid development of international business, there is an increasing number of cross-border disputes between parties from different countries. Bringing a lawsuit before a state court is a usual way for parties to resolve their disputes. In order to achieve certainty and predictability, many legal systems allow parties to reach an agreement on the court in which to resolve their disputes for civil and commercial matters. Choice of court agreements record the parties' consent and direct the parties to an agreed court in which to resolve their disputes. When the parties enter into choice of court agreements, they expect greater certainty, procedural efficiency, and lower litigation cost,¹ and most importantly, that no party will breach this agreement.

Based on the principle of party autonomy, when the chosen court determines its jurisdiction on the dispute, the first step is to decide if the choice of court agreement is valid. If a choice of court agreement is valid, in principle, the chosen court may exercise its jurisdiction in respect of the dispute. Only when a choice of court agreement is valid and the chosen court has properly exercised jurisdiction, can its resulting judgment be recognized and enforced in another state. Therefore, the validity of choice of court agreements is an important subject for state courts to address in exercising jurisdiction as well as in enforcing a judgment from a chosen court. If a judgment of the chosen court is not recognized and enforced in another country where the judgment debtor has assets, the judgment has little value.

Nowadays, the trend to support party autonomy through choice of court is witnessed not only by individual countries, but also by international efforts, which establish harmonized jurisdiction rules on choice of court agreements. The Convention of 30 June 2005 on

¹ Zheng Sophia Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Routledge 2014) 1.

Choice of Court Agreements (“the 2005 Hague Convention”) is the international instrument on admitting the effectiveness of exclusive choice of court agreements among Contracting States. 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) (“Brussels I Recast”) provides uniform jurisdiction rules for determining the validity and enforceability of choice of court agreements within the EU. It is reasonable to predict that the importance of choice of court agreements will continue to increase in the future. Countries are likely to further relax national law rules on determining the validity of choice of court agreements, and judicial cooperation will be built internationally to improve the efficiency of choice of court agreements.²

1.2 Objective and Methodology of Thesis

Choice of court agreements, as the research objective of this thesis, are special contract terms. They not only have contractual binding effects on contracting parties, but also have procedural effects on jurisdiction.³ In Chapter 2, basic features of choice of court agreements will be introduced, including relevant terminologies, different types and scopes of choice of court agreements. Choice of court agreements can demonstrate the principle of party autonomy which plays a vital role in maintaining the global commercial order,⁴ and can influence the judicial sovereignty of a State as well. If a country accepts the view that private parties have the right to choose a competent court, choice of court agreements will get the full validity, enforceability, and predictability which the parties intend them to have, thus the parties will have clearer expectations on dispute resolution. As a result, party autonomy in choosing a court for litigation can be respected and the predictability of dispute resolution in international commercial transactions can also be promoted. This positive result will, in turn, facilitate parties to choose the optimal court in choice of court agreements and to avoid unnecessary delay. When a claimant brings a lawsuit before a

² *ibid*, 3.

³ *ibid*, 13.

⁴ Marlene Wethmar-Lemmer, ‘Party Autonomy and International Sales Contracts’ (2011) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 431, 431.

state court on the basis of a choice of court agreement or before another state court in disregard of the choice of court agreement, the primary questions for the court, chosen or non-chosen, are deciding whether a choice of court agreement is valid (according to the applicable law that also must be determined). Only after deciding whether or not the agreement is valid, can the court decide if it has jurisdiction over that dispute, ultimately to exercise or decline jurisdiction.⁵ Different legal systems have different approaches to answering this question, setting various requirements or limitations on choice of court agreements for international civil and commercial disputes.

This thesis intends to make a comparative study of the relevant rules concerning choice of court agreements mainly in Chinese law, the 2005 Hague Convention and Brussels I Recast, to demonstrate how to determine the validity of choice of court agreements, as well as examining the remedies for breach of choice of court agreements. The recent development of these three legal systems will enrich the discussion on choice of court agreements throughout the thesis. This author has chosen the 2005 Hague Convention as a global example and Brussels I Recast as a regional example of the regulation of choice of court agreements. As a result, the 2005 Hague Convention and Brussels I Recast will serve as the reference point for Chinese law in this comparative legal analysis, mainly in two capacities. Firstly, the differences between the Convention and Brussels I Recast provide an environment where the comparison may be effectively employed. In addition, existing Chinese law in relation to choice of court agreements is compared to the Convention. Through these comparisons, the author is going to make some suggestions as to Chinese rules concerning choice of court agreements, as well as to predict the likelihood of China's ratifying the 2005 Hague Convention.

1.3 Outline Legal Framework

1.3.1 Chinese Law

⁵ Jing Long and Xiangjun Zhang, 'Identification of Validity of Jurisdiction Agreement in Foreign Civil Lawsuit' (2014) 1 *Journal of Beihua University (Social Sciences)* 111, 111.

Chinese law follows the civil law tradition. Chinese laws exist in legislation and the judicial interpretations or directions of the Supreme People's Court. Case law only has referential value in China.⁶ The 1991 Chinese Civil Procedure Law is the first legislation that recognizes the effect of choice of court agreements. It has been amended in 2007, 2012 and 2017, respectively. In the latest 2017 version of Chinese Civil Procedure Law ("Chinese CPL"), the provisions on jurisdiction based on choice of court agreements made by parties have been deleted from Part IV, which is focused on international issues. However, this does not mean that choice of court agreements will not be honoured or enforced any more in international civil proceedings in China. The fact is that now, Article 34 of the Chinese CPL, which permits choice of court, applies universally to both domestic and international cases in China. Also, Article 34 does not make a distinction between exclusive and non-exclusive choice of court agreements, thus it is safe to say that the rule can apply to both exclusive and non-exclusive choice of court agreements in both domestic and international cases. Apart from the Chinese CPL, the validity and enforcement of choice of court agreements have also been interpreted in some judicial interpretations published by the Supreme People's Court, and the latest is the "Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China" ("2015 Interpretation").⁷ Chinese rules and judicial practices in relation to choice of court agreements will be discussed in Chapter 3.

1.3.2 The 2005 Hague Convention

The most important worldwide convention regarding the rules regulating choice of court agreements is the 2005 Hague Convention. It has entered into force among the Contracting States of the EU, Mexico, Singapore, and Montenegro.⁸ The Convention is a significant achievement of the Hague Conference on Private International Law ("HCCH") for choice of court agreements in international commercial litigation, and produces positive effects on

⁶ Zheng Sophia Tang (n 1) 15.

⁷ The 2015 Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China <<http://en.pkulaw.cn/display.aspx?cgid=82f91c0394dcdc28bdfb&lib=law>> accessed 5 September 2019.

⁸ Updated list of Contracting States to the 2005 Hague Convention <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>> accessed 5 September 2019.

the development of international transactions. It establishes an international framework to promote international trade and investment by encouraging judicial cooperation in the field of jurisdiction and the recognition and enforcement of judgments in regard to choice of court agreements.⁹ The 2005 Hague Convention leads to “a full harmonization of the Contracting States’ regulation”¹⁰ and aims to promote greater legal certainty concerning choice of court agreements between parties in international commercial transactions. More specifically, it seeks to make choice of court agreements more effective in different legal systems by establishing “a coordinated regulatory framework” across all these systems.¹¹ More details about the rules of the 2005 Hague Convention will be provided and discussed in Chapter 4.

The People’s Republic of China, as the second largest economy in the world, signed the 2005 Hague Convention on 12 September 2017, but has not yet ratified it. This marks an important step forward towards the global acceptance of the Convention. China’s joining as a Contracting State to the 2005 Hague Convention is expected to lead to enhanced certainty in settling commercial disputes arising between Chinese parties and parties of other Contracting States.¹² It is important to compare the provisions of the 2005 Hague Convention with the corresponding rules in existing Chinese law, as well as to predict the future of Chinese law in this area: what is the next step of ratification for China and how will China coordinate the Convention with its national rules? The relationship between the 2005 Hague Convention and existing Chinese law will be further discussed in Chapter 6.

1.3.3 The Brussels I Recast Regulation

⁹ Dorothy Murray, Haitao Liu and Ronghui Li, ‘China Signs the Hague Choice of Court Convention’ (*King & Wood Mallesons*, 27 September 2017)

<https://www.chinalawinsight.com/2017/09/articles/global-network/china-signs-the-hague-choice-of-court-convention/#_ftn1> accessed 5 September 2019.

¹⁰ Johannes Landbrecht, ‘The Hague Conference on Private International Law: Shaping a Global Framework for Party Autonomy’ (2017) 1 *International Business Law Journal* 35, 36.

¹¹ *ibid.*

¹² Dan Song, ‘Web alert - China signs The Hague Choice of Court Convention - A step towards international judicial cooperation’ (*The Standard Club*, 31 January 2018)

<<https://www.standard-club.com/news-and-knowledge/latest-updates/2018/01/web-alert-china-signs-the-hague-choice-of-court-convention-a-step-towards-international-judicial-cooperation.aspx>> accessed 5 September 2019.

Aside from international harmonization via the 2005 Hague Convention, Brussels I Recast, as the more influential regional harmonization measure, has been a significant development among the EU Member States. Through Brussels I Recast, the EU has harmonized its jurisdiction rules and recognition and enforcement of foreign judgments among its Member States.¹³ The purpose of Brussels I Recast is to achieve the goal of free circulation of judgments in civil and commercial matters in the EU Member States. According to Brussels I Recast, a court in an EU Member State shall exercise its jurisdiction mainly (i.e. under the general rule) if the defender is “domiciled” in a Member State (Article 4) or, regardless of the domicile of the defender, if the court of a Member State has special jurisdiction (Article 7), or exclusive jurisdiction (Article 24), or jurisdiction by parties’ choice (Article 25), or by their submission (Article 26). More details of Article 25 concerning choice of court agreements will be provided and discussed in Chapter 5.

Many similarities may be found between Brussels I Recast and the 2005 Hague Convention with respect to choice of court agreements. It can also be said that the adoption of Brussels I Recast contributed to the approval of the Convention by the EU. For the EU, ensuring coherence as early as possible between the rules on choice of court agreements in civil and commercial matters and the rules of the 2005 Hague Convention was a wise decision. The relationship between the Brussels I Recast and the 2005 Hague Convention will also be further examined in Chapter 6, including the influence of Brexit.

¹³ Zheng Sophia Tang (n 1) 17.

2 Basic Features of Choice of Court Agreements

2.1 Relevant Terminology

Parties reaching an agreement in writing is the most direct form of exercise of party autonomy. In civil and commercial matters, an agreement about jurisdiction could be a part of the main contract between parties (contained in one clause or more clauses), or it could be a separate (i.e. freestanding) agreement made by the parties. No matter what form the agreement takes, different terminology is used in different instruments and materials by different legislators and scholars. This section will introduce these terms relating to the choice of court and make some comments, thus setting an appropriate basis for greater discussion of choice of court agreements in later sections.

2.1.1 Choice of Court Agreements

The term “choice of court agreements” (or “choice-of-court agreements”) is used in the 2005 Hague Choice of Court Convention. Article 1(1) defines the scope of the Convention, that is, “[t]his Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters”. As this is an international convention, this terminology seems to have been widely accepted on a global level. This term is widely used by many scholars in their published books and articles, such as Ahmed,¹⁴ Dickinson,¹⁵ and Hartley.¹⁶

The exercise of party autonomy through the choice of court is where two or more parties agree about where litigation concerning their disputes will take place. Three basic elements (agreement, choice and court) are contained in this terminology, which explicitly reflects

¹⁴ Mukarrum Ahmed, *The Nature and Enforcement of Choice of Court Agreements: A Comparative Study*, vol 19 (Hart Publishing 2017).

¹⁵ Chapter 9 in Andrew Dickinson and Eva Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press 2015) 277-306.

¹⁶ Chapter 13 in Trevor C Hartley, *Civil Jurisdiction and Judgments in Europe: The Brussels I Regulation, the Lugano Convention, and the Hague Choice of Court Convention* (Oxford University Press 2017) 225-279.

the parties' autonomy. It requires firstly that there is an "agreement", that is, there has been a meeting of parties' minds concluded in a formal way. If the consent of parties is absent, there can be no choice of court agreement.¹⁷

2.1.2 Forum Selection Clause

The term "forum selection clause" (or "forum-selection clause") is commonly used in cases in the US. In this context, the word "forum" means "a court or, more specifically, the system that has jurisdiction",¹⁸ and is explained more specifically as "A court of justice where disputes are heard and decided; a judicial tribune that hears and decides disputes; a place of jurisdiction where remedies afforded by the law are pursued".¹⁹ The word "clause" means "a part of a legal document, such as a section, phrase, paragraph or segment" in the legal dictionary.²⁰ Thus, in the term "forum selection clause", it seems that "forum" equals "court" in general and "clause" refers to a certain part of the main contract, and that part is about selecting courts for solving disputes between parties.

Historically, forum selection clauses were not favoured by American courts.²¹ Many courts, whether federal or state, declined to enforce them on the grounds that forum selection clauses were contrary to public policy and their purpose was to derogate from the jurisdiction of the court.²² In 1972, the US Supreme Court adopted a more favourable attitude towards forum selection clauses in the landmark case of *The Bremen v Zapata Off-Shore Co.*²³ From that case, if forum selection clauses are not "affected by fraud, undue influence or overweening bargaining power"²⁴ or the enforcement of the forum selection clause would not "contravene strong public policy of forum in which suit is

¹⁷ Ronald A Brand and Paul M Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (Cambridge University Press 2008) 40.

¹⁸ 'Forum' (*Collins Dictionary of Law*, 2006) <<https://legal-dictionary.thefreedictionary.com/forum>> accessed 15 July 2019.

¹⁹ 'Forum' (*West's Encyclopedia of American Law, 2nd edn*, 2008) <<https://legal-dictionary.thefreedictionary.com/forum>> accessed 15 July 2019.

²⁰ 'Clause' (*Collins Dictionary of Law*, 2006) <<https://legal-dictionary.thefreedictionary.com/clause>> accessed 15 July 2019.

²¹ Matthew J Sorensen, 'Enforcement of Forum-Selection Clauses in Federal Court after *Atlantic Marine*' (2014) 82(6) *Fordham Law Review* 2521, 2529.

²² *ibid.*

²³ *The Bremen v Zapata Off-Shore Co.* 92 S.Ct. 1907 (1972).

²⁴ *ibid.*, 1908.

brought, whether declared by statute or by judicial decision”²⁵, they shall be given effect.

2.1.3 Jurisdiction Agreements

Section 7 of the Brussels I Recast Regulation uses the heading, “Prorogation of Jurisdiction”. The term “agreement conferring jurisdiction” is used in Article 25. However, European scholars, including Briggs,²⁶ Van Calster,²⁷ Lord Collins of Mapesbury,²⁸ Fentiman,²⁹ Magnus and Mankowski,³⁰ and Torremans,³¹ usually use the terminology of “jurisdiction agreements” or “agreements on jurisdiction” when referring to Article 25. In the context of this term, the meaning of “agreement” between the parties is contractual in nature and this kind of agreement is about the “jurisdiction” of a potential litigation. However, the contractual agreement, which sets out the jurisdiction of a particular court, may be regarded as “a part of procedural or public law”.³² Basically, whether a court has jurisdiction is always a matter of public law, lying beyond the scope of party autonomy and the direct control of private parties.³³ Therefore, there are some apparent conflicts in relation to this term and it is essential to notice the mixed legal nature (public and private) of an agreement on choice of court.

There are some other types of jurisdiction agreements aside from choice of court agreements, such as arbitration agreements and mediation agreements.³⁴ According to Tiong Min Yeo, choice of court agreements are simply about choosing the courts and country and are the classic jurisdiction agreements for managing disputes, while other

²⁵ *ibid.*

²⁶ Para 1.13-1.18 and Chapter 6, 7, 8 in Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press 2008).

²⁷ Section 2.2.9 in Geert Van Calster, *European Private International Law* (Hart Publishing 2013) 77-85.

²⁸ Chapter 12.2 in Lord Collins of Mapesbury and others (eds), *Dicey, Morris and Collins on the Conflict of Laws*, vol 1 (15th edn, Sweet & Maxwell/Thomson Reuters 2012) 599-644.

²⁹ Chapter 2 in Richard Fentiman, *International Commercial Litigation* (Second, Oxford University Press 2015) 48-88.

³⁰ Ulrich Magnus and Peter Mankowski (eds), *Brussels Ibis Regulation 2016*, vol 1 (2nd edn, Otto Schmidt 2016) 583-669.

³¹ Chapter 11 & 12 in Paul Torremans (ed), *Cheshire, North & Fawcett Private International Law* (15th edn, Oxford University Press 2017).

³² Adrian Briggs (n 26) 10, para 1.17.

³³ *ibid.*

³⁴ Tiong Min Yeo, ‘The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements’ (2005) 17(1) Singapore Academy of Law Journal 306, 318.

types of jurisdiction agreements, including arbitration agreements and mediation agreements, also perform important roles in resolving disputes. Thus, in the context of the term “jurisdiction agreements”, the word “jurisdiction” should not specially refer to the choice of court by the parties.

2.1.4 Other Terms

Apart from the three main terms set out above, which are used frequently, there are some others which appear regularly in publications. Because “forum” is broadly equivalent to “court” and “clause” is a form of “agreement”, some scholars prefer to refer to “choice of forum agreements”,³⁵ “choice of forum clause”,³⁶ “choice of court clauses”,³⁷ or “jurisdiction clause”,³⁸ and so on.

2.1.5 Comments

Although all of the above terms have broadly the same meaning, in this thesis the term “choice of court agreements” shall be used, following the example of the 2005 Hague Convention. This phrase expresses party autonomy in choice of court explicitly, containing the three basic elements (agreement, choice and court). On the contrary, the term “forum selection clause” only reflects the idea of parties selecting a particular court. Similarly, the term “jurisdiction agreement” does not show the core concept of party autonomy in choice of court, that is, the choice of parties.

2.2 Types of Choice of Court Agreements

³⁵ Regina Asariotis, ‘Antisuit Injunctions for Breach of a Choice of Forum Agreement: A Critical Review of the English Approach’ (1999) 19(1) *Yearbook of European Law* 447.

³⁶ Lorraine L Griffin, ‘Choice of Forum Clauses in Contractual Agreements’ (1983) 10(1) *Southern University Law Review* 147.

³⁷ Elizabeth B Crawford and Janeen M Carruthers, *International Private Law: A Scots Perspective* (4th edn, W Green 2015), para 7-41.

³⁸ Lauren D Miller, ‘Is the Unilateral Jurisdiction Clause No Longer Option? Examining Courts’ Justifications for Upholding or Invalidating Asymmetrical or Unilateral Jurisdiction Clauses’ (2016) 51(3) *Texas International Law Journal* 321; Zheng Sophia Tang, ‘Effective of Exclusive Jurisdiction Clauses in the Chinese Courts—A Pragmatic Study’ (2012) 61(2) *International and Comparative Law Quarterly* 459; David Wilson and Joanna Silver, ‘Exclusive Jurisdiction Clauses and Anti-Suit Injunctions’ (2010) 5(4) *Journal of Intellectual Property Law and Practice* 220.

In general, most choice of court agreements in writing have the same purpose, namely, to confer jurisdiction on some court or to exclude some court's jurisdiction, so that according to the extent of exclusion, choice of court agreements may be divided into several forms.

2.2.1 Exclusive and Non-Exclusive Choice of Court Agreements

Although the word “exclusive” seems to indicate that only one court can have exclusive jurisdiction, parties usually choose the courts of one state, rather than a particular court, to have exclusive jurisdiction on their disputes in a choice of court agreement. Thus, exclusive choice of court agreements permit one or several courts within a single legal system to determine disputes between the parties. According to Article 3(a) of the 2005 Hague Convention, “exclusive choice of court agreement” means that an agreement designates one or several specific courts to the exclusion of the jurisdiction of any other courts.³⁹ For instance, parties often express exclusivity like this: “Party A shall sue Party B and Party B shall sue Party A in the court(s) of country X, and in no other place”.⁴⁰ An agreement is “deemed to be exclusive unless the parties have expressly provided otherwise” under Article 3(b) (i.e. presumption of exclusivity), which means that the chosen court is located in a specific country, for example, “Party A shall sue Party B and Party B shall sue Party A in the court(s) of China”.

Non-exclusive choice of court agreements are sometimes concluded by parties in order to avoid excluding a particular court's jurisdiction and to easily reach consensus. This kind of agreement confers jurisdiction on one court, but also allows each party to sue the other in any other competent court.⁴¹ It does not exclude the jurisdiction of all other competent courts and inevitably assumes that a lawsuit may be brought before any competent court. The chosen court has jurisdiction in addition to the other possibly competent courts (i.e. an additional forum).⁴² The parties may express non-exclusivity in writing, such as

³⁹ Article 3 of the 2005 Hague Convention adopts the wording of “the courts of one Contracting State or one or more specific courts of one Contracting State”, thus both one court and several courts could have exclusive jurisdiction.

⁴⁰ Ronald A Brand and Paul M Herrup (n 17) 43.

⁴¹ Richard Fentiman, ‘Unilateral Jurisdiction Agreements in Europe’ (2013) 72(1) *The Cambridge Law Journal* 24, 24.

⁴² Jochem Vlek, ‘Lis Pendens, Choice of Court Agreements and Abuse of Law under Brussels Ibis’ (2016)

“Litigation may be brought in the court(s) of country X, or in any other court which may exercise jurisdiction under its own law”.⁴³ Also, parties may designate more than one country and there may be some restrictions, such as “Litigation shall be brought in the court(s) of country X or in the court(s) of country Y”⁴⁴ or “Litigation shall be brought by Party A only in the court(s) of country X, and litigation shall be brought by Party B only in the court(s) of country Y”.⁴⁵

2.2.2 Asymmetric (or Asymmetrical) or Unilateral Choice of Court Agreements

Although there is an assumption that choice of court agreements may be divided into either exclusive or non-exclusive categories, some agreements intend to contain both elements and apply differently to each contracting party.⁴⁶ These agreements are called asymmetric choice of court agreements or unilateral choice of court agreements.⁴⁷ They are usually concluded for the benefit of one party only and provide a wider range of choice for that party than for the other. Specifically, party A is able to sue party B in any of the chosen courts while party B can sue Party A only in one designated court. Therefore, only the advantaged party enjoys the choice and has the freedom to initiate proceedings before any competent court while the other party may be able to sue in only one court.⁴⁸ It is hard to say whether asymmetric choice of court agreements are exclusive or non-exclusive in nature. This is because, although an asymmetric choice of court agreement is non-exclusive for party A, it is exclusive for party B. This kind of agreement usually exists in situations where the parties have unequal bargaining power and one party is “commercially dominant”, especially in banking and financial “transactions such as loans, bonds or swaps”.⁴⁹ In a case where there is a discreditable debtor, such agreements not only ensure that “creditors can always litigate in a debtor’s home court, or where its assets

63(3) *Netherlands International Law Review* 297, 310.

⁴³ Ronald A Brand and Paul M Herrup (n 17) 43.

⁴⁴ *ibid.*

⁴⁵ *ibid.*, 44.

⁴⁶ Mary Keyes and Brooke Adele Marshall, ‘Jurisdiction Agreements: Exclusive, Optional and Asymmetrical’ (2015) 11(3) *Journal of Private International Law* 345, 364.

⁴⁷ They can also be called lop-sided agreements or one-sided agreements, see para 4.190 in Adrian Briggs, *Private International Law in English Courts* (Oxford University Press 2014).

⁴⁸ Jochem Vlek (n 42) 310.

⁴⁹ Richard Fentiman (n 41) 24.

are located”,⁵⁰ but also give creditors the flexibility of suing the debtor “in the jurisdiction where the speediest and most effective relief is to be had”,⁵¹ thus reducing the risk to creditors.

2.2.3 Harlequin Choice of Court Agreements

There is another type of choice of court agreement which applies differently to each contracting party, but which is not asymmetric. This kind of agreement is called a “harlequin clause” and has been long accepted by the European Court of Justice (ECJ).⁵² In the case of *Nikolaus Meeth v Glacetal*, the parties agreed that:

If Meeth sues Glacetal the French courts alone shall have jurisdiction. If Glacetal sues Meeth the German courts alone shall have jurisdiction.⁵³

It can be seen from the above agreement that harlequin choice of court agreements are a kind of non-exclusive choice of court agreement and give parties equal rights to sue the other only in the courts of their respective country. Although the point of each party suing in different courts makes harlequin choice of court agreements similar to asymmetric agreements, the equal right of only having one court in which to sue the other is the point to distinguish them. Notably, in the above case, in the ECJ’s view, harlequin choice of court agreements are not prohibited by Article 17 of the Brussels Convention. Consequently, Article 25 of the Brussels I Recast, as a successor to Article 17 of the Brussels Convention, seemingly still permits harlequin choice of court agreements.

2.2.4 Non-specific Choice of Court Agreements

Non-specific choice of court agreements do not express which country’s court will have jurisdiction. They contain “non-geographic terms” and have been approved by the ECJ.⁵⁴

⁵⁰ *ibid.*

⁵¹ Elizabeth B Crawford and Janeen M Carruthers (n 37) 169, para 7-44.

⁵² *ibid.*, 168.

⁵³ Case 23/78 *Nikolaus Meeth v Glacetal* [1978] ECR 2133, 2135.

⁵⁴ Adrian Briggs, *Private International Law in English Courts* (Oxford University Press 2014) 245, para 4.191.

One example is the agreement in the case of *Coreck Maritime GmbH v Handelsveem BV and Others*,⁵⁵ where there was a clause stating that “the courts of the country in which the carrier has its principal place of business” shall have jurisdiction. In this situation, the identity of the carrier should not be in dispute and the principal place of business can be identified without any difficulty, otherwise, it is hard to make sense of the agreement due to the lack of clear meaning within it.

2.2.5 Hybrid Choice of Court Agreements

This type of choice of court agreement is a “combined arbitration and jurisdiction agreement”⁵⁶ and is particularly used when the agreement “incorporates an alternative arbitration or court dispute resolution mechanism”.⁵⁷ They may provide that litigation in a particular court is the primary way of resolving parties’ disputes, with arbitration as an alternative; or, alternatively, they may provide that arbitration is primary, with litigation as an alternative.⁵⁸

Just like asymmetrical choice of court agreements, hybrid agreements also have some advantages. Firstly, they have more flexibility to offer different solutions in different circumstances. In addition, such agreements also could be enforced effectively because the widely accepted regime of the “New York Convention”⁵⁹ offers easier access to enforce the option of arbitration.⁶⁰ However, such agreements combining arbitration and jurisdiction seem to be incoherent because they cause much difficulty in distinguishing the roles of courts and arbitration.⁶¹ Specifically, if one party exercises the right to refer the dispute to arbitration, but the other party refers to the chosen court, which approach should be followed and is the chosen court superior to the arbitration? In almost every country, arbitration serves as a kind of autonomous dispute resolution meaning, but litigation in the

⁵⁵ Case C-387/98 *Coreck Maritime GmbH v Handelsveem BV and Others* [2000] ECR I-9337.

⁵⁶ Adrian Briggs (n 26) 137.

⁵⁷ Louise Merrett, ‘The Future Enforcement of Asymmetric Jurisdiction Agreements’ (2018) 67(1) *International & Comparative Law Quarterly* 37, 40.

⁵⁸ Richard Fentiman (n 29) 45, para 2.13.

⁵⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

⁶⁰ Richard Fentiman (n 29) 46, para 2.16.

⁶¹ Adrian Briggs (n 26) 138, para 4.55.

domestic courts is usually the final step to solve disputes. If the litigation is superior to the arbitration, it seems that “the reference to arbitration is optional rather than mutually mandatory”.⁶² As a result, such hybrid agreements become purely jurisdiction agreements and it becomes meaningless for the parties to agree on arbitration. Based on this reason, there seems to be an odd logic operating within hybrid choice of court agreements. Even so, hybrid agreements combining arbitration and jurisdiction are “mixed and matched by the parties to produce the structure they want”,⁶³ and they represent an autonomous way of seeking dispute resolution by the parties.

2.3 Scope of Choice of Court Agreements

2.3.1 Temporal Scope

“Temporal scope” means the concluding time of choice of court agreements, i.e. choice of court agreements may be concluded before or after the dispute arises, and which choice of court agreement should be followed if the parties conclude several choice of court agreements in different times. In civil and commercial matters, from a theoretical perspective, any choice of court agreement could be concluded between the parties before the substantive proceedings start in one court because of the principle of party autonomy. The parties are free to choose any type of dispute resolution before or after a dispute arises. It is clear that a choice of court agreement can cover both existing disputes and potential disputes. But complex commercial transactions, especially financing transactions, often involve several distinct contracts between the contracting parties,⁶⁴ which may contain conflicting choice of court agreements. It is necessary to assign jurisdiction to one competent court, usually the last chosen one, from two or more inconsistent choice of court agreements, otherwise it would be inconvenient and unpredictable for parties as well as for those chosen courts. There is an important assumption that the parties, as “rational commercial actors”,⁶⁵ would not want the same matter to be governed by more than one

⁶² *ibid*, para 4.56.

⁶³ *ibid*, 139, para 4.58.

⁶⁴ Richard Fentiman (n 29) 58, para 2.55.

⁶⁵ Lord Collins of Mapesbury and others (eds) (n 28) 608, para 12-109.

agreement.⁶⁶ Therefore, when there is no submission by appearance to an earlier chosen court, it is wise to follow the last choice of court agreement to decide the jurisdiction.

2.3.2 Personal Scope

Determining who should be bound by a choice of court agreement is an important matter. Normally, both the parties to the main contract will be bound by any choice of court agreement contained in it.⁶⁷ The situation is a little more complex when a choice of court agreement concerns a third person. For instance, the choice of court agreement between party A and party B is that A undertakes B to initiate a proceeding against party C only in a chosen court.⁶⁸ It is apparent that there are two questions to consider. Firstly, can a choice of court agreement be framed like this? Then, what would happen if A sues C in a non-chosen court? Arguably, this kind of agreement could be made as the parties are free to agree whatever they want in civil and commercial matters, thus it represents an undertaking made by party A to party B. In the above example, A undertakes B to sue C only in the chosen court. In the author's view, such an undertaking shall be interpreted as giving rights to B rather than C because that agreement is concluded by Party A and B. If there is no other choice of court agreement between A and C, when A brings a lawsuit against C before a non-chosen court, B should be able to apply for a stay or dismissal of the proceedings in order to enforce the undertaking.⁶⁹ There is no obvious reason to deny the application unless B has no "legitimate interest" in the proceedings brought against C.⁷⁰ In addition, whether C could do the same in his or her own right depends on the wording of whether A and B agree to confer the right on him or her in the choice of court agreement.

2.3.3 Material Scope

In cases in which there is no dispute about the validity (formal and essential) of a choice of court agreement, the main question that is likely to arise is whether the dispute in question

⁶⁶ Richard Fentiman (n 29) 58, para 2.55.

⁶⁷ Trevor C Hartley (n 16) 273, para 13.165.

⁶⁸ Lord Collins of Mapesbury and others (eds) (n 28) 609, para 12-111.

⁶⁹ *ibid*, 610.

⁷⁰ *ibid*.

falls within the material scope of the choice of court agreement. Choice of court agreements only have an effect on the disputes covered by them.

2.3.4.1 Subject Matter (Civil and Commercial Matters)

It is widely accepted that choice of court agreements may be formed in relation to civil and commercial matters, and common perception holds that civil and commercial law is distinct from public law.⁷¹ However, the standard distinction between these two kinds of laws has never been fully settled, and it is never easy to distinguish civil and commercial matters from public matters. There are also uncertainties in several other areas, such as environmental matters, competition law, and public procurement law,⁷² which cannot be readily classified into private matters or public matters.

When assessing the private or public nature of the subject matter, commercial matters could be considered as a sub-category of civil matters,⁷³ and the key point is to consider whether public power is exercised. If both parties in the lawsuit are private persons (including natural persons and legal persons), their disputed matters will always be of a civil, private nature. If one of the parties is a public authority, or both parties are public authorities, the subject matter depends on “whether the public authority actually uses its public power, rather than whether the public authority acts”.⁷⁴ If the dispute originates from an act of exercising public power by the public authority, the subject matter should be regarded as a public law matter, such as the claims for compensation or damages arising from acts exercising public power. If the use of public power is not an issue in the dispute, the subject matter should be regarded as a civil and commercial matter, which can be covered by the choice of court agreement.

2.3.4.2 A Particular Legal Relationship

⁷¹ Geert Van Calster (n 27) 21.

⁷² *ibid.*

⁷³ Andrew Dickinson and Eva Lein (eds) (n 15) 62, para 2.15.

⁷⁴ *ibid* 63, para 2.19.

After deciding the civil nature of disputed matters, it is usually required that a choice of court agreement should relate to a particular legal relationship. Besides contractual claims, the dispute between the parties could relate to some other claim as long as it is characterized as a civil matter. Therefore, if not clearly restricted, a choice of court agreement may cover any dispute arising from the contractual relationship between the parties, and non-contractual claims related to the contractual relationship,⁷⁵ but only this particular contractual relationship. In *Powell Duffryn v. Petereit*,⁷⁶ the ECJ limited the scope of a choice of court agreement solely to a particular legal relationship, stating that this is because the purpose of a choice of court agreement is to “avoid a party being taken by surprise by the assignment of jurisdiction to a given forum as regards all disputes which may arise out of its relationship with the other party to the contract and stem from a relationship other than that in connection with which the agreement conferring jurisdiction was made”.⁷⁷

A choice of court agreement is agreed by the parties, thus only disputes stemming from their legal relationship can fall within the scope of the choice of court agreement. The most common situation is where the dispute stems from the main contract in which the choice of court agreement is contained, which defines the particular legal relationship to be created by the main contract. However, if the choice of court agreement states that it applies to “all disputes arising out of the contract concluded by the parties”, the agreement may apply to a legal relationship arising out of another contract between them,⁷⁸ because the word “contract” does not specify which contract and there is no reason to deny other legal relationships. Therefore, in the author’s view, when two separate legal relationships exist between the parties, the choice of court agreement could apply to both of them as long as it is not clearly prohibited.

⁷⁵ *ibid* 303, para 9.88.

⁷⁶ Case C-214/89 *Powell Duffryn plc v Wolfgang Petereit* [1992] ECR I-1745.

⁷⁷ *ibid*, para 31.

⁷⁸ Trevor C Hartley (n 16) 271, para 13.159.

3 Choice of Court Agreements in Chinese Law

3.1 Chinese Rules on Choice of Court Agreements

3.1.1 Specific Rules

In terms of choice of court agreements, it can be observed that there were two provisions in the 1991 and 2007 Chinese Civil Procedure Law (CPL): one was for domestic disputes and the other one was applied in international disputes. The 2012 Chinese CPL removed the difference between domestic and international cases. At that time, some scholars argued that this change was likely to be a preparation for the future adoption of the 2005 Hague Choice of Court Convention.⁷⁹ As expected, China signed the Convention on 12 September 2017.

The latest version of Chinese Civil Procedure Law is dated 27 June 2017 and came into force on 1 July 2017. Article 34, which is related to choice of court agreements, stays the same as the 2012 Chinese CPL. It does not distinguish domestic from international disputes and also does not differentiate exclusive choice of court agreements from non-exclusive ones. It provides that:

Parties to a dispute over a contract or any other right or interest in property may, by a written agreement, choose the people's court at the place of domicile of the defendant, at the place where the contract is performed or signed, at the place of domicile of the plaintiff, at the place where the subject matter is located or at any other place actually connected to the dispute to have jurisdiction over the dispute, but the provisions of this Law regarding hierarchical jurisdiction and exclusive jurisdiction shall not be violated.⁸⁰

It can be seen that parties involved in a domestic or foreign-related dispute are allowed to

⁷⁹ Jie (Jeanne) Huang, 'The Partially Modernized Chinese Conflicts System: Achievements and Challenges: Review of Zheng Sophia Tang, Yongping Xiao, and Zhengxin Huo, Conflict of Laws in the People's Republic of China' (2017) 13(3) *Journal of Private International Law* 633, 646.

⁸⁰ Translated Article 34 of the 2017 Civil Procedure Law of the People's Republic of China <<http://en.pkulaw.cn/display.aspx?cgid=d33df017c784876fbdfb&lib=law>> accessed 10 September 2019.

choose a competent court, but the chosen court should have a substantial connection with the dispute. In addition, quite a few courts in exact places are listed rather than just the phrase of “substantial connection” as in the 2007 Chinese CPL. The listed places, where the courts allowed to be chosen are located, are supposed to be actually connected to the disputes.⁸¹ Therefore, it could be predicted in the future that, if the chosen court is located in one of the listed places, parties shall not need to prove that the chosen court is actually connected to their disputes (i.e. a presumption of substantial connection).

3.1.2 Status of Judicial Interpretations and Cases

Apart from codified laws, judicial interpretations, issued by the Supreme People’s Court (SPC), are also regarded as authoritative law in China.⁸² Although the SPC does not have legislative power in China,⁸³ it can provide clear guidance to lower courts, aiming at the encountered difficulties in judicial practice, by interpreting some provisions. As a result, judicial interpretations have significance in Chinese judicial practice and form an important part of Chinese laws. After the 2012 Chinese CPL came into force, the SPC published its judicial interpretation on the CPL on 30 January 2015, which became effective on 4 February 2015. Provisions in relation to choice of court agreements are contained in Articles 29 to 34 and Article 531.

China follows the tradition of civil law system, so cases and judgments from one court are not legally binding on other courts in China. However, the Supreme People’s Court is always making efforts to publicize typical cases to guide lower courts. Since 20 January 2011, the Supreme People’s Court has publicized 112 guiding cases,⁸⁴ which is a great contribution to building a case reporting system for lower courts. In addition, since 1 January 2014, most Chinese judgments have had to be published online except in special circumstances.⁸⁵ Therefore, although cases are not regarded as formal law in China, they

⁸¹ Guangjian Tu, *Private International Law in China* (Springer 2016) 132.

⁸² Wenwen Liang, ‘Unilateral Jurisdiction Clauses under Chinese Law’ (2015) 30(6) *Journal of International Banking Law and Regulation* 341, 341.

⁸³ Mingsheng Yuan, ‘Legislationized Judicial Interpretations’ (2003) 2 *Studies in Law and Business* 3, 3.

⁸⁴ The Supreme People’s Court of The People’s Republic of China <<http://www.court.gov.cn/fabu-gengduo-77.html>> accessed 10 September 2019.

⁸⁵ Wenwen Liang (n 82) 341 and the website is <<http://wenshu.court.gov.cn/>> accessed 11 September 2019.

can still be important references on how Chinese courts apply Chinese laws.

3.2 Severability

A choice of court agreement is different from the other provisions of a contract because it is a conflict of laws agreement, thus should be treated differently from the other provisions. According to the principle of severability, a choice of court agreement is independent from the main contract. The invalidity of the main contract does not necessarily lead to the non-existence and invalidity of a choice of court agreement.⁸⁶ The 2017 Chinese CPL does not obviously demonstrate the severability of choice of court agreements. However, the principle of severability is authorized for dispute resolution clauses by Article 57 of the 1999 Chinese Contract Law. It provides: “if a contract is void, voidable or terminated, it shall not affect the validity of the dispute resolution clause which independently exists in the contract.”⁸⁷ As an important type of dispute resolution clause, the severability of choice of court agreements is widely accepted in Chinese judicial practice.

If fraud, duress, misunderstanding or unfairness make the main contract void, it will not necessarily invalidate the choice of court agreement under the doctrine of severability,⁸⁸ unless the other party proves that the choice of court agreement is also the result of fraud, duress, misunderstanding or unfairness. In the case of *Shandong Jufeng Internet Co., Ltd. v. Korea MGame Co.*,⁸⁹ the SPC argued that choice of applicable law by agreement and choice of court by agreement are two totally different legal acts and that their validity should be decided separately according to their own relevant laws.

3.3 Applicable Law

Only after the court verifies that a choice of court agreement exists and is valid can the

⁸⁶ Zheng Sophia Tang, ‘Effectiveness of Exclusive Jurisdiction Clauses in the Chinese Courts—A Pragmatic Study’ (2012) 61(2) *International and Comparative Law Quarterly* 459, 462.

⁸⁷ Translated Article 57 of the 1999 Contract Law of the People’s Republic of China <<http://en.pkulaw.cn/display.aspx?cgid=21651&lib=law>> accessed 11 September 2019.

⁸⁸ Zheng Sophia Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Routledge 2014) 56.

⁸⁹ Supreme People’s Court, [2009] Min San Zhong Zi No. 4.

agreement be enforced by the court. The law applicable to choice of court agreements varies in different countries. Chinese CPL does not provide corresponding rules to decide the law applicable to determine the existence and validity of choice of court agreements. As a result, Chinese judicial practice demonstrates some inconsistency.

Some Chinese courts treat choice of court agreements the same as the main contracts and apply the *lex causae* of the main contracts to determine the existence and validity of choice of court agreements. In the case of *The Sumitomo Bank Co., Ltd. v. Xinhua Real Estate Co., Ltd.*,⁹⁰ the parties chose Hong Kong law to govern their loan agreement and conferred non-exclusive jurisdiction on Hong Kong courts. The SPC used Hong Kong law to interpret the meaning of the asymmetric choice of court clause in the loan agreement and declined the jurisdiction of Chinese courts. This kind of approach is criticized because it ignores the principle of severability. Although the severability of choice of court agreements does not necessarily mean that choice of court agreements and main contracts must apply different applicable laws, it is wise to treat them separately when deciding applicable laws.

In the case of *Xinhuawen International Leasing Co., Ltd. v. Deutsche Bank Guangzhou Branch, Canadian Imperial Bank of Commerce Singapore Branch, Development Bank of Singapore Shanghai Branch, Commerzbank Shanghai Branch, Bank of Montreal Beijing Branch*,⁹¹ Beijing High People's Court believed that the *lex causae* is only the applicable law for the main contract. Therefore, the Hong Kong law chosen by the parties as the governing law was irrelevant to the matter of jurisdiction and could not be used to interpret the choice of court agreement. In the end, Chinese law was directly applied to determine the validity of the choice of court agreement. The same approach can also be found in the case of *The Bank of East Asia Shanghai Branch, Po Sang Bank Shenzhen Branch and China International Finance Co., Ltd. v. Shanghai Jisheng Real Estate Co., Ltd. and Shenzhen Nanyou (Holdings) Co., Ltd.*,⁹² in which the SPC even did not explain why Chinese law should apply.

⁹⁰ Supreme People's Court, [1999] Jing Zhong Zi No. 194.

⁹¹ Beijing High People's Court, [2003] Gao Min Zhong Zi No. 600.

⁹² Supreme People's Court, [2001] Min Er Zhong Zi No. 154.

Currently, most Chinese courts hold that choice of court agreements are procedural issues and should be governed by a different law from the substantial matters. As a result, they use the *lex fori* to determine the validity of choice of court agreements. In the case of *Shandong Jufeng Internet Co., Ltd. v. Korea MGame Co.*,⁹³ the validity of choice of court agreements was classified as an issue relating to procedure to be judged exclusively by the *lex fori* rather than the *lex causae* of the main contract. This approach has been widely accepted by subsequent Chinese judicial practice and has become the dominant approach.⁹⁴ In this way, when a lawsuit is brought before a Chinese court by the claimant, no matter whether the parties choose a Chinese court or a foreign court in the choice of court agreement, the seized court will decide the validity of the agreement on the basis of Chinese law.

Applying the *lex fori* to assess the preliminary issues of choice of court agreements is very quick and familiar for Chinese courts. Despite the advantage of efficiency and familiarity, this approach is also criticized in some areas. On the one hand, the existence and validity of choice of court agreements are not purely procedural matters.⁹⁵ A choice of court agreement stems from party autonomy and can be regarded as one contractual term. The examination of its effectiveness is largely based on contractual concepts apart from procedural concepts. On the other hand, if the *lex fori* is always applied, the validity of choice of court agreements will depend on the country which seizes the case. This approach would encourage forum shopping due to the various requirements of different countries.⁹⁶ For example, one court may invalidate a choice of court agreement which would be valid under some other countries' laws. It is likely that some parties would utilize these strict requirements in order to escape an otherwise binding choice of court agreement. Therefore, to some extent, applying the *lex fori* as the applicable law is unreasonable both from a theoretical perspective and in judicial practice.

⁹³ *Shandong Jufeng Internet Co., Ltd. v. Korea MGame Co.* (n 89).

⁹⁴ *Shanghai Yanliu International Transportation Co., Ltd. v. Evergreen Marine Co. (Taiwan) Ltd.*, Supreme People's Court, [2011] Min Ti Zi No. 301; *Zhiming XU v. Yihua ZHANG*, Supreme People's Court, [2015] Min Shen Zi No. 471.

⁹⁵ Zheng Sophia Tang (n 86) 463.

⁹⁶ *ibid*, 464.

In the author's view, choice of court agreements can be compared to arbitration agreements. This is because both are conflict clauses, both designate the competent forum to solve disputes and both deal with procedural matters. With regard to the applicable law of arbitration agreements, Chinese law provides:

The parties can agree on the applicable law governing the examination of the validity of an arbitration agreement; if the parties do not choose the applicable law but agree on the place of arbitration, the law of the agreed place of arbitration should apply; if the parties neither choose the applicable law nor agree on the place of arbitration or the place of arbitration is not clearly agreed on, the *lex fori* shall apply.⁹⁷

It can be observed that the provision excludes the application of the *lex causae* as the applicable law of arbitration agreements. Therefore, in this author's view, the parties can also agree on the separate applicable law governing a choice of court agreement. If the parties do not choose the applicable law for the choice of court agreement, but agree on the chosen court, the law of the place of the chosen court shall apply to determine the validity of the agreement. If the parties neither choose the applicable law nor agree on the chosen court or the chosen court is not clearly agreed, the *lex fori* shall apply.

3.4 Formal Validity

Requirements for the formal validity of choice of court agreements vary largely from country to country. The "written form" is the most common and standard form of contracts in civil and commercial matters.⁹⁸ It can expressly demonstrate the existence and contents of a choice of court agreement. The black letters or words on white paper can keep an accurate record and cannot be easily modified without any marks, so that forged agreements can be recognized. Anything in written form can be preserved as evidence in case the choice of court agreement needs to be proved later. Almost all countries admit choice of court agreements that are concluded in writing. The phrase "in writing" traditionally means that the parties write down or print their agreed choice on paper. With

⁹⁷ Translated Article 16 of the 2008 Interpretation of the Supreme People's Court concerning Some Issues on the Application of the Arbitration Law of the People's Republic of China
<<http://en.pkulaw.cn/display.aspx?cgid=c0d4cb469028a461bdfb&lib=law>> accessed 11 September 2019.

⁹⁸ Zheng Sophia Tang (n 88) 45.

the development of modern technology and electronic communication, the meaning of “in writing” has enjoyed “a relaxed extension in the international trend, including all digital data stored in various hardware devices”.⁹⁹ Apart from the flexible interpretation of “in writing”, the concept of “written form” has currently included any form evidenced in writing, such as oral agreements evidenced in writing.

According to Article 34 of the 2017 Chinese CPL, choice of court agreements entered in China must be made in written form in China. However, neither the 2017 Chinese CPL nor the 2015 Interpretation distinguishes between “in writing” and “evidenced in writing”, thus it is unclear whether an oral choice of court agreement evidenced in writing is valid in China. Also, neither of the two instruments lists the admitted written forms, which may make the judicial practice in deciding the formal validity of choice of court agreements inconsistent among Chinese courts.

With regard to the meaning of “written form”, Article 11 of the 1999 Chinese Contract Law can be taken as a good explanation. In that article, the term “written form” refers to “any form that can tangibly express the contents contained therein such as a written contractual agreement, a letter, or electronic data text (including telegram, telex, fax, electronic data exchange, and e-mail)”.¹⁰⁰ Article 4 of the 2015 Chinese Electronic Signature Law defines “electronic data text” as “any electronic data text that can show the contents it specifies in material form, and can be picked up for reference and use at any time, shall be regarded as complying with the written form prescribed by laws and regulations.”¹⁰¹ It can be observed in Chinese regulations that “written form” shall refer to documents that are concluded both in writing and by other means of communication which can tangibly represent its content as well.¹⁰² With the development of modern technology, the written form should not be limited to writing on paper. So long as these emerging forms can be evidenced in writing, the purpose of preserving evidence and confirming the parties’ intention can be achieved.

⁹⁹ *ibid.*

¹⁰⁰ Translated Article 11 of the 1999 Contract Law of the People’s Republic of China (n 87).

¹⁰¹ Translated Article 4 of the 2019 Electronic Signature Law of the People’s Republic of China

<<http://en.pkulaw.cn/display.aspx?cgid=6f82cd6fb76141e5bdfb&lib=law>> accessed 11 September 2019.

¹⁰² Guangjian Tu (n 81) 131.

Generally, a choice of court agreement is clearly written in the main contract or separately concluded. Although the above-expanded definition of “written form” in the 1999 Chinese Contract Law is not formally incorporated into the 2017 Chinese CPL, some choice of court agreements evidenced in writing have been identified as valid by Chinese courts in judicial practice, such as fax¹⁰³ and an IOU.¹⁰⁴ Furthermore, a choice of court agreement in a memo with both parties’ seals was identified as the basis of establishing jurisdiction in the case of *Shangyu Changfeng Motor Co., Ltd. v. Hangzhou Shengyuan Technology Co., Ltd.*¹⁰⁵ Similarly, in a later case, the choice of court agreement in a memo was not only valid, but also binding on later disputes which resulted from the parties’ continuous business transactions.¹⁰⁶ From the discussed judicial practice in China, some Chinese courts, in the author’s view, have made a breakthrough in deciding the formal validity of choice of court agreements, while the phrase of “written form” could be more clearly refined in Chinese law.

3.5 Essential Validity

3.5.1 Parties’ Consensus

Choice of court agreements are based on the doctrine of party autonomy and parties should conclude choice of court agreements with true consensus. The 2017 Chinese CPL does not mention parties’ consensus in choice of court agreements. According to the general principle of contract law, defective consent can make a contract void or voidable. Similarly, choice of court agreements should represent the authentic intention of both parties and ought to have been negotiated fully between them rather than proposed unilaterally. The choice of court should be the outcome of parties’ consensus so that the agreement is valid. Choice of court agreements will be denied essential validity if parties’ consensus is

¹⁰³ *Hangzhou XXX Materials Industry & Trade Co., Ltd. v. Shangyu XXX Chemical Co., Ltd.*, Xiaoshan District People’s Court in Hangzhou, [2012] Hang Xiao Shang Chu Zi No. 2983-2.

¹⁰⁴ *JIA v. SU*, Ouhai District People’s Court in Wenzhou, [2012] Wen Ou Shang Chu Zi No. 591; *Putian Kanghua Feed Co., Ltd. v. Longfu ZHENG*, Chengxiang District People’s Court in Putian, [2012] Cheng Min Chu Zi No. 180.

¹⁰⁵ Shaoxing Intermediate People’s Court, [2011] Zhe Shao Xia Zhong Zi No. 134.

¹⁰⁶ *Gaomi XXX Textile Printing and Dyeing Co., Ltd. v. Taizhou XXX Chemical Fiber Factory*, Taizhou Intermediate People’s Court, [2013] Tai Zhong Shang Xia Zhong Zi No. 0052.

defective by reason of “misrepresentation, mistake, fraud, duress or undue influence”.¹⁰⁷

In general, the existence and authenticity of parties’ consensus can be determined from the above formal validity of choice of court agreements. If there is evidence that the parties failed to reach consensus on the choice of court, the choice of court agreement will be void and will not be enforced by Chinese courts. In the case of *Hangzhou Liaosiankai Chemical Co., Ltd. v. Suzhou Jiecheng Dyeing Co., Ltd.*,¹⁰⁸ the delivery note submitted by the plaintiff was a special standard document printed unilaterally by the plaintiff. Although it contained the words “the disputes between the supplier and the buyer arising from the business shall be settled by the court of the supplier”, that clause had not been confirmed by the seal or the signature of the defendant. As for the act of the defendant’s staff signing on the delivery note, it could only show the fact that the defendant had received the plaintiff’s goods and could not prove the fact that the choice of court clause in the delivery note had been approved by the defendant. As a result, the choice of court clause in the delivery note was not binding on the defendant and the court rejected its jurisdiction. Similarly, in the case of *Guolei JIANG v. Dongyang Red Star Clothing Co., Ltd.*,¹⁰⁹ there was a clause on the code sheet saying “If there is any dispute, it shall be accepted by Zhuji People’s Court.” The seized court regarded the code sheet as a unilateral declaration by the claimant rather than a choice of court agreement based on both parties’ consensus.

Articles 52 and 54 of the 1999 Chinese Contract Law respectively list the situations when a contract is void or voidable, including fraud, duress, malicious collusion, concealing illegal purpose, damaging public interests, violating mandatory rules, serious misunderstanding, and obvious unfairness.¹¹⁰ These two provisions can be referred to when examining parties’ consensus in choice of court agreements. In terms of the above various situations, there are only cases in Chinese judicial practice in which choice of court agreements are invalidated for unfairness to one party and these cases mainly concern choice of court agreements in bills of lading. The choice of court agreements in bills of lading are standard

¹⁰⁷ Zheng Sophia Tang (n 88) 56.

¹⁰⁸ Shangcheng District People’s Court in Hangzhou, [2010] Hang Shang Shang Chu Zi No. 434-1.

¹⁰⁹ Shaoxing Intermediate People’s Court, [2011] Zhe Shao Xia Zhong Zi No. 37.

¹¹⁰ Translated Articles 52 and 54 of the 1999 Contract Law of the People’s Republic of China (n 87).

terms which are prepared in advance for general and repeated use by one party and which are not negotiated with the other party when concluding the contract. Under Article 39 of the 1999 Chinese Contract Law, only when the party drafting the standard contract informs the other party in a reasonable way and makes it known to the other party can the standard contract be valid.¹¹¹ This is the requirement of “proper notice” abiding by the principle of fairness.

As regards the requirement of “proper notice”, it seems discretionary for Chinese court. In the case of *Wenzhou Foreign Trade Co. of Light Industry Arts and Crafts v. CMA CGM (France)*,¹¹² the choice of court agreement was printed on the face of the bill of lading in red while all other provisions were in blue. The court confirmed that the defendant had properly notified the plaintiff with a striking color. On the contrary, in the case of *Ningbo Rida Clothing Co., Ltd. v. Japan Nohhi Logistics Co., Ltd.*,¹¹³ the choice of court agreement was printed on the back of the bill of lading and the carrier did not perform the reasonable duty of notice. The court held that the choice of court agreement did not express the parties’ consensus, thus was void against the principle of fairness. Similarly, it was also held that a choice of court agreement in small English print on the left corner of a bill of lading was not proper notice to the other party.¹¹⁴

3.5.2 Substantial Connection

According to Article 34 of the 2017 Chinese CPL, it can be observed that Chinese law still insists on the principle of “substantial connection” and parties are only allowed to choose courts that have a substantial connection with the dispute. In Article 34, five courts (i.e. the place where the defendant is domiciled, or where the contract is performed or signed, or where the plaintiff is domiciled, or where the subject matter is located or any other place that has substantial connection with the dispute) are listed as qualifying courts. If the connection between the dispute and the chosen court is too weak or even non-existent, the

¹¹¹ Translated Article 39 of the 1999 Contract Law of the People’s Republic of China (n 87).

¹¹² Fujian High People’s Court, CLI.C. 21767

<<http://www.chinawuliu.com.cn/xsyj/201307/25/242767.shtml>> accessed 11 September 2019.

¹¹³ Ningbo Maritime Court, [2009] Yong Hai Fa Shang Chu Zi No. 255.

¹¹⁴ Wenwen Liang (n 82) 343.

choice of court agreement will be invalid and the chosen court will not exercise jurisdiction. In the case of *Liqiang Zheng v. Wider Logistics Co., Ltd.*,¹¹⁵ the choice of court agreement in the bill of lading provided that all disputes arising from the US Carriage of Goods by Sea Act 1936 should be brought exclusively before the US Court, and the English court had jurisdiction in respect of other disputes. The Chinese court held that neither the US nor the UK had a substantial connection with the dispute, thus invalidated the choice of court agreement.

Although the chosen court is required to have a substantial connection to the dispute, it is not clear whether other types of connections apart from the five listed places are competent to validate choice of court agreements. Some Chinese courts only allow the parties to choose from the five listed places, and would not consider whether there is any other substantial connection when the chosen court is not in the five listed places.¹¹⁶ In fact, the Supreme People's Court admits there can be other substantial connection, but does not reflect it expressly in published judicial interpretations. In the case of *Shandong Jufeng Internet Co., Ltd. v. Korea MGame Co.*,¹¹⁷ a Chinese Internet company and a Korean company concluded a contract, choosing the Chinese law as the applicable law and Singaporean courts to have exclusive jurisdiction. The SPC held that:

Singapore referred to by the parties' choice of court agreement, in this case, is neither the place of domicile of both parties, nor the performance place or contracting place of the contract, or the place of the subject matter. At the same time, the applicable law in the parties' choice of law agreement, in this case, is also not the Singaporean law. In addition, the parties failed to prove that Singapore has other substantial connections with the dispute.

As a result, Singapore had no substantial connection with the dispute and the choice of court agreement was invalid. What should be noted is that one of the reasons why Singaporean courts had no substantial connection with the dispute was that the parties chose Chinese law instead of Singaporean law to govern their dispute. This reasoning seems to indicate that the substantial connection can be established by the choice of law

¹¹⁵ Guangzhou Maritime Court, [2005] Guang Hai Fa Chu Zi No. 267.

¹¹⁶ Zheng Sophia Tang (n 86) 466.

¹¹⁷ *Shandong Jufeng Internet Co., Ltd. v. Korea MGame Co.* (n 89).

agreements.¹¹⁸ Therefore, the applicable law of the main contract can also be used as a criterion for deciding the “substantial connection” if it is the law of the place of the chosen court. Specifically, if there is no choice of law agreement and the chosen court is chosen, but has no other connection to the dispute, the chosen court has no substantial connection to the dispute. If the applicable law of the main contract chosen by the parties is the law of the place of the chosen court, the chosen court will have a substantial connection to the dispute due to the fact itself that the parties choose the law of the place of the chosen court.

3.5.3 The Levels of Jurisdiction and Exclusive Jurisdiction of Chinese Courts

In determining the validity of choice of court agreements, one country may require that agreements do not violate special provisions concerning jurisdiction in its own domestic law. Article 34 of the 2017 Chinese CPL indicates that the Chinese law regarding the levels of jurisdiction and exclusive jurisdiction of Chinese courts shall not be violated by parties’ choice of court agreements.

The levels of jurisdiction of Chinese courts refers to the level of a court deciding a case in China.¹¹⁹ The court of original jurisdiction initially hears and decides a case. On appeal, the case is heard by a court with appellate jurisdiction. According to Articles 17 to 20 of the 2017 Chinese CPL, basic people’s courts generally shall have jurisdiction over civil cases as a court of the first instance. The first instance courts for civil cases with major international elements or a major impact are intermediate people’s courts, high people’s courts or the Supreme People’s Court, which depend on the scope of impact of the case.¹²⁰

¹¹⁸ Zheng Sophia Tang (n 86) 467.

¹¹⁹ According to the 2018 Constitution of the People’s Republic of China and the 2018 Organic Law of the People’s Courts of the People’s Republic of China, the Chinese court system includes:

1. The Supreme People’s Court (SPC) in Beijing, which is the court of last resort for the whole People’s Republic of China except for Hong Kong and Macau.

2. The local people’s courts, which make up the remaining three levels of the court system and consist of “high people’s courts” at the level of the provinces, autonomous regions, and special municipalities; “intermediate people’s courts” at the level of prefectures, autonomous prefectures, and municipalities; and “basic people’s courts” at the level of autonomous counties, towns, and municipal districts.

3. The special people’s courts, which include military courts, maritime courts, intellectual property courts, financial courts and so on.

Hong Kong and Macau have separate court systems due to their historical status as British and Portuguese colonies respectively.

¹²⁰ Translated Article 17-20 of the 2017 Civil Procedure Law of the People’s Republic of China (n 80).

Generally, major international cases include any case involving a large amount in dispute, a case with complicated situations, a case consisting of a large number of parties, and other cases with a major impact.¹²¹

Apart from the above mentioned main rules, there are many other provisions and notices issued by the SPC setting a more detailed structure of the levels of jurisdiction for Chinese courts. For example, the main standard in assessing the impact of civil and commercial cases is the value of the subject matter, varying in different provinces according to the level of prosperity.¹²² Following China's accession to the World Trade Organization, international cases are subject to some special rules in China for the purposes of facilitating litigation matters for the parties concerned, preventing the loss of international cases, fostering and making full use of the judicial resources, and improving the ability in trying international cases.¹²³ The first instance court for international civil and commercial cases is usually a court at a higher level because such court is assumed to be more competent.¹²⁴

With regard to exclusive jurisdiction, it means that certain international civil and commercial cases can only be seized by some domestic courts of a country. The parties cannot exclude their jurisdiction by choice of court agreements, and other courts cannot exercise jurisdiction. Exclusive jurisdiction is prioritized and mandatory, and specifically reflects the various public policies of different legal systems. Generally, the degree of connection between the dispute and the legal system concerned is taken as the standard to determine exclusive jurisdiction in different legal systems. Real estate disputes are usually

¹²¹ Translated Article 1 of the 2015 Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China
<<http://en.pkulaw.cn/display.aspx?cgid=82f91c0394dcdc28bdfb&lib=law>> accessed 11 September 2019.

¹²² Notice of the Supreme People's Court on Clarifying Relevant Matters Concerning the Standards for Hierarchical Jurisdiction over and Centralized Handling of Foreign-related Civil and Commercial Cases of First Instance <<http://en.pkulaw.cn/display.aspx?cgid=f6b0744d27af6775bdfb&lib=law>> accessed 11 September 2019;

Notice of the Supreme People's Court on Adjusting the Standards for Jurisdiction of the Higher People's Courts and the Intermediate People's Courts over the Civil and Commercial Cases of First Instance
<<http://en.pkulaw.cn/display.aspx?cgid=c5f91d3897ddec54bdfb&lib=law>> accessed 11 September 2019.

¹²³ Notice of the Supreme People's Court about Strengthening the Jurisdiction of Foreign-related Commercial Cases <<http://en.pkulaw.cn/display.aspx?cgid=f2d9741ceaa807e2bdfb&lib=law>> accessed 11 September 2019.

¹²⁴ Provisions of the Supreme People's Court on Some Issues Concerning the Jurisdiction of Civil and Commercial Cases Involving Foreign Elements
<<http://en.pkulaw.cn/display.aspx?cgid=26d06fe14a58379abdfb&lib=law>> accessed 11 September 2019.

assumed to have the closest relationship with the country where the real estate is located, as well as with the sovereign interests of the country. Therefore, disputes involving real estates are usually included in the exclusive jurisdiction of most legal systems.

According to the 2017 Chinese CPL, three kinds of disputes arising from real estates, harbour operations and inheritance shall be respectively subject to the jurisdiction of the Chinese court at the place where the real estate is located, the court at the place where the harbour is located, and the court at the place of domicile of the deceased upon death or at the place where the major inheritance is located.¹²⁵ Also, if the place of performance of “contracts of Chinese-foreign joint ventures”, “contracts of Chinese-foreign cooperative ventures” and “contracts of Chinese-foreign cooperation in exploring and exploiting natural resources” are in China, the disputes arising from these three types of contracts shall be seized exclusively by Chinese courts.¹²⁶ The parties cannot choose foreign courts for the above-mentioned six types of disputes.¹²⁷ However, although Chinese courts have exclusive jurisdiction on these disputes, it is not clear whether the parties can choose courts within the territorial scope of China for these matters.

3.6 Breach of Choice of Court Agreements

Breach of choice of court agreements may happen in China when a Chinese court seized determines the jurisdiction but the parties have chosen a foreign court. For non-exclusive choice of court agreements, the jurisdiction of other competent courts is not excluded, thus suing in a non-chosen Chinese court cannot be regarded as a breach of choice of court agreement. But for exclusive choice of court agreements, due to the relatively strict requirement of “substantial connection” in Chinese law, the plaintiff may bring a lawsuit before a Chinese court with the purpose of invalidating an exclusive choice of court agreement. There are no relative rules for Chinese courts to decide whether or not to decline jurisdiction in the face of a valid exclusive choice of foreign court agreement. As a

¹²⁵ Translated Article 33 of the 2017 Civil Procedure Law of the People’s Republic of China (n 80).

¹²⁶ *ibid*, Article 266.

¹²⁷ Translated Article 531(2) of the 2015 Interpretation of the Supreme People’s Court on the Application of the Civil Procedure Law of the People’s Republic of China (n 121).

result, judicial practice is not uniform in China concerning this question but some positive changes have been witnessed.

Some Chinese courts take jurisdiction in breach of a valid exclusive choice of court agreement because the resultant foreign judgment might not be enforced in China. In the case of *Japan Nippon Kanzai Co., Ltd. v. Beijing Zhuangsheng Real Estate Co., Ltd.*,¹²⁸ the parties concluded an exclusive choice of court agreement in favour of the Hong Kong Court and the Hong Kong court had given its judgment. But there was no judicial cooperation between China Mainland and Hong Kong at that time, thus Hong Kong judgments could not be recognized and enforced in China. In the end, the Chinese court argued that the exclusive choice of court agreement could not prevent competent Chinese courts from taking jurisdiction, and finally declared jurisdiction without recognizing the judgment of the Hong Kong court. This approach led to unreasonable results that some parties are forced to breach their choice of court agreements by bringing lawsuits directly before the Chinese courts in order to avoid unenforceable judgments. This approach is often criticized for the reason that “the possible result of the judgment should not be a factor for a court to consider when determining its jurisdiction”.¹²⁹

As China entered into more and more bilateral agreements with foreign countries to recognize and enforce judgments,¹³⁰ more Chinese courts began to recognize exclusive choice of court agreements and declined jurisdiction in breach of them. If the exclusivity of the chosen court is obviously expressed in the choice of court agreement, Chinese courts would recognize that exclusivity and decline jurisdiction, for example, in the case of *Sojitz Co. v. Jianyu XIAO*,¹³¹ *Junichirou WATANABE v. Culture & Art Press*,¹³² and *May Delight Ltd., Good Prosper Holdings Ltd., Total Fortune Investments Ltd. and Long Life International (Hong Kong) Co., Ltd. v. Fulai International (Shanghai) Co., Ltd.*¹³³ However, if the exclusivity of the chosen court is not obviously expressed in the choice of

¹²⁸ Beijing High People’s Court, [2008] Gao Min Zhong Zi No. 919.

¹²⁹ Zheng Sophia Tang (n 86) 476.

¹³⁰ Bilateral civil judicial cooperation agreements between the People’s Republic of China and other countries <http://www.moj.gov.cn/Department/node_358.html> accessed 11 September 2019.

¹³¹ Shanghai High People’s Court, [2004] Hu Gao Min San (Zhi) Zhong Zi No. 72.

¹³² Shanghai No. 1 Intermediate People’s Court, [2008] Hu Yi Zhong Min Wu (Zhi) Chu Zi No. 210.

¹³³ Shanghai High People’s Court, [2017] Hu Min Xia Zhong No. 96.

court agreement, Chinese courts would try to find out whether the chosen court was intended to be exclusive. For example, in the case of *Standard Chartered Bank (China) Co., Ltd. v. Changshu Xingyu Xinxing Building Materials Co., Ltd.*,¹³⁴ the Chinese court argued that exclusivity depended on whether the words used by the parties are clear. If the chosen Taiwanese court is clearly stated in the choice of court agreement, it will be presumed to be the exclusive court. As a result, the Chinese court did not have competent jurisdiction and declined it. Similar reasoning can also be found in the case of *Guangzhou Xingji Film Co., Ltd. v. Xinghao Entertainment Co., Ltd.*,¹³⁵ *Cathay United Bank Co., Ltd. v. Chao GAO*,¹³⁶ *Shanzheng International Securities Co., Ltd. v. Kai YANG*.¹³⁷ It can be seen that the importance of party autonomy is increasingly highlighted in Chinese judicial practice when there is a breach of valid exclusive choice of court agreement.

3.7 Conclusion

With the development of party autonomy as one of the most important principles in modern private international law, Chinese law recognizes the validity of choice of court agreements in international civil and commercial matters. With regard to the severability, applicable law and formal validity of choice of court agreements, Article 34 of the 2017 Chinese CPL can generally provide certainty, predictability, and efficiency to the parties with the supplement of other relevant rules and judicial cases. However, for the essential validity of choice of court agreements, Chinese law sets relatively strict requirements for a choice of court agreement to be valid. Considering the limitations and drawbacks of Article 34, some recommendations for enhancing Chinese law will be discussed and provided in Chapter 6. For comparison, the 2005 Hague Choice of Court Convention, as a significant international achievement, is going to be examined in the next chapter.

¹³⁴ Jiangsu Province High People's Court, [2010] Su Shang Wai Zhong Zi No. 0052.

¹³⁵ Guangdong Province High People's Court, [2016] Yue Min Xia Zhong No. 312.

¹³⁶ Supreme People's Court, [2017] Zui Gao Fa Min Shen No. 4205.

¹³⁷ Supreme People's Court, [2018] Zui Gao Fa Min Xia Zhong No. 28.

4 Choice of Court Agreements in the 2005 Hague Convention

4.1 Introduction

The 2005 Hague Convention on Choice of Court Agreements was completed at the Hague Conference on Private International Law on 30 June 2005, and entered into force within the EU and Mexico on 1 October 2015. It has been an important source of law for both lawyers drafting international commercial contracts and for judges involved in disputes between international commercial parties. The 2005 Hague Convention is a milestone for establishing jurisdiction in relation to choice of court agreements and aims to have court judgments recognized and enforced among the Contracting States.

The 2005 Hague Convention has its origins in the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, concluded by the Hague Conference on Private International Law on 1 February 1971. That Convention came into force on 20 August 1979 within Cyprus and the Netherlands, but only five countries are Contracting States so far.¹³⁸ No other states deposited the approval agreements necessary to apply the treaty. In May 1992, the negotiation of a multilateral convention on the recognition and enforcement of judgments was proposed again by the U.S. Department of State.¹³⁹ In April 2002, the ambitious worldwide project was laid aside and the Commission I on General Affairs and Policy began to consider drafting a convention about jurisdiction based on the parties' agreement during the 19th session. The more specific the topic is, the easier it is for countries to reach an agreement. The Convention on Choice of Court Agreements was finally completed in June 2005. On 30 June 2005, the Final Act was signed and the Convention became open for signature and ratification. Mexico deposited its instrument of ratification on 26 September 2007, becoming the first state to ratify it.¹⁴⁰ The United States of America signed the Convention

¹³⁸ List of Contracting States <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=78>> accessed 11 September 2019.

¹³⁹ Ronald A Brand and Paul M Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (Cambridge University Press 2008) 6.

¹⁴⁰ Updated list of Contracting States to the 2005 Hague Convention

on 1 January 2009 but has not approved it to date.¹⁴¹ With the release of the official Explanatory Report in 2013,¹⁴² the Convention was ready to be considered by other States.

The European Union and Singapore signed the 2005 Hague Convention on 1 April 2009 and 25 March 2015 respectively.¹⁴³ But according to Article 31, the 2005 Hague Convention requires the second instrument of ratification to be effective within the Contracting States. The EU ratified the 2005 Hague Convention on 11 June 2015. As a result, the 2005 Hague Convention entered into effect on 1 October 2015 within Mexico and 27 of the 28 Member States of the European Union (not Denmark). Following this development, Singapore ratified the 2005 Hague Convention on 2 June 2016 and the Convention became effective within Singapore on 1 October 2016. Denmark accepted the 2005 Hague Convention on 30 May 2018 and the Convention became effective within Denmark on 1 September 2018. Apart from the above states, Ukraine, the People's Republic of China and Montenegro signed the 2005 Hague Convention on 21 March 2016, 12 September 2017 and 5 October 2017 respectively.¹⁴⁴ It can be seen that the Convention is a cooperative and worldwide achievement, and has increasingly gained influence around the world.

The 2005 Hague Convention aims at “ensuring the effectiveness of choice of court agreements between parties to international commercial transactions”.¹⁴⁵ In order to avoid and manage risk, parties often try to agree in advance how disputes arising from the transaction between them are to be settled. On the one hand, parties may choose arbitration for resolution. On the other hand, they may agree to submit their disputes and litigate in a designated court. According to the rules set down in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958 New York Convention), arbitration agreements in international cases are almost universally recognized and

<https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> accessed 11 September 2019.

¹⁴¹ *ibid.*

¹⁴² Permanent Bureau of the Conference, *Convention of 30 June 2005 on Choice of Court Agreements (Text adopted by the Twentieth Session), Explanatory Report by Trevor Hartley and Masato Dogauchi* (HCCH Publications 2013) <https://assets.hcch.net/upload/expl37final.pdf> accessed 11 September 2019.

¹⁴³ Updated list of Contracting States to the 2005 Hague Convention (n 140).

¹⁴⁴ *ibid.*

¹⁴⁵ Hague Conference on Private International Law: Outline of the Convention <https://assets.hcch.net/docs/89be0bce-36c7-4701-af9a-1f27be046125.pdf> accessed 11 September 2019.

enforced.¹⁴⁶ Although choice of court agreements are usually respected in many countries, the recognition and enforcement of judgments is still not universal. The 2005 Hague Convention aims to remedy this situation, thereby promoting greater legal certainty and a more supportive environment for international trade and investment, as well as other international civil and commercial matters.

The 2005 Hague Convention applies “in international cases to exclusive choice of court agreements concluded in civil or commercial matters” (Article 1). This statement provides three basic limitations on the scope of the Convention: “international cases”, “civil or commercial matters” and, most importantly, “exclusive choice of court agreements”. However, non-exclusive choice of court agreements may also be covered in situations when a Contracting State declares that it will recognize and enforce judgments from the courts designated in a non-exclusive choice of court agreement according to Article 22. The 2005 Hague Convention sets out in Article 2 a lengthy list of excluded matters to which it shall not apply. These exclusions indicate a compromise in the process of negotiations and demonstrate that the Convention was drafted in a way to make it more readily acceptable to more countries.

The 2005 Hague Convention contains three basic rules that give effect to choice of court agreements: the chosen court must in principle hear the case (Article 5); any court not chosen must in principle decline to hear the case (Article 6); and any judgment rendered by the chosen court must be recognized and enforced in other Contracting States, except where a ground for refusal applies (Articles 8 and 9).¹⁴⁷ In general, the overriding principle in the 2005 Hague Convention is party autonomy. Courts in a Contracting State should respect parties’ choice of a court in another country for the settlement of disputes, and should recognize and enforce the resulting judgments. The 2005 Hague Convention is designed to ensure the effectiveness of exclusive choice of court agreements between parties in commercial transactions, thereby protecting the predictability of choice of court

¹⁴⁶ There are currently 160 Contracting Parties to the 1958 New York Convention <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2> accessed 11 September 2019.

¹⁴⁷ Hague Conference on Private International Law: Outline of the Convention (n 145).

in civil and commercial relationships.

4.2 Severability

The severability of choice of court agreements refers to its separateness from the main contract of which the choice of court clause forms part. This principle is stated in Article 3(d) of the 2005 Hague Convention:

d) an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.¹⁴⁸

This means that the validity of the main contract and the validity of the choice of court agreement shall be determined separately. A challenge to the validity of the main contract does not influence the validity of the choice of court agreement. A challenge to the validity of the choice of court agreement must be based on matters which are related to the agreement itself.¹⁴⁹ The validity of a choice of court agreement must be decided independently according to Articles 5, 6 or 9, and depends on specific circumstances and the applicable law.¹⁵⁰ Conversely, the validity of the main contract is determined by national law. As a result, the choice of court agreement may be valid while the main contract is invalidated. Likewise, the choice of court agreement may be invalid even if the main contract is effective.

In addition, the second part of the wording of Article 3(d) might raise a further question on the scope of severability. It only mentions the validity of choice of court agreements but does not refer to the existence of choice of court agreements. The existence of choice of court agreements refers to whether an agreement exists between the parties, and is an issue that should be considered before determining the validity. The distinction between existence and validity is frequently ignored in the legislative process and in judicial

¹⁴⁸ Article 3(d) of the 2005 Hague Convention.

¹⁴⁹ Adrian Briggs, *Private International Law in English Courts* (Oxford University Press 2014) 250, para 4.203.

¹⁵⁰ Trevor Hartley and Masato Dogauchi, *Explanatory Report* (n 142) 53, para 115.

practice.¹⁵¹ It is not clear whether the word “validity” in the 2005 Hague Convention includes the “existence” and whether the existence of the choice of court agreement can be influenced by the existence of the main contract. Usually, the validity of choice of court agreements can be understood according to a two-part test: formal validity and essential validity. As a result, there are three approaches to clarify the existence and validity of choice of court agreements: the “existence” of choice of court agreements does not fall within the scope of either formal or essential validity; the “existence” is included in the formal validity; the “existence” is included in the essential validity. Brand and Herrup argue that the existence of choice of court agreements does not fall within the scope of either validity and should be determined by the law of the forum,¹⁵² while Beaumont holds that the existence is covered by formal validity.¹⁵³ Hartley and Dogauchi do not explain this issue in the Explanatory Report. This author agrees with the opinion of Beaumont because the existence of choice of court agreements is usually demonstrated through a certain form. If the requirements for formal validity are satisfied, one can say that a choice of court agreement exists. It seems improper to argue that a choice of court agreement does not exist when it is exactly written down in black and white. Treating “existence” as a matter of formal validity is also an appropriate approach to ensure uniformity when applying the 2005 Hague Convention. Arguably, the meaning of “existence” is implied in the “validity” of Article 3(d). Thus, the severability of choice of court agreements means that the courts should examine the existence, formal validity and essential validity of choice of court agreements independently from the existence, formal validity and essential validity of the main contract.¹⁵⁴

4.3 Applicable Law

When the chosen court decides that a choice of court agreement is “null and void”, Article 5(1) of the 2005 Hague Convention requires that such a determination should be made by

¹⁵¹ Zheng Sophia Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Routledge 2014) 20.

¹⁵² Ronald A Brand and Paul M Herrup (n 139) 79.

¹⁵³ Paul Beaumont, ‘Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status’ (2009) 5(1) *Journal of Private International Law* 125, 138.

¹⁵⁴ Tena Ratković and Dora Zgrabljic Rotar, ‘Choice-of-Court Agreements under the Brussels I Regulation (Recast)’ (2013) 9(2) *Journal of Private International Law* 245, 261.

application of the law of the State of the chosen court:

(1) The court or courts of a Contracting State designated in an exclusive choice of 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 State; ...¹⁵⁵

Thus, it can be regarded that parties choose courts as well as the applicable law. This rule means the validity of the choice of court agreement is decided by the law of that State in its entirety, including its conflict of law rules.¹⁵⁶ The court seized must first determine what substantive law should be applied under its conflict of law rules, and then it can apply that substantive law to decide whether or not the choice of court agreement is null or void.¹⁵⁷ Under Article 5(1), the chosen court will be the court seized so that its own law will be applied. The chosen court must hear the case in principle under the 2005 Hague Convention. Besides special declarations based on Article 19,¹⁵⁸ “null and void” is the only exception for the chosen court to exercise the jurisdiction. The chosen court can decline jurisdiction only when the choice of court agreement is “null and void” according to its own law.

For any “non-chosen but seized” court, according to Article 6, the law of the State of the chosen court or the law of the State of the court seized may be applied:

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 unless –

- a) the agreement is null and void under the law of the State of the chosen court;
- b) a party lacked the capacity to conclude the agreement under the law of the State of the court seized; ...¹⁵⁹

When one party initiates the proceedings in a non-chosen court in breach of the choice of court agreement, the “non-chosen but seized” court is obliged to decline jurisdiction, but

¹⁵⁵ Articles 5(1) of the 2005 Hague Convention.

¹⁵⁶ Trevor Hartley and Masato Dogauchi, *Explanatory Report* (n 142) 55, para 125.

¹⁵⁷ Guy S Lipe and Timothy J Tyler, ‘The Hague Convention on Choice of Court Agreements: Creating Room for Choice in International Cases’ (2010) 33(1) *Houston Journal of International Law* 1, 23.

¹⁵⁸ Declarations about substantial connection will be discussed in the following part 4.5.2.

¹⁵⁹ Articles 6 of the 2005 Hague Convention.

there are some exceptions in Article 6.¹⁶⁰ Under Article 6(a), the court seized is not chosen by the parties, but it still needs to apply the law of the State of the chosen court rather than its own national law to decide whether a choice of court agreement is “null and void”. Therefore, Articles 5(1) and 6(a) help to ensure that the chosen court and the non-chosen court give consistent judgments on the validity of a choice of court agreement,¹⁶¹ as well as ensuring certainty and predictability.¹⁶²

Article 6(b) provides that the court seized does not need to suspend or dismiss proceedings if a party lacked the capacity to conclude the choice of court agreement under its own national law. In addition, according to Hartley and Dogauchi, lack of capacity is taken for granted in the grounds on which the choice of court agreement is null and void under the law of the State of the chosen court in terms of Article 6(a).¹⁶³ Therefore, both the law of the chosen court and the law of the court seized will be applied to determine the issue of capacity. The chosen court will apply its national law to decide the parties’ capacity, while the seized non-chosen court can apply either the law of the chosen court or its national law to invalidate the choice of court agreement.¹⁶⁴ If either party lacked the capacity to conclude contracts under either law, the choice of court agreement is null and void and the court seized does not need to decline the jurisdiction.

4.4 Formal Validity

The formal requirements for choice of court agreements are set in Article 3(c) of the 2005 Hague Convention:

c) an exclusive choice of court agreement must be concluded or documented - i) in writing; or ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference.¹⁶⁵

¹⁶⁰ The obligations of a non-chosen court will be discussed further in part 4.6.

¹⁶¹ Trevor Hartley and Masato Dogauchi, *Explanatory Report* (n 142) 61, para 149.

¹⁶² Zheng Sophia Tang (n 151) 26.

¹⁶³ Trevor Hartley and Masato Dogauchi, *Explanatory Report* (n 142) 61, para 150.

¹⁶⁴ Zheng Sophia Tang (n 151) 33.

¹⁶⁵ Articles 3(c) of the 2005 Hague Convention.

If a choice of court agreement does not satisfy the above requirements, it will not be covered by the 2005 Hague Convention. Hartley and Dogauchi explain that these two formal requirements are “necessary and sufficient” within the Convention,¹⁶⁶ which means that the Contracting States cannot add further formal requirements by national law.¹⁶⁷ In other words, Article 3(c) of the 2005 Hague Convention is the highest standard for all Contracting States and national law can only set less rigid formal requirements for choice of court agreements. Thus, a choice of court agreement may be recognized as valid as to form by a Contracting State under its national law even if it does not satisfy the formal requirements of Article 3(c).

Under Article 3(c), when the choice of court agreement is “in writing”, it shall be explained as referring to the direct and traditional paper form or hard copy. Other possible forms include all “electronic means of data transmission or storage” only if the data is accessible and can be used in the future,¹⁶⁸ such as telegram, fax, email and so on. The expression of “means of communication which renders information accessible so as to be usable for subsequent reference” comes from Article 6(1) of the 1996 UNCITRAL Model Law on Electronic Commerce.¹⁶⁹ It tries to cover all communication and electronic means of data transmission or storage, which are widely used in daily life and may continue to emerge with the development of technology in the future. Therefore, the formal requirements in the 2005 Hague Convention are relatively easy to satisfy, which fully reflects the tolerant attitude to making choice of court agreements as effective as possible.

In addition, it is notable that the wording “concluded or documented in writing” is used in Article 3(c) instead of “evidenced in writing”. Hartley and Dogauchi explain that the provision does not constitute a rule of evidence.¹⁷⁰ This means that an oral choice of court agreement, which is documented later, also meets the formal requirements of the 2005 Hague Convention. If one party records and confirms the oral agreement in writing, and

¹⁶⁶ Trevor Hartley and Masato Dogauchi, *Explanatory Report* (n 142) 53, para 110.

¹⁶⁷ Ronald A Brand and Paul M Herrup (n 139) 45; Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press 2018) 222.

¹⁶⁸ Trevor Hartley and Masato Dogauchi, *Explanatory Report* (n 142) 53, para 112.

¹⁶⁹ Trevor C Hartley, *Civil Jurisdiction and Judgments in Europe: The Brussels I Regulation, the Lugano Convention, and the Hague Choice of Court Convention* (Oxford University Press 2017) 263, para 13.127.

¹⁷⁰ Trevor Hartley and Masato Dogauchi, *Explanatory Report* (n 142) 53, para 113.

the other party does not raise an objection after knowing it, this choice of court agreement can be recognized as satisfying the formal requirements, regardless of which party benefits from the original oral agreement. In this kind of situation, the party who put the choice of court agreement into writing must do so within a reasonable time and must communicate the written document to the other party.¹⁷¹ Furthermore, Article 3(c) does not require a choice of court agreement to be signed in order to be valid.¹⁷² Although the lack of parties' signatures will make it more difficult to prove the existence of the agreement and parties' consensus,¹⁷³ whether the choice of court agreement is signed does not influence its formal validity.

4.5 Essential Validity

With regard to the essential validity of choice of court agreements, we can summarize some general requirements from some relevant articles in the 2005 Hague Convention.

4.5.1 Article 3

Article 3(a) in the 2005 Hague Convention is the defining article for exclusive choice of court agreements:

- a) "exclusive choice of court agreement" means 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.¹⁷⁴

It can be seen that there are four requirements for choice of court agreements in Article 3(a). Firstly, two or more parties must reach consensus and there must be an agreement. This means that the choice of court agreement should be based on a meeting of minds

¹⁷¹ Trevor C Hartley (n 169) 264, para 13.131.

¹⁷² Zheng Sophia Tang (n 151) 50.

¹⁷³ Trevor Hartley and Masato Dogauchi, *Explanatory Report* (n 142) 53, para 112.

¹⁷⁴ Articles 3(a) of the 2005 Hague Convention.

because it cannot be established unilaterally.¹⁷⁵ There simply can be no choice of court agreement if consensus between the parties is absent.¹⁷⁶ For example, if the choice of court agreement is made by one party but the other party has no reasonable opportunity to check it, there will be no consensus between them and the 2005 Hague Convention will not apply. Furthermore, lack of parties' signatures may influence the proof of consensus while it is not necessary for the formal requirements, as discussed above.

Secondly, the agreement must exclude the jurisdiction of any other court. This requires the parties' choice to be exclusive and the chosen court or courts of one State to have exclusive jurisdiction.¹⁷⁷ This requirement is related to the following Article 3(b), which defines the implied exclusivity.

Thirdly, the chosen court or courts should be in one Contracting State. Choice of court agreements designating the courts of a non-Contracting State will not be covered by the 2005 Hague Convention.¹⁷⁸ No matter how many courts are designated in a choice of court agreement, they must locate in one Contracting State. The agreement, in which several chosen courts are in different States, will be regarded as non-exclusive and will not be covered by the 2005 Hague Convention.¹⁷⁹ According to the wording of Article 3, parties can designate the courts of one State, for example, "the courts of State X", without specifying which court in State X. Parties can also choose a particular court in State X as well as two or more specific courts in State X, for example, "the court of Y or the court of Z" (Y and Z are cities of State X).

Finally, parties' disputes in relation to the choice, whether current or future disputes, should be in connection with a particular legal relationship. Generally, choice of court agreements concern contractual claims. But non-contractual claims, for example, tort claims, can also be covered if they arise out of a particular legal relationship. However, it is possible for the parties to agree that their choice of court agreement only applies to certain

¹⁷⁵ Trevor Hartley and Masato Dogauchi, *Explanatory Report* (n 142) 49, para 94.

¹⁷⁶ Ronald A Brand and Paul M Herrup (n 139) 40.

¹⁷⁷ Examples of exclusive choice of court agreements are in part 2.2.1.

¹⁷⁸ Trevor Hartley and Masato Dogauchi, *Explanatory Report* (n 142) 51, para 100.

¹⁷⁹ *ibid*, para 104.

types of disputes,¹⁸⁰ thus, whether non-contractual claims are covered would depend on the specific terms of the agreement in particular cases.¹⁸¹

As a further regulation of exclusivity, Article 3(b) defines the implied exclusivity of choice of court agreements and provides:

b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise.¹⁸²

There is a presumption of exclusivity of the chosen court in Article 3(b). If the parties wish a choice of court agreement to be non-exclusive, they will have to say so explicitly in the choice of court agreement.¹⁸³

4.5.2 Article 19

The chosen court should exercise jurisdiction in principle under the 2005 Hague Convention unless the choice of court agreement is null or void according to its own law. Article 19 provides another exception to the exercise of the jurisdiction by the chosen court:

A State may declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.¹⁸⁴

This declaration of limiting jurisdiction is optional for all Contracting States. In practice, parties may choose the courts of a neutral State which has no connection to either party or the dispute. Both parties may feel that they may be treated unfairly before the courts of the other party's State. Some countries welcome this kind of choice, while others argue that it

¹⁸⁰ Ronald A Brand and Paul M Herrup (n 139) 44-45.

¹⁸¹ Trevor Hartley and Masato Doguchi, *Explanatory Report* (n 142) 51, para 101.

¹⁸² Articles 3(b) of the 2005 Hague Convention.

¹⁸³ Ronald A Brand and Paul M Herrup (n 139) 42.

¹⁸⁴ Articles 19 of the 2005 Hague Convention.

will impose an undue burden on their judicial systems.¹⁸⁵ Article 19 is necessary where some Contracting States do not want to give up the requirement of “substantial connection” in their national law. Furthermore, it is noted that the 2005 Hague Convention uses the wording of “may refuse” so that the courts still have the discretion to exercise jurisdiction even if the Contracting State makes such a declaration.¹⁸⁶ At the same time, national legislation could further specify under what situation there would no connection between the State and the parties or the dispute.

In addition, according to Article 28 of the 2005 Hague Convention, a State can make a declaration under Article 19 for only a part of its State if it is a non-unified legal system. For example, the People’s Republic of China, containing four legal regions, may ratify the Convention and only make the declaration for the mainland in the future.¹⁸⁷ However, no party to the 2005 Hague Convention has made a declaration under Article 19 so far.¹⁸⁸

4.6 Breach of Choice of Court Agreements

Most of the above discussion concerns how the chosen court determines the validity of a choice of court agreement. The 2005 Hague Convention requires the chosen court to exercise jurisdiction because the exclusive character of choice of court agreements should be respected.¹⁸⁹ For this reason, when the parties bring proceedings before a non-chosen court in breach of the choice of court agreement, the court seized should not hear the case. Article 6 of the 2005 Hague Convention requires non-chosen courts to suspend or dismiss proceedings (even if they have jurisdiction under their own national law), except in defined circumstances:

- 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 unless –
- a) the agreement is null and void under the law of the State of the chosen court;
 - b) a party lacked the capacity to conclude the agreement under the law of the State of

¹⁸⁵ Trevor Hartley and Masato Dogauchi, *Explanatory Report* (n 142) 81, para 230.

¹⁸⁶ *ibid*, para 229.

¹⁸⁷ Paul Beaumont (n 153) 149.

¹⁸⁸ Updated list of Contracting States to the 2005 Hague Convention (n 140).

¹⁸⁹ Trevor Hartley and Masato Dogauchi, *Explanatory Report* (n 142) 59, para 141.

the court seized;

- c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seized;
- d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or
- e) the chosen court has decided not to hear the case.¹⁹⁰

When one of the exceptions applies, the “non-chosen but seized” court does not need to suspend or dismiss its proceedings. The court seized does not have to hear the case,¹⁹¹ and it can decide whether or not to continue its proceedings according to its national law. The first two exceptions are concerned with the law applicable to choice of court agreements and have been discussed above.¹⁹² The third exception “manifest injustice and public policy” is another situation where the court seized can apply its own national law. The “manifest injustice” usually exists where the choice of court agreement is concluded in some unfair circumstances or where one party will receive unfair treatment before the chosen court. For example, one party has a stronger bargaining power than the other. The standards of injustice can be set by the law of the court seized and the reasons of injustice should be reasonable. In addition, “public policy” usually refers to some basic principles or mandatory rules of the State of the court seized. The distinction between “manifest injustice” and “public policy” is that the concept of “manifest injustice” is concerned with the interests of a particular individual, while the concept of “public policy” deals with the interests of the public at large.¹⁹³ The concept of “manifest injustice” may be included in the concept of “public policy” in some legal systems, but either standard needs to be satisfied when the court seized needs to exercise jurisdiction according to its national law. Therefore, this exception does not permit the court seized to disregard the choice of court agreement only because the agreement would be invalid under its domestic law.¹⁹⁴ When the agreement is null or void but does not lead to manifest injustice or violate public policy, this exception cannot be applied and the court seized shall still suspend or dismiss its proceedings.

¹⁹⁰ Articles 6 of the 2005 Hague Convention.

¹⁹¹ Trevor C Hartley (n 169) 279, para 193.

¹⁹² See above part 4.3.

¹⁹³ Trevor Hartley and Masato Doguchi, *Explanatory Report* (n 142) 61, para 151.

¹⁹⁴ *ibid*, para 152.

The fourth exception “incapable of performance” mainly refers to the doctrine of change of circumstances in contract law. It means that it is unreasonable, even impossible, to perform the choice of court agreement due to some difficulties in some exceptional situations that the parties cannot control. Hartley and Dogauchi give two examples for this exception in the Explanatory Report. One example is that the chosen court no longer exists or that it cannot be regarded as the original chosen court.¹⁹⁵ The other example is that there is a war in the concerned State and its courts are not functioning.¹⁹⁶ Apart from these two situations, other objective circumstances, where the choice of court agreement cannot be performed reasonably, can also be considered for this exception, such as natural disasters, unforeseen accidents, a major change of domestic law, national policy or social environment and so on. Brand and Herrup summarize those possible situations into three categories: legal impossibility, functional impossibility, and fundamental transformation.¹⁹⁷ Finally, the fifth exception is when the case will not be heard by the chosen court. Hartley and Dogauchi argue that the purpose of this exception is to avoid “denial of justice”.¹⁹⁸ After all, once the dispute arises between the parties, it is better to have some court hear the case than that no court will accept jurisdiction.

To summarise, when one party breaches the choice of court agreement and sues in a non-chosen court, the court seized is permitted to continue its proceedings if one of the five exceptions in Article 6 applies. If no exception applies, any non-chosen court seized is required to suspend or dismiss its proceedings even if there are no proceedings pending in the chosen court. If parallel proceedings are already pending in the chosen court, the non-chosen court must at least suspend its own proceedings, and can also dismiss.¹⁹⁹ In general, the five exceptions would cover most of the circumstances in which choice of court agreements may not be enforced.²⁰⁰ It can be seen that the exceptions to review by the non-chosen court are more than those by the chosen court. In this way, the 2005 Hague

¹⁹⁵ Trevor Hartley and Masato Dogauchi, *Explanatory Report* (n 142) 62-63, para 154.

¹⁹⁶ *ibid.*

¹⁹⁷ Ronald A Brand and Paul M Herrup (n 139) 94.

¹⁹⁸ Trevor Hartley and Masato Dogauchi, *Explanatory Report* (n 142) 63, para 155.

¹⁹⁹ Matthias Weller, ‘Choice of Court Agreements under Brussels Ia and under the Hague Convention: Coherences and Clashes’ (2017) 13(1) *Journal of Private International Law* 91, 111.

²⁰⁰ Alex Mills (n 167) 157.

Convention tries its best to reduce the risk of parallel proceedings.²⁰¹

4.7 Conclusion

As the most important international achievement concerning choice of court agreements so far, the 2005 Hague Convention comprehensively deals with the obligations of the chosen court and of the court seized rather than giving direct requirements for the validity of choice of court agreements. With regard to the severability, applicable law, formal validity and essential validity of choice of court agreements, the requirements can be summarized from those regulated obligations when deciding the validity of choice of court agreements and have been fully interpreted in the official explanatory report. In general, the 2005 Hague Convention is a valuable example to deal with choice of court agreements in international civil and commercial matters and will certainly attract more countries to accede. After China's signing the 2005 Hague Convention, the China's attitude to ratification of the Convention will be further discussed from China's perspective in Chapter 6. For comparison, rules concerning choice of court agreements in the Brussels I Recast Regulation are going to be examined in the next chapter.

²⁰¹ Matthias Weller (n 199) 111.

5 Choice of Court Agreements in the Brussels I Recast Regulation

5.1 Introduction of Brussels I Recast

There is extensive cooperation among EU Member States on jurisdiction and recognition and enforcement of judgments in civil and commercial cases. 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) (Brussels I Recast)²⁰² has applied in 27 of the 28 Member States of the European Union since January 10, 2015. It replaced Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation),²⁰³ which became effective in Europe in March 2002. With regard to the origins of Brussels I Recast, the European Community created its own framework for both jurisdiction and the recognition and enforcement of judgments in 1968. The 1968 Brussels Convention²⁰⁴ and the following Brussels I Regulation aimed to provide uniformity in both jurisdiction and judgment recognition and enforcement. The structure of Brussels I Recast is largely similar to those provisions and contains the same core principles.²⁰⁵

The rules concerning choice of court agreements are mainly the provisions of Article 25, located in Section 7 “Prorogation of jurisdiction” of Brussels I Recast. It provides:

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

²⁰² 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 [2012] OJ L 351/1.

²⁰³ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] OJ L 12/1.

²⁰⁴ 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L 299/32.

²⁰⁵ Andrew Dickinson and Eva Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press 2015) 1.

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.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.

3. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved.

4. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15, 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24.

5. 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.²⁰⁶

Article 25 has been adjusted in some aspects from the equivalent earlier rules, namely, Article 17 of the 1968 Brussels Convention²⁰⁷ and Article 23 of Brussels I Regulation.²⁰⁸

²⁰⁶ Article 25 of Brussels I Recast.

²⁰⁷ The original version of Article 17 of 1968 Brussels Convention (text had been amended by Article 11 of the 1978 Accession Convention and by Article 7 of the 1989 Accession Convention):

If the Parties, one or more of whom is domiciled in a Contracting State, have, by agreement in writing or by an oral agreement evidenced in writing, agreed that a court or the courts of a Contracting 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 exclusive jurisdiction.

Agreements conferring jurisdiction shall have no legal force if they are contrary to the provisions of Article 12 or 15, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 16.

If the agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention.

²⁰⁸ Article 23 of Brussels I Regulation:

1. If the parties, one or more of whom is domiciled in a Member State, 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. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

- (a) in writing or evidenced in writing; or
- (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.

The most significant change introduced by Brussels I Recast pertains to the parties' domicile. In Article 17 of the 1968 Brussels Convention and Articles 23 of Brussels I Regulation, it is required that one or more of the parties is domiciled in a Member State. In Article 25.1 of Brussels I Recast, the rule concerning choice of court agreements can apply to the parties "regardless of their domicile", which means that the parties can be domiciled in EU or non-EU States as long as the chosen court or courts is/are in a Member State. It is no longer necessary that at least one party is domiciled in a Member State and the only requirement now is that the parties designate a court of a Member State.²⁰⁹ The reason for deletion of the domicile requirement is that "under the old provision it was disputed whether the domicile requirement had to be met when the jurisdiction agreement was concluded or when court proceedings were instituted."²¹⁰ The deletion is welcomed as a positive change because it "covers all instances in which parties have selected the courts of an EU Member State".²¹¹ The domicile of the parties may change, so that there is no need to focus on the changed domicile under a valid choice of court agreement. As a result, comparing Article 25 with the previous article of the Brussels I Regulation, the current rule is simpler to apply because the connection of the parties' domicile in a Member State has been deleted from Brussels I Recast.

Under Article 17 of the 1968 Brussels Convention and Articles 23 of Brussels I Regulation, the chosen court shall have jurisdiction when one or more of the parties is domiciled in a Member State, and it can exercise jurisdiction when none of the parties is domiciled in a Member State. But for the non-chosen courts of other Member States, they shall have no

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".

3. Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

4. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.

²⁰⁹ Matthias Weller, 'Choice of Court Agreements under Brussels Ia and under the Hague Convention: Coherences and Clashes' (2017) 13(1) *Journal of Private International Law* 91, 96.

²¹⁰ Ulrich Magnus and Peter Mankowski (eds), *Brussels Ibis Regulation 2016*, vol 1 (2nd edn, Otto Schmidt 2016) 614, para 51.

²¹¹ Vesna Lazić and Steven Stuij (eds), *Brussels Ibis Regulation: Changes and Challenges of the Renewed Procedural Scheme* (TMC Asser Press 2017) 40.

jurisdiction unless the chosen court or courts have declined jurisdiction. However, when the chosen court exercises jurisdiction under Article 25 of Brussels I Recast, the parties can be from different Member States or from the same Member State other than the Member State where the chosen court is located, or from a third state (from the same third state or from different third states).²¹² Any non-chosen court may also exercise jurisdiction, regardless of the domicile of the parties, as long as the choice of court agreement is null and void as to its substantive validity under the law of the Member State of the chosen court. Therefore, the changes from Article 17 of the 1968 Brussels Convention and Articles 23 of Brussels I Regulation to Article 25 of Brussels I Recast can be summarized as below:

		One or more of the parties is domiciled in a Member State	None of the parties is domiciled in a Member State
The chosen court	Under Article 17 of the 1968 Brussels Convention and Article 23 of Brussels I Regulation	It shall have jurisdiction.	It can exercise jurisdiction.
	Under Article 25 of Brussels I Recast	It shall have jurisdiction unless the agreement is null and void as to its substantive validity under the law of that Member State.	
The non-chosen court	Under Article 17 of the 1968 Brussels Convention and Article 23 of Brussels I Regulation	It shall have no jurisdiction unless the chosen court or courts has/have declined jurisdiction.	
	Under Article 25 of Brussels I Recast	It can have jurisdiction when the agreement is null and void as to its substantive validity under the law of that Member State of the chosen court.	

Brussels I Recast generally follows the rules of the 1968 Brussels Convention and Brussels I Regulation, but there are obvious improvements in many details. In terms of choice of court agreements, apart from parties' domicile, other requirements or limits on choice of court agreements will be examined below.

5.2 Severability

²¹² Matthias Weller (n 209) 96.

Choice of court agreements are treated independently of the main contract. Article 25.5, which concerns the severability of choice of court agreements, is a newly added rule in Brussels I Recast. Although Article 25.5 is new, the essence of the rule is not new because it codifies a point of the judgment of the ECJ,²¹³ in the case *Francesco Benincasa v Dentalkit Srl*.²¹⁴ A choice of court agreement designating the courts at Florence was distinguished from the main franchising contract performed in Munich because of their different purposes and applicable laws, thus its validity must be distinguished from that of the main franchising contract. Specifically, the choice of court agreement “serves a procedural purpose”,²¹⁵ while other substantive provisions of the main contract set the rights and obligations of both parties. Therefore, a choice of court agreement shall be treated independently of the main contract.

Article 25.5 follows the same approach as the corresponding rule (i.e. Article 3(d)) in the 2005 Hague Convention and provides that a choice of court agreement which forms part of the main contract shall be treated as an agreement independent of the other terms of the main contract.²¹⁶ This means that the validity of a choice of court agreement should be judged by its own conflict of laws rules. Furthermore, the validity of the agreement cannot be contested solely on the ground that the main contract is not valid. As a result, an invalid main contract will not necessarily lead to an invalid choice of court clause within the main contract. When the main contract is invalidated, altered, cancelled or terminated for various reasons, the choice of court agreement, as a special agreement for dispute resolution, is not necessarily invalidated, altered, cancelled or terminated. The choice of court agreement may be valid even if the main contract is not. Likewise, the choice of court agreement may be invalid even if the main contract is effective.

Thus, the rule of severability effectively avoids creating uncertainties and “separates the issues of the validity of a choice of court clause from the validity of the contract within which the clause is found”.²¹⁷ Even if the validity of the main contract is questioned, it

²¹³ Vesna Lazić and Steven Stuij (eds) (n 211) 41.

²¹⁴ Case C-269/95 *Francesco Benincasa v Dentalkit Srl* [1997] ECR I-3767.

²¹⁵ *ibid*, para 25.

²¹⁶ See part 4.2 in Chapter 4.

²¹⁷ Elizabeth B Crawford and Janeen M Carruthers, *International Private Law: A Scots Perspective* (4th edn,

will not prevent a valid choice of court agreement from being recognized and enforced. Thus, the chosen court still can exercise jurisdiction based on the valid choice of court agreement and can adjudicate relative issues.

5.3 Applicable Law

Article 23 of Brussels I Regulation did not provide the applicable law for choice of court agreements. Thus, the validity of a choice of court agreement was uncertain as it may be valid in one Member State under its domestic rules, but invalid in another Member State per Article 23. In the case law of the ECJ, the law applicable to choice of court agreements was the domestic law of Member State of the seized court.²¹⁸ For example in the case of *Powell Duffryn plc v Wolfgang Petereit*,²¹⁹ a choice of court agreement contained in the statutes of a company limited by shares needed to be “adopted in accordance with the provisions of the applicable national law” (German law).²²⁰

Article 1.2(e) of the Rome I Regulation excludes from the scope of the Regulation choice of court agreements,²²¹ and thus there is no uniform rule designating the substantive law applicable to the validity of choice of court agreements under the Rome I Regulation.²²² Article 25 of Brussels I Recast introduces a uniform conflict of laws rule for choice of court agreements. Due to the principle of severability, the law applicable to a choice of court agreement may be different from the contractual *lex causae*, the applicable law of the main contract. Article 25.1 provides a clear choice of law rule applicable to the essential validity of choice of court agreements. The chosen court or courts of a Member State shall have presumed exclusive jurisdiction “unless the agreement is null and void as to its substantive validity under the law of that Member State”. Therefore, the law of the State of

W Green 2015) 167, para 7-42.

²¹⁸ Richard Fentiman, *International Commercial Litigation* (2nd edn, Oxford University Press 2015) 56, para 2.48; Louise Merrett, ‘Article 23 of the Brussels I Regulation: A Comparative Code for Jurisdiction Agreements?’ (2009) 58 *International and Comparative Law Quarterly* 545, 564.

²¹⁹ Case C-214/89 *Powell Duffryn plc v Wolfgang Petereit* [1992] ECR I-1745.

²²⁰ *ibid*, para 21.

²²¹ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6.

²²² Lord Collins of Mapesbury and others (eds), *Dicey, Morris and Collins on the Conflict of Laws*, vol 1 (15th edn, Sweet & Maxwell/Thomson Reuters 2012) 603-604, para 12-103; Vesna Lazić and Steven Stuij (eds) (n 211) 41.

the chosen court governs the essential validity of the choice of court agreement, whereas the essential validity of the main contract is governed by the *lex causae* under Article 3.1 of the Rome I Regulation. Also, as clarified in Recital 20 of Brussels I Recast, “the law of that Member State” includes the conflict of laws rules of that Member State, thus this harmonised conflict of laws rule can ensure a similar outcome on the case whatever the court seised.²²³ As for formal validity, Articles 25.1 and 25.2 of Brussels I Recast set the formal requirements for choice of court agreements,²²⁴ whereas the formal requirements of the main contract are governed by the law designated by Article 11 of the Rome I Regulation.²²⁵

5.4 Formal Validity

In terms of the formal validity of choice of court agreements, Article 17 of the 1968 Brussels Convention allowed a choice of court agreement to be agreed only ‘in writing or evidenced in writing’:

If the Parties, one or more of whom is domiciled in a Contracting State, have, by agreement in writing or by an oral agreement evidenced in writing, agreed that...²²⁶

In the following amendments, the formal requirements have been made more flexible and easier to satisfy. ‘Practices in international trade or commerce’ was added into Article 17 by Article 11 of the 1978 Accession Convention,²²⁷ and the provision at that stage was:

...Such an agreement conferring jurisdiction shall be either in writing or evidenced in writing or, in international trade or commerce, in a form which accords with practices

²²³ Andrew Bowen, ‘New Brussels I Regulation and Choice of Court Agreements’ (2014) 24 Scots Law Times 99, 102.

²²⁴ See following part 5.4.

²²⁵ Andrew Dickinson and Eva Lein (eds) (n 205) 305, para 9.94.

²²⁶ Article 17 of 1968 Brussels Convention (n 207).

²²⁷ Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (78/884/EEC) [1978] OJ L 304/1.

in that trade or commerce of which the parties are or ought to have been aware...²²⁸

Then ‘practices established between the parties’ was added into Article 17 by Article 7 of the 1989 Accession Convention,²²⁹ and the provision at that stage was:

...Such an agreement conferring jurisdiction shall be either:

- (a) in writing or evidenced in writing, or
- (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...²³⁰

This final version of three main formal requirements in the 1968 Brussels Convention is maintained same by Article 23.1 of Brussels I Regulation and Article 25.1 of Brussels I Recast. Firstly, a choice of court agreement shall be “in writing or evidenced in writing”; secondly, the agreement can be “in a form which accords with practices which the parties have established between themselves”; thirdly, the agreement can be “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”. In addition, Article 23.2 of Brussels I Regulation and Article 25.2 of Brussels I Recast treat “any communication by electronic means which provides a durable record” as equal to a written choice of court agreement.

5.4.1 In Writing or Evidenced in Writing

²²⁸ Article 17 of Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Consolidated version) - 1968 Brussels Convention [1983] OJ C 97/2.

²²⁹ Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland and the adjustments made to them by the Convention on the accession of the Hellenic Republic (89/535/EEC) [1989] OJ L 285/1.

²³⁰ Article 17 of Convention on jurisdiction and the enforcement of judgements in civil and commercial matters (Consolidated version) - 1968 Brussels Convention [1990] OJ C 189/2.

It seems that any formal requirement of the above three options is easy for choice of court agreements to satisfy in most commercial practices.²³¹ However, the interpretation of the formal requirements by the ECJ is relatively stricter in the first requirement of “in writing or evidenced in writing”.²³² For example, in the case of *Estasis Salotti di Colzani Aimò e Gianmario Colzani s.n.c. v Ruwa Polsteimaschinen GmbH*,²³³ the ECJ ruled that a choice of court agreement, which is included among general conditions of sale printed on the back of a contract, fulfills the requirement of writing only if the contract signed by both parties contained an express reference to those general conditions.²³⁴ The express reference does not need to “specifically refer to the presence” of a choice of court agreement in the earlier offers,²³⁵ but shall be checked by a party exercising ‘reasonable care’.²³⁶ Hence, the choice of court agreement will not satisfy the formal requirements if there is no reasonably noticed reference or the reference is “only indirect or implied”.²³⁷

As for oral choice of court agreements evidenced in writing, the interpretation is also usually strict, namely, an oral agreement merely incorporated by reference to a document containing the choice of court agreement is not enough.²³⁸ For example, in the case of *Partenreederei ms. Tilly Russ and Ernest Russ v NV Haven- & Vervoerbedrijf Nova and NV Goeminne Hout*²³⁹ and *F. Berghoefer GmbH & Co. KG v ASA SA*,²⁴⁰ an oral agreement must be expressly related to the choice of court and written confirmation of that agreement by one of the parties must be received by the other and the latter must have raised no objection.²⁴¹ As a result, both elements are necessary: an oral choice of court agreement and subsequent written confirmation by one of the parties. In the case of *Saey Home & Garden NV/SA v Lusavouga-Máquinas e Acessórios Industriais SA*,²⁴² a verbal agreement

²³¹ Richard Fentiman (n 218) 67, para 2.82.

²³² Lord Collins of Mapesbury and others (eds) (n 222) 623, para 12-135.

²³³ Case 24/76 *Estasis Salotti di Colzani Aimò e Gianmario Colzani s.n.c. v Ruwa Polsteimaschinen GmbH* [1976] ECR 1831.

²³⁴ *ibid*, para 10.

²³⁵ Geert Van Calster, *European Private International Law* (Hart Publishing 2013) 81.

²³⁶ *Colzani* (n 233), para 13.

²³⁷ Trevor Hartley, *Civil Jurisdiction and Judgments in Europe: The Brussels I Regulation, the Lugano Convention, and the Hague Choice of Court Convention* (Oxford University Press 2017) 245, para 13.63.

²³⁸ Peter Stone, *EU Private International Law* (3rd edn, Edward Elgar 2014) 173.

²³⁹ Case 71/83 *Partenreederei ms. Tilly Russ and Ernest Russ v NV Haven- & Vervoerbedrijf Nova and NV Goeminne Hout* [1984] ECR 2417.

²⁴⁰ Case 221/84 *F. Berghoefer GmbH & Co. KG v ASA SA* [1985] ECR 2699.

²⁴¹ *Tilly Russ* (n 239), para 19; *F. Berghoefer GmbH* (n 240), para 16.

²⁴² Case C-64/17 *Saey Home & Garden NV/SA v Lusavouga-Máquinas e Acessórios Industriais SA* [2018]

without written confirmation was held not to satisfy the requirement of Article 25.²⁴³

In addition, a choice of court agreement concluded by electronic means shall be equivalent to an agreement in writing by virtue of Article 25.2. That provision was included in Article 23.2 of Brussels I Regulation and is inspired by Article 9(1) and 10(3) of the ‘Directive on Electronic Commerce’.²⁴⁴ The definition of “electronic communication” was taken from Article 6(1) of the 1996 UNCITRAL Model Law on Electronic Commerce.²⁴⁵ The key element is that electronic communication can be durably stored so that it can be accessed later, for example, emails, fax, telegram, and active web pages. The application of this provision to internet sales is straightforward because the choice of court agreement can appear on the screen in a form which can be printed and saved.²⁴⁶ In the case of *Jaouad El Majdoub v CarsOnTheWeb.Deutschland GmbH*,²⁴⁷ the claimant submitted that the webpage containing the defendant’s general terms and conditions of sale did not open automatically upon every individual sale. Instead, a box with the indication ‘click here to open the conditions of delivery and payment in a new window’ must be clicked on (‘click wrapping’). Thus, the applicant argued that a choice of court agreement had not been validly incorporated. However, the ECJ held that the method of accepting the general terms and conditions of a contract for sale by ‘click-wrapping’ constitutes a communication by electronic means which provides a durable record of the choice of court agreement because “that method makes it possible to print and save the text of those terms and conditions before the conclusion of the contract”.²⁴⁸ The purpose of Article 25.2 is to “treat certain forms of electronic communications in the same way as written communications in order

OJ C 161/12

<<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1566170887401&uri=CELEX:62017CJ0064>>
accessed 13 September 2019.

²⁴³ *ibid*, para 32.

²⁴⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178/1.

²⁴⁵ UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with additional article 5 bis as adopted in 1998 <https://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf>
accessed 13 September 2019.

²⁴⁶ Trevor Hartley (n 237) 261, para 13.121.

²⁴⁷ Case C-322/14 *Jaouad El Majdoub v CarsOnTheWeb.Deutschland GmbH* [2015] OJ C 236/19,
<<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1566171660162&uri=CELEX:62014CJ0322>>
accessed 13 September 2019.

²⁴⁸ *ibid*, para 40.

to simplify the conclusion of contracts by electronic means”,²⁴⁹ and the requirement of ‘in writing or evidenced in writing’ should not invalidate a choice of court agreement “concluded in a form that is not written on paper but accessible on screen”.²⁵⁰ It is possible to save and print the choice of court agreement before concluding the contract so that the fact that the webpage does not open automatically cannot “call into question the validity of the agreement conferring jurisdiction”.²⁵¹

5.4.2 Established Practices

For the second formal requirement, Article 25.1(b) refers to a choice of court agreement that is “in a form which accords with practices which the parties have established between themselves”. This wording is taken from Article 9(1) of the 1980 Vienna Sales Convention (CISG),²⁵² and it can be distinguished from Article 25.1(a) (namely, the requirement of writing) because it “does not in principle require any writing at all”.²⁵³ To establish practices, there should be consensus between the parties with sufficient certainty on the choice of court agreement in their previous contracts and the parties should have been concluding contracts “on a regular basis and in accordance with a certain practice”.²⁵⁴ All of the parties are relying on the existence of these contracts based on the principle of good faith. Continuous frequent trading relationships between the parties can justify the existence of a bilaterally established practice. Bilaterally established practices require that “the parties used to conduct their transactions regularly in a specific way” and that “this practice had lasted a certain time”.²⁵⁵ If there has been a negotiation leading to a new contract between the parties, or a substantial break in their trading relationships, the “established practices” is broken and the previous choice of court agreement will not apply.

This requirement of “bilaterally established practices” is an independent concept used by

²⁴⁹ *ibid*, para 36.

²⁵⁰ *ibid*, para 35.

²⁵¹ *ibid*, para 39.

²⁵² United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980), <<https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>> accessed 13 September 2019.

²⁵³ Peter Stone (n 238) 174.

²⁵⁴ Andrew Dickinson and Eva Lein (eds) (n 205) 291, para 9.48.

²⁵⁵ Ulrich Magnus and Peter Mankowski (eds) (n 210) 644, para 110.

the ECJ in “interpreting the requirement of writing in the context of confirmatory documents which were received without objection”.²⁵⁶ For example in the case of *Galeries Segoura SPRL v Societe Rahim Bonakdarian*,²⁵⁷ a unilateral declaration in writing was sufficient to constitute a choice of court agreement within the framework of a continuing trading relationship,²⁵⁸ thus the written declaration formed a bilaterally established practice. If “it is established that the dealings taken as a whole are governed by the general conditions of the party giving the confirmation” containing a choice of court agreement, it would be contrary to the principle of good faith for the recipient of the confirmation to deny the existence of the choice of court agreement “even if he had given no acceptance in writing”.²⁵⁹ The same outcome was reached in the case of *Partenreederei ms. Tilly Russ and Ernest Russ v NV Haven- & Vervoerbedrijf Nova and NV Goeminne Hout*.²⁶⁰

5.4.3 Usages in International Trade or Commerce

As for the third option in Article 25.1(c) (a “form which accords with usages” in international trade or commerce), the requirements vary on a case-by-case basis. Just like the wording in that provision, whether the parties are or ought to have been aware of the usage, and whether the usage is widely known to and regularly observed by parties in such trade or commerce, are factual questions to be decided by the national court.²⁶¹ In the case of *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA*,²⁶² the ECJ held that:

The existence of a usage, which must be determined in relation to the branch of trade or commerce in which the parties to the contract operate, is established where a particular course of conduct is generally and regularly followed by operators in that

²⁵⁶ Peter Stone (n 238) 174.

²⁵⁷ Case 25/76 *Galeries Segoura SPRL v Societe Rahim Bonakdarian* [1976] ECR 1851.

²⁵⁸ Trevor Hartley (n 237) 246, para 13.68.

²⁵⁹ *Segoura* (n 257), para 11.

²⁶⁰ *Tilly Russ* (n 239), para 18.

²⁶¹ Case C-106/95 *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL* [1997] ECR I-911, para 21.

²⁶² Case C-159/97 *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA* [1999] ECR I-1597.

branch when concluding contracts of a particular type.²⁶³

“Usages in international trade or commerce” refers to repeated similar transactions in a particular field of international trade.²⁶⁴ These transactions should be consistent with previous agreements between the parties for the same contractual matters, and other parties also adopt the similar doings regularly in other transactions. As a result, these similar transactions may constitute usages in international trade or commerce. The courts of EU Member States have discretion to determine whether the transaction accords with usages in international trade or commerce, however, this discretion might lead to great uncertainty because the parties may not foresee the result.

5.5 Essential Validity

Article 25 of Brussels I Recast does not regulate the essential validity of choice of court agreements directly, but rather leaves it to the law of the Member State of the chosen court. However, choice of court agreements need to satisfy some implied essential requirements in Article 25, such as parties’ consensus and presumed exclusivity. In addition, there are some limits on choice of court agreements pertaining to insurance matters, consumer contracts and individual contracts of employment.

5.5.1 Consensus

Like contracts in civil and commercial law, it is the parties’ consensus that is the primary requirement to make a choice of court agreement valid. The consensus is the ‘central element’ for the validity of a choice of court agreement.²⁶⁵ The meeting of minds should be authentic and the parties must be willing to be bound to the agreement. Consensus between the parties must be “clearly and precisely demonstrated”.²⁶⁶ Although the formal requirements are more flexible than before, they do not eliminate the need for consensus

²⁶³ *ibid*, para 30.

²⁶⁴ Lord Collins of Mapesbury and others (eds) (n 222) 626, para 12-138.

²⁶⁵ Ulrich Magnus and Peter Mankowski (eds) (n 210) 625, para 75.

²⁶⁶ Andrew Dickinson and Eva Lein (eds) (n 205) 293, para 9.54.

between the parties.²⁶⁷ If either formal requirement in Article 25 is satisfied, consensus between the parties is assumed to exist.²⁶⁸

According to general rules, it remains possible for a choice of court agreement to be held invalid “by reason of fraud, mistake or improper pressure”.²⁶⁹ In addition, the ECJ has made it clear in *Siegfried Zelger v Sebastiano Salinitri*²⁷⁰ that Article 17 of the 1968 Brussels Convention dispenses with any requirement for an objective connection between the dispute and the court designated.²⁷¹ The same view has been affirmed in various cases.²⁷² Thus choosing a ‘neutral’ court is acceptable under Article 25. It is better to choose a specific court and thus “pre-empt any problem of finding the territorially appropriate court within the chosen State”.²⁷³ If the parties merely choose the courts of a Member State in general, the court which shall be competent will be decided by the internal law of that State.

Furthermore, consensus refers to the consensus of original parties rather than of any successor to a party. When the main contract is transmitted to a third party, due to the principle of party autonomy, the choice of court agreement in the main contract cannot be transmitted automatically to the third party “unless the successor himself has agreed to the choice of court clause”.²⁷⁴ This can also result from the principle of severability which makes the choice of court agreement independent from the main contract. In the case of *Refcomp SpA v Axa Corporate Solutions Assurance SA and Others*,²⁷⁵ the ECJ held that a choice of court agreement cannot be transmitted to the third party automatically. The agreement will not bind “a party to a subsequent contract and successor, in whole or in part, to the rights and obligations of one of the parties to the initial contract”,²⁷⁶ unless that third

²⁶⁷ *ibid*, 292, para 9.51.

²⁶⁸ *ibid*.

²⁶⁹ Peter Stone (n 238) 181.

²⁷⁰ Case 56/79 *Siegfried Zelger v Sebastiano Salinitri* [1980] ECR 89.

²⁷¹ *ibid*, para 4.

²⁷² *MSG* (n 261), para 34; *Francesco Benincasa* (n 214), para 28; *Trasporti* (n 262), para 50.

²⁷³ Peter Stone (n 238) 184.

²⁷⁴ Elizabeth B Crawford and Janeen M Carruthers (n 217) 167, para 7-42.

²⁷⁵ C-543/10 *Refcomp SpA v Axa Corporate Solutions Assurance SA and Others* [2013] OJ C 108/2, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1566248772087&uri=CELEX:62010CJ0543>> accessed 13 September 2019.

²⁷⁶ *ibid*, para 25.

party has agreed to accept the choice of court in person. The wording of Article 23.1 of Brussels I Regulation did not indicate whether a choice of court agreement could be “transmitted, beyond the circle of the parties to a contract, to a third party”.²⁷⁷ More importantly, it is the consensus between the parties that justifies the jurisdiction of the chosen court. As a result, the scope of Article 25.1 of Brussels I Recast is limited to “cases in which the parties have ‘agreed’ on a court”.²⁷⁸

5.5.2 Exclusivity

The exclusive jurisdiction of the chosen court is defined in Article 17 of the 1968 Brussels Convention, but too much effort was spent verifying whether or not the choice of court agreements were exclusive. Article 23 of Brussels I Regulation contains a presumption of exclusivity for the chosen court or courts of a Member State, but this presumption can be rebutted if the parties agree otherwise. Therefore, if a choice of court agreement does not clearly state whether it is exclusive or not and the parties have no agreement otherwise, the choice of court agreement will be presumed to be exclusive. On the contrary, only if the parties have agreed clearly on a non-exclusive choice of court agreement,²⁷⁹ will the choice of court agreement be non-exclusive.²⁸⁰

Article 25 of Brussels I Recast keeps the same presumption of exclusivity, but this exclusivity must “bow before the provisions of Articles 24 and 26”.²⁸¹ It means that the presumed exclusivity will be rebutted if the disputed matter falls within the scope of Article 24 (exclusive jurisdiction) or 26 (submission by appearance). Since Article 25 is based on the principle of party autonomy, it does not prevent parties from subsequently concluding a further choice of court agreement that is in conflict with the earlier one. Submission by appearance in Article 26, regarded as an implied choice of court, should prevail over Article 25.²⁸² In addition, the exclusive jurisdiction in Article 24 has priority

²⁷⁷ *ibid.*

²⁷⁸ *ibid.*, para 26.

²⁷⁹ Ulrich Magnus and Peter Mankowski (eds) (n 210) 658, para 147.

²⁸⁰ See part 2.2.1 in Chapter 2.

²⁸¹ Elizabeth B Crawford and Janeen M Carruthers (n 217) 168, para 7-43.

²⁸² Peter Stone (n 238) 184.

across the whole Brussels I Recast so that it prevails over prorogation of jurisdiction.²⁸³ The latter half part of Article 25.4 states that choice of court agreements shall have no legal force “if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24”.

5.5.3 Protection of the Weaker Party

With the development of ‘substantial fairness and justice’ in the field of private international law, protection of the weaker party is attracting more attention and has developed into a basic principle in private international law.²⁸⁴ In international trade and commerce, situations when the rights and bargaining powers of the parties are not equal, or possibly are disparate, are easily found. Choice of court agreements might only maintain superficial equality between the parties. In fact, it is very likely that one party who has the stronger bargaining power will force the weaker party to agree on a court which is beneficial to the stronger party.²⁸⁵ Although the chosen court is not necessarily harmful to the weaker party, the proceedings in it are possibly full of various obstacles, for example, higher litigation costs, longer lawsuit time and difficult service of documents, etc. This kind of choice of court cannot truly reflect the authentic intention of the weaker party, which runs counter to the principle of party autonomy. Therefore, in order to realize ‘substantial fairness and justice’, both national laws and international regulations usually give unique protection to the weaker party, either in the provisions directly or in the legislative intention inferred from the texts.

Brussels I Recast inherits and develops the protection of the weaker party in the 1968 Brussels Convention and Brussels I Regulation. It focuses on three categories, namely, insurance matters, consumer contracts and individual contracts of employment. In relation to insurance, consumer and employment contracts, the weaker party refers respectively to the policyholder, the insured, a beneficiary of the insurance contract, the injured party; the consumer; and the employee. They “should be protected by rules of jurisdiction more

²⁸³ Article 27 of Brussels I Recast (n 202).

²⁸⁴ Vesna Lazić and Steven Stuij (eds) (n 211) 68.

²⁸⁵ See part 2.2.2 in Chapter 2.

favourable to his interests than the general rules”.²⁸⁶ As a result, the first part of Article 25.4 provides that choice of court agreements shall “have no legal force if they are contrary to Article 15, 19 or 23”. It sets limitations on the capacity of the weaker party to “depart by agreement from what is provided for their benefit” in the Brussels I Recast.²⁸⁷ It can be seen that protection of the weaker party mainly concerns the timing of concluding choice of court agreements and the scope of courts where the weaker party can bring proceedings. Specifically, the choice of court agreement should be entered into after the dispute has arisen; the choice of court agreement should allow the policyholder, the insured, a beneficiary, the consumer and the employee to bring proceedings in courts other than those indicated in those three Sections in Brussels I Recast (Section 3, 4 & 5). In the author’s view, protecting the weaker party in insurance, consumer and employment contracts reflects the comprehensiveness of the framework of the EU law.

5.6 Breach of Choice of Court Agreements

A choice of court agreement is usually honoured by the parties. However, a particular situation, where concurrent proceedings may arise, needs to be satisfactorily dealt with when there is an exclusive choice of court agreement. It is the situation “where a court not chosen in an exclusive choice of court agreement has been seised of proceedings and the designated court is seised subsequently of proceedings involving the same cause of action and between the same parties”.²⁸⁸ When proceedings involving the same cause of action and between the same parties are brought before the courts of different Member States, the non-chosen court may also have jurisdiction under the regulation. It is important to clarify the ranking and priority of the jurisdictional rules in Brussels I Recast. The most logical way of clarification is “the most specific and exclusive first”.²⁸⁹ The *lis pendens* rule in Section 9 of Brussels I Recast solves conflicts of international jurisdiction and is intended to avoid parallel proceedings in different Member States.²⁹⁰ It concerns the order and operation of different articles and ensures that judgments can be enforced among the

²⁸⁶ Recital 18 of Brussels I Recast (n 202).

²⁸⁷ Elizabeth B Crawford and Janeen M Carruthers (n 217) 168, para 7-43.

²⁸⁸ Recital 22 of Brussels I Recast (n 202).

²⁸⁹ Geert Van Calster (n 235) 23.

²⁹⁰ Vesna Lazić and Steven Stuij (eds) (n 211) 2.

Member States.

In the strict system of *lis pendens* rule under Brussels I Regulation, only the court first seised could establish its own jurisdiction and any other court (including the chosen court) was required to stay or decline jurisdiction.²⁹¹ The jurisdiction of the court first seised could be established “both generally and in light of argument that the parties had made an exclusive choice of court in favour of another jurisdiction”,²⁹² which was criticized for a long time. It meant that the court designated by the parties needed to stay its proceedings if another court had been seised first. The efficiency of choice of court agreements was lowered and the rule enabled some claimants “acting in bad faith” to frustrate the exclusive choice of court agreement by first seising a non-competent court.²⁹³ This possibility destroyed the predictability and legal certainty of dispute resolution which choice of court agreements should produce.²⁹⁴

It was the judgment of the ECJ in the case of *Erich Gasser GmbH v MISAT Srl*²⁹⁵ that prioritised the *lis pendens* rule over choice of court agreements. This motivated the EU to modify the *lis pendens* rule in Brussels I Regulation. An Austrian company “Gasser” and an Italian company “MISAT” chose the Austrian courts in their contract (on the back of all invoices). When the dispute arose between them, MISAT brought a lawsuit in a court in Rome for a negative declaratory judgment (a declaration of non-liability) firstly in April 2000. In December 2000, Gasser initiated the proceedings for the payment of invoices in the chosen Regional Court in Austria based on their choice of court agreement. In the end, the ECJ decided that the Austrian court, even if it is chosen in the choice of court agreement, must stay its proceedings until the first seised Italian court has declared that it does not have jurisdiction, because the chosen court is seised later.²⁹⁶ This was the case where the *lis pendens* rule applies rigidly. However, it might take a long time for the Italian court to adjudicate its jurisdiction²⁹⁷ and it was more likely for the Italian court to decline

²⁹¹ Articles 27-30 of Brussels I Regulation (n 203).

²⁹² Elizabeth B Crawford and Janeen M Carruthers (n 217) 170, para 7-46.

²⁹³ Andrew Bowen (n 223) 102.

²⁹⁴ *ibid.*

²⁹⁵ Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693.

²⁹⁶ *ibid.*, para 54.

²⁹⁷ Trevor Hartley (n 237) 388, para 23.04.

its jurisdiction due to the fact that the Austrian court is the chosen court by parties. This judgment showed that the principle of party autonomy could be overridden by other principles. A party may purposely initiate proceedings in a “slow” court, which is highly inefficient in the area of dispute resolution. A strict *lis pendens* rule is a good principle based on mutual trust among Member States of the EU, but it ultimately makes the principle of party autonomy “blocked or frozen”.²⁹⁸ Such rigid application of the *lis pendens* rule was heavily criticized as “being abusive and hampering justice and trade”.²⁹⁹ Just like the negative declaratory judgment sought by MISAT in the Italian court, it is unreasonable for a party to “seize the initiative by seising a forum in which to seek” a negative declaration in order to escape a choice of court agreement,³⁰⁰ such as a declaration of no capacity or non-liability, a declaration of no valid choice of court agreement, a declaration of breach the main contract, and so on. These expected declarations will breach the good faith between the parties and eventually ruin the social justice. Fortunately, this situation has been corrected by Article 31.2 of Brussels I Recast.

According to Article 31.2, any court seised other than the one exclusively chosen should stay its proceedings as soon as the chosen court has been seised and until the chosen court declares that it has no jurisdiction under the choice of court agreement. The situation of Article 31.3 follows that of Article 31.2, which provides that if the chosen court accepts jurisdiction, any other court seised should decline jurisdiction. For the sake of the chosen court, Article 31.2 adjusts the implied equality of courts and protects party autonomy more effectively. According to Recital 22 of Brussels I Recast, this exception “enhances the effectiveness of exclusive choice-of-court agreements” and “avoids abusive litigation tactics”.³⁰¹ When a party wants to seek a negative declaration in a non-chosen court in breach of the choice of court agreement, his plan will fail because any non-chosen court should stay or dismiss its proceedings in principle. Article 31.2 ensures the priority of the chosen court. In addition, the chosen court should be able to proceed “irrespective of whether the non-designated court has already decided on the stay of proceedings”.³⁰²

²⁹⁸ Vesna Lazić and Steven Stuij (eds) (n 211) 35.

²⁹⁹ *ibid*, 36.

³⁰⁰ Elizabeth B Crawford and Janeen M Carruthers (n 217) 181, para 7-59.

³⁰¹ Recital 22 of Brussels I Recast (n 202).

³⁰² *ibid*.

Moreover, according to Article 31.4, there is an exception for insurance, consumer, and employment contracts where the weaker parties are claimants and the choice of parties is invalid based on Sections 3, 4, or 5 in Chapter 2 of Brussels I Recast. This provision protects the interests of the weaker party in those three kinds of matters and allows them to seek negative declarations in non-chosen courts. It is because the weaker party may be forced by the stronger party to choose the designated court and it is very likely that the interests of the weaker party may be damaged in the chosen court.

In summary, the *lis pendens* rule generally supports the jurisdiction of the court first seised. When there is an exclusive choice of court agreement, the jurisdiction of the chosen court should be respected over that of the court seised even if a court is the court first seised in breach of the choice of court agreement. However, firstly, the exclusive jurisdiction in Article 24 cannot be violated; it has the top priority among all of the jurisdiction rules in Brussels I Recast. Then the special jurisdiction in Sections 3, 4 and 5 should not be violated. Submission by appearance in Article 26 can also prevail over the jurisdiction of the chosen court, which means that a court seised in breach of a valid choice of court agreement will be the competent court if the defendant enters an appearance without contesting its jurisdiction. After having checked all the above, the jurisdiction of the chosen court can be respected and the *lis pendens* rule will not apply.

5.7 Conclusion

The Brussels Regime, from the 1968 Brussels Convention to the Brussels I Regulation and the current Brussels I Recast, respects the principle of party autonomy and secures the validity of choice of court agreements in order to ensure legal certainty. With regard to the severability, applicable law and formal validity of choice of court agreements, Article 25 of Brussels I Recast takes a similar approach to the rules of the 2005 Hague Convention. In addition, the formal requirements in Article 25 are more flexible. To sum up, considering its advantages and disadvantages, Article 25 is a good example of a legislative rule for choice of court agreements. It efficiently coordinates the allocation of jurisdiction between the chosen court and non-chosen courts. The relationship between Brussels I Recast and

the 2005 Hague Convention will be discussed in the next chapter, as will be the UK's attitude to Brussels I Recast and the 2005 Hague Convention under the influence of Brexit. Finally, whether or not Article 25 of Brussels I Recast is a good model for Chinese law will also be examined.

6 Comparison and Conclusion

6.1 The Relationship between the 2005 Hague Convention and Brussels I Recast

6.1.1 Comparing the 2005 Hague Convention and Brussels I Recast

As examined in Chapters 4 and 5, the provisions concerning choice of court agreements in the 2005 Hague Convention and Brussels I Recast have something in common, especially the mirror rules about severability and applicable law. Only two possible incompatibilities between the two instruments are pointed out by the Explanatory Report: the *lis pendens* rule (under Brussels I Regulation) and the insurance rules.³⁰³ However, due to the new *lis pendens* rule modified in Brussels I Recast and the declaration made by the EU with regard to insurance contracts, actually there are almost no incompatibilities between the two instruments concerning choice of court agreements and “the risk of a true conflict between the two instruments is marginal”.³⁰⁴ Both instruments can be regarded as a valuable model of legislation, aiming to ensure the validity of choice of court agreements at an international level.

The 2005 Hague Convention establishes jurisdiction from the perspective of the chosen court and the non-chosen court. It is relatively easy for either the chosen court or any non-chosen court to determine the validity of a choice of court agreement. However, the Convention is limited to exclusive choice of court agreements in international civil and commercial situations and excludes from its scope many kinds of subject matters. In addition, the geographic scope of the 2005 Hague Convention is limited.³⁰⁵ It is hard to say that the 2005 Hague Convention, in practice or reality, is a global convention because

³⁰³ Permanent Bureau of the Conference, *Convention of 30 June 2005 on Choice of Court Agreements (Text adopted by the Twentieth Session), Explanatory Report by Trevor Hartley and Masato Dogauchi* (HCCH Publications 2013) 95, para 295, <<https://assets.hcch.net/upload/expl37final.pdf>> accessed 13 September 2019.

³⁰⁴ Andrew Dickinson and Eva Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press 2015) 284, para 9.25.

³⁰⁵ Giesela Rühl, ‘Judicial Cooperation in Civil and Commercial Matters after Brexit: Which Way Forward?’ (2018) 67(1) *International and Comparative Law Quarterly* 99, 127.

it is currently in force only within the EU, Mexico, Montenegro and Singapore.³⁰⁶ As a result, there is little experience with the workings of the Convention in legal practice.³⁰⁷ Only one litigated case under the 2005 Hague Convention can be found so far.³⁰⁸ However, one should hold an optimistic view about the future of the Convention that it will attract an increasing number of accession States.

Brussels I Recast, as a regional instrument, seems to have “achieved perfect coherence on a formal level”.³⁰⁹ Some important changes concerning the rules dealing with choice of court agreements have been introduced by Brussels I Recast. In order to enhance the validity of choice of court agreements, Article 25 adopts a unique approach to the concept of choice of court agreements and gives “less judicial discretion on whether or not to hear a case”.³¹⁰ But there are still some questions remaining unsolved. One is that there is no direct conflict of laws rule in Brussels I Recast to determine the substantive validity of choice of court agreements, so that the approach of *renvoi* may be applied in every case, but the conflict of laws rule may vary from Member State to Member State.³¹¹ The other question is that there is no specific rule for complex choice of court agreements,³¹² such as asymmetric or unilateral agreements, harlequin agreements, non-specific agreements and hybrid agreements referred in part 2.2, above.

The relationship between the 2005 Hague Convention and Brussels I Recast is managed by Article 26 of the Convention. According to Article 26.6, the 2005 Hague Convention “shall

³⁰⁶ Updated list of Contracting States to the Hague Convention

<<https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>> accessed 13 September 2019.

³⁰⁷ Giesela Rühl (n 305) 128.

³⁰⁸ In June 2018, the High Court of Singapore granted the Enforcement Application for a judgment of the English High Court of Justice, Queen’s Bench Division, under the framework of the 2005 Hague Convention, which is the first judgment to be enforced under the 2005 Hague Convention.

<<https://www.hcch.net/en/publications-and-studies/details4/?pid=6616&dtid=55>> accessed 13 September 2019.

³⁰⁹ Matthias Weller, ‘Choice of Court Agreements under Brussels Ia and under the Hague Convention: Coherences and Clashes’ (2017) 13(1) *Journal of Private International Law* 91, 101.

³¹⁰ Jonas Steinle and Evan Vasiliades, ‘The Enforcement of Jurisdiction Agreements under the Brussels I Regulation: Reconsidering the Principle of Party Autonomy’ (2010) 6(3) *Journal of Private International Law* 565, 587.

³¹¹ Mónica Herranz Ballesteros, ‘The Regime of Party Autonomy in the Brussels I Recast: The Solutions Adopted for Agreements on Jurisdiction’ (2014) 10(2) *Journal of Private International Law* 291, 308; Quim Forner-Delaygua, ‘Changes to Jurisdiction Based on Exclusive Jurisdiction Agreements under the Brussels I Regulation Recast’ (2015) 11(3) *Journal of Private International Law* 379, 399.

³¹² Mónica Herranz Ballesteros (n 311) 308.

not affect the application of the rules of a Regional Economic Integration Organization that is a Party to this Convention, whether adopted before or after this Convention”.³¹³ The EU is regarded as a Regional Economic Integration Organization when it acceded to the 2005 Hague Convention, so that generally the application of Brussels I Recast between EU Member States is not influenced by the Convention. At the same time, Article 26.1 provides that the 2005 Hague Convention “shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention”.³¹⁴ In cases where both parties are residents of EU Member States, the Convention gives precedence to Brussels I Recast.

Furthermore, as provided in Article 26.2, the 2005 Hague Convention “shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, in cases where none of the parties is resident in a Contracting State that is not a Party to the treaty”.³¹⁵ This means that Brussels I Recast, rather than the 2005 Hague Convention, is applied in cases where one party is resident in an EU Member State and the other party is a resident in a third State which is not a Contracting State to the 2005 Hague Convention.³¹⁶ The 2005 Hague Convention is applied only in cases where one party is resident in an EU Member State and the other party is resident in a third State which is a Contracting State to the Convention. These third States currently include Mexico, Montenegro and Singapore.³¹⁷ The rationale of this rule is that when one party is resident in a Contracting State to the 2005 Hague Convention which is not an EU Member State, that State “has an interest” in the prevailing operation of the Convention.³¹⁸ For example, a choice of court agreement between an EU firm and a Singaporean firm, choosing the courts in France, will be governed by the 2005 Hague Convention.

6.1.2 The Influence of Brexit

³¹³ Article 26.6 of the 2005 Hague Convention.

³¹⁴ Article 26.1 of the 2005 Hague Convention.

³¹⁵ Article 26.2 of the 2005 Hague Convention.

³¹⁶ Elizabeth B Crawford and Janeen M Carruthers, *International Private Law: A Scots Perspective* (4th edn, W Green 2015) 173, para 7-50.

³¹⁷ Updated list of Contracting States to the 2005 Hague Convention (n 306).

³¹⁸ Trevor Hartley and Masato Dogauchi, *Explanatory Report* (n 305) 91, para 273; Andrew Dickinson and Eva Lein (eds) (n 304) 284, para 9.24.

In accordance with Article 29 of the 2005 Hague Convention, the UK is bound by the Convention by virtue of its membership of the EU, which approved the 2005 Hague Convention on behalf of its Member States.³¹⁹ The ongoing uncertainty pertaining to Brexit may lead to complex situations in applying the 2005 Hague Convention or Brussels I Recast. The uncertainty will exist until Brexit is effected and the terms of any future relationship between the UK and the EU are agreed, between UK parties and parties who are resident in a Contracting State to the 2005 Hague Convention which is not an EU Member State.

The Government of the UK and the European Council reached political agreement on the withdrawal of the UK from the EU, but the “Brexit Withdrawal Agreement” has not been approved by the UK Parliament.³²⁰ This has delayed the process of Brexit. The original Brexit Withdrawal Agreement includes provisions for a transition period from 30 March 2019 to 31 December 2020 or such later date as may be agreed by the UK and the EU. In accordance with the Withdrawal Agreement, during the transition period, the UK would still be treated as a Member State of the EU for the purposes of international agreements concluded by the EU,³²¹ including the 2005 Hague Convention. As a result, EU law, including the 2005 Hague Convention, would continue to apply to and in the UK.³²²

However, the above is the simple situation when the Brexit Withdrawal Agreement is ratified by the approval of the UK Parliament. It is very likely, as matters currently stand, that the UK will leave the EU with no agreement concerning international treaties. The 2005 Hague Convention may cease to apply to and in the UK if a “No Deal” scenario

³¹⁹ Declaration of succession from the EU

<<https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1044&disp=resdn>> accessed 13 September 2019.

³²⁰ On 15 January 2019, the House of Commons rejected the Withdrawal Agreement by a vote of 432 to 202. The Agreement was rejected again on 12 March 2019 by the House of Commons on a vote of 391 to 242, and it was rejected a third time on 29 March 2019 by 344 votes to 286. See “Brexit withdrawal agreement” from Wikipedia <https://en.wikipedia.org/wiki/Brexit_withdrawal_agreement> accessed 13 September 2019.

³²¹ Declarations from the UK and Notice from the Depositary

<<https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1318&disp=resdn>> accessed 13 September 2019.

³²² *ibid.*

became a reality.³²³ In order to ensure continuity of application of the Convention in the UK from the point at which it ceases to be a Member State of the EU, the UK submitted an Instrument of Accession in accordance with Article 27(4) of the 2005 Hague Convention on 28 December 2018, in preparation for this situation.³²⁴ The Instrument of Accession declares that the UK accedes to the 2005 Hague Convention in its own right with effect from 1 April 2019. The UK intends to continue to participate in the 2005 Hague Convention after it withdraws from the EU and this declaration illustrates that the UK had signed and ratified the 2005 Hague Convention on 28 December 2018.³²⁵ By doing this, the UK seems to have reduced the potential “inapplicable” gap to two days (30 and 31 March 2019). On the contrary, in the event that the Brexit Withdrawal Agreement had been signed, ratified and approved by the UK and the EU and entered into force on 30 March 2019, the UK would have withdrawn the Instrument of Accession.³²⁶ In that case, during the transition period as stated above, the UK would have been continuously treated as a Member State of the EU and the 2005 Hague Convention would have continued to have effect accordingly.³²⁷

Following the delayed Brexit date of 31 October 2019, agreed by the European Council, the UK has a further extension of the period for withdrawal from the EU. During the extension period, the UK will remain a Member State of the EU.³²⁸ As a result, EU law, including the 2005 Hague Convention, will remain applicable to and in the UK. In order to keep consistency, the UK’s accession to the 2005 Hague Convention has been suspended to 1 November 2019 according to the UK’s new declaration.³²⁹ Likewise, if the Brexit Withdrawal Agreement is signed, ratified and approved by the UK and the EU, the UK will withdraw the Instrument of Accession submitted on 28 December 2018.

³²³ Tobias Lutzi, ‘UK Ratifies Hague Choice of Court and Hague Maintenance Conventions’ (*Conflictflaws.net*, 3 January 2019) <<http://conflictflaws.net/2019/uk-ratifies-hague-choice-of-court-and-hague-maintenance-conventions/>> accessed 13 September 2019.

³²⁴ Declarations from the UK and Notice from the Depositary (n 321).

³²⁵ Updated list of Contracting States to the 2005 Hague Convention (n 306).

³²⁶ Declarations from the UK and Notice from the Depositary (n 321).

³²⁷ *ibid.*

³²⁸ *ibid.*

³²⁹ *ibid.*

Importantly, the 2005 Hague Convention was ratified by the UK only for the event that there is no withdrawal agreement between the UK and the EU. No matter what transpires, the 2005 Hague Convention will apply in cases where one party is resident in the UK and the other party is resident in a third State which is a Contracting State to the Convention. In cases between one UK party and another party from an other EU Member State, things may be complex from 31 October 2019. Before 31 October 2019, Brussels I Recast will continue to apply between the UK and other EU Member States. From 1 November 2019, if there is a ratified Brexit Withdrawal Agreement, Brussels I Recast will still be applicable during any transition period and then the 2005 Hague Convention will apply after the transition period. If the “No Deal” scenario should become a reality from 1 November 2019, the 2005 Hague Convention will apply directly between the UK and other EU Member States.

6.2 The Relationship between Chinese Law and the 2005 Hague Convention

6.2.1 Political Considerations

Although China signed the 2005 Hague Convention on 12 September 2017, it has not yet ratified it. For China, it has been a great step forward to sign the 2005 Hague Convention, but there are still various elements to consider before ratification. Firstly, the special political system of China is an important and unique element to examine. Considering the special Chinese situation of “one country, two systems, three legal traditions and four legal regions”, general private international law rules cannot be applied simply. China has a constitutional framework of “one country, two systems” between Mainland China, Hong Kong and Macao. Hong Kong has inherited common law traditions from the UK and Macao continues to use the Portuguese civil law system.³³⁰ Mainland China is also strongly influenced by the civil law tradition, but has a communist legal system.³³¹ As for

³³⁰ Jin Huang and Andrew Xuefeng Qian, “‘One Country, Two Systems,’ Three Law Families, and Four Legal Regions: The Emerging Inter-Regional Conflicts of Law in China’ (1995) 5(2) *Duke Journal of Comparative & International Law* 289, 295.

³³¹ Jie (Jeanne) Huang, ‘The Partially Modernized Chinese Conflicts System: Achievements and Challenges: Review of Zheng Sophia Tang, Yongping Xiao, and Zhengxin Huo, *Conflict of Laws in the People’s Republic of China*’ (2017) 13(3) *Journal of Private International Law* 633, 642.

Taiwan, it is politically separated from Mainland China due to some historical issues, but also belongs to the civil law system. Therefore, Mainland China, Hong Kong, Macao and Taiwan are four legal regions. China has its own domestic inter-regional conflict of laws rules between Mainland China and Hong Kong, Macao and Taiwan, respectively. When ratifying the 2005 Hague Convention, China must consider the relationships between and among these four legal regions.

It is helpful to consider the status of other Hague Conference conventions to which China is a Contracting State. The People's Republic of China is a Contracting State party to three conventions of the Hague Conference on Private International Law.³³² Although these three conventions also apply in Hong Kong and Macao, there are another five conventions and another six conventions which have been extended by the UK and Portugal to the Special Administrative Regions of Hong Kong and Macao respectively.³³³ With regard to the three main conventions applying in China, the 1993 Hague Protection of Children Convention (Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption) is a good example to consider when predicting the status of the 2005 Hague Convention for China because it is the only convention which was ratified after China restored Hong Kong and Macao;³³⁴ both of the other conventions entered into force in Hong Kong and Macao before China acceded to them. It is just like the current situation. After fully considering the benefits and drawbacks, it took almost five years for China to ratify the 1993 Hague Protection of Children Convention, from signature on 30 November 2000 to ratification on 16 September 2005. At the same time, some reservations were declared in regard to the law of Hong Kong and Macao. Similarly for the 2005 Hague Convention, it is likely that it may take some years for China to ratify it. At the same time, China may make certain declarations to the law of Hong Kong and Macao if needed.

6.2.2 Commercial Considerations

³³² "HCCH Members: China, People's Republic of"

<<https://www.hcch.net/en/states/hcch-members/details1/?sid=30>> accessed 13 September 2019.

³³³ *ibid.*

³³⁴ Updated list of Contracting States to the 1993 Hague Protection of Children Convention

<<https://www.hcch.net/en/instruments/conventions/status-table/?cid=69>> accessed 13 September 2019.

Apart from these political considerations, there are also some commercial elements to take into consideration in regard to the relationship between Chinese law and the 2005 Hague Convention. From a commercial perspective, the global economy is being greatly promoted by the Belt and Road Initiative (“BRI”),³³⁵ a development strategy proposed by the Chinese government on 28 March 2015 to focus on connectivity and cooperation among Eurasian countries.³³⁶ The BRI initially focuses on infrastructure investment and is estimated to be one of the largest infrastructure and investment projects in history, covering 65% of the world’s population and 40% of the global GDP.³³⁷ Up to 30 April 2019, China has signed 187 cooperation documents with 131 countries and 30 international organizations to build BRI.³³⁸ The BRI is “a bid to enhance regional connectivity and embrace a brighter future” by the Chinese government.³³⁹ It has the potential to accelerate economic growth across the Asia Pacific area and Central and Eastern Europe. Along with the establishment of the Silk Road Fund³⁴⁰ and the Asian Infrastructure Investment Bank (AIIB),³⁴¹ there have been and will continue to be rapidly increasing international commercial relationships between Chinese parties and parties from other BRI countries. At the same time, the ability of Chinese parties to participate in international commercial and investment matters has increased. As a result, this commercial development will inevitably lead to a growing number of civil and commercial disputes. Apart from seeking resolution

³³⁵ The initiative was released by Xi Jinping in late 2013 and was subsequently promoted by Premier Li Keqiang during state visits to Asia and Europe. The initiative was known as the One Belt and One Road Initiative (OBOR) before and quickly became the most frequently mentioned concept in the official newspaper People’s Daily in China. See <https://en.wikipedia.org/wiki/Belt_and_Road_Initiative> accessed 13 September 2019.

³³⁶ Xinhua News Agency, ‘China unveils action plan on Belt and Road Initiative’ (*The State Council of the People’s Republic of China*, 28 March 2015) <http://english.gov.cn/news/top_news/2015/03/28/content_281475079055789.htm> accessed 13 September 2019.

³³⁷ Charlie Campbell, ‘China Says It’s Building the New Silk Road. Here Are Five Things to Know Ahead of a Key Summit’ (*Time*, 12 May 2017) <<http://time.com/4776845/china-xi-jinping-belt-road-initiative-obor/>> accessed 13 September 2019.

³³⁸ BRI countries <<https://www.yidaiyilu.gov.cn/gbjg/gbgk/77073.htm>> accessed 13 September 2019.

³³⁹ Xinhua News Agency (n 336).

³⁴⁰ The Silk Road Fund is a state owned investment fund of the Chinese government aimed at fostering increased investment in BRI countries. Silk Road Fund Co., Ltd. was established in Beijing on 29 December 2014 with investment from the State Administration of Foreign Exchange, China Investment Corporation, China Development Bank and Export-Import Bank of China. See <<http://www.silkroadfund.com.cn/enweb/23775/23767/index.html>> accessed 13 September 2019.

³⁴¹ The Asian Infrastructure Investment Bank (AIIB) is a multilateral development bank that was established on 29 June 2015 and is dedicated to lending to infrastructure projects, in order to improve social and economic outcomes in Asia and beyond. See <<https://www.aiib.org/en/about-aiib/index.html>> accessed 13 September 2019.

through arbitration, these disputes may also be brought before state courts when choice of court agreements or other bases of jurisdiction exist.

For Chinese parties, especially investors in China, China's joining the 2005 Hague Convention is a welcome demonstration of integrating China into the global economy and supporting the BRI. However, after signing the 2005 Hague Convention, whether to ratify it and when to ratify it are still controversial issues amongst Chinese scholars and practitioners. Some scholars argue that there are difficulties for the Chinese government in ratifying the Convention and there will be some potential negative influences on China's economy and Chinese parties after the ratification. For instance, China's status as a developing country has not fundamentally changed, nor has the relatively weaker status of Chinese parties in international commercial transactions.³⁴² As a result, premature ratification to some extent would neglect Chinese state interests and could lead to the loss of essential fairness for Chinese parties,³⁴³ which would negatively influence China's economy and Chinese parties. Therefore, it is likely that China will wait for a commercially optimal, later time to ratify the 2005 Hague Convention.

On the contrary, other scholars argue that ratifying the 2005 Hague Convention as soon as possible will contribute to the promotion of the BRI and will meet the needs of establishing two international commercial courts in China.³⁴⁴ To adjudicate international commercial cases, two international commercial courts were established by the Supreme People's Court of China (SPC) on 29 June 2018.³⁴⁵ The purpose of these two courts is to try international commercial cases in a fair and timely manner, to protect the lawful rights and interests of Chinese and foreign parties equally, and to create a stable, fair, transparent and convenient rule of law within the international business environment.³⁴⁶ The establishment

³⁴² Jiwen Wang, 'Discussion on Timing of Ratifying The 2005 Hague Convention on Choice of Court Agreements' (2018) 2 *Wuhan University International Law Review* 105, 110.

³⁴³ Yongping Xiao, 'An Analysis of the Ratification of the Convention on Choice of Court Agreements and China's Countermeasures' (2017) 5 *Wuhan University International Law Review* 1, 6-7.

³⁴⁴ Jiwen Wang (n 342) 114.

³⁴⁵ The First International Commercial Court is situated in Shenzhen, Guangdong Province, and the Second International Commercial Court in Xi'an, Shaanxi Province. The Fourth Civil Division of SPC is responsible for coordinating and guiding the two international commercial courts.

³⁴⁶ Introduction of China International Commercial Court
<<http://cicc.court.gov.cn/html/1/219/193/195/index.html>> accessed 13 September 2019.

of these two international commercial courts will help strengthen China's judicial cooperation with the BRI countries and will make it easier to recognize and enforce judgments from Chinese courts.³⁴⁷ Moreover, if China should ratify the 2005 Hague Convention in the near future, this ratification would set a good example and attract more countries to sign the Convention, especially the BRI countries,³⁴⁸ which would help broaden the international influence of the 2005 Hague Convention and realise its purpose. It can be predicted that when Chinese judgments fall within the scope of the 2005 Hague Convention, China's ratification would facilitate the recognition and enforcement of those judgments, as well as the settlement of international commercial disputes. Therefore, in this author's view, considering commercial factors, China will finally ratify the 2005 Hague Convention, in order to provide clear guidance on settling international commercial disputes concerning choice of court agreements with BRI countries, especially those which are presently Contracting States to the 2005 Hague Convention including Singapore, Montenegro and some EU Member States that are also BRI countries.³⁴⁹ When China ratifies the 2005 Hague Convention, recognized international rules will be applied in disputes concerning choice of court agreements, which would provide parties with more certainty and would contribute to increased commercial activities between China and other foreign countries.

6.2.3 Legal Considerations

The most difficult obstacle to China's ratification of the 2005 Hague Convention is the conflict between the two legal regimes. As examined in Chapter 3, Article 34 of the Chinese Civil Procedure Law not only does not clarify the legal nature of choice of court agreements (procedural or contractual), but also does not clarify the severability of choice of court agreements. In addition, the applicable law for choice of court agreements is not provided for in Chinese law, which brings vagueness and uncertainty in determining the

³⁴⁷ Tao Du, 'The Legal Issues and Countermeasure of China's Ratification of the Hague Convention on Choice of Court Agreements' (2016) 4 Wuhan University Journal (Philosophy & Social Sciences) 88, 90.

³⁴⁸ Jiwen Wang (n 342) 114; Tao Du (n 347) 90.

³⁴⁹ i.e. Austria, Bulgaria, Croatia, Czech Republic, Estonia, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia and Slovenia. Checked from BRI countries (n 338) and Updated list of Contracting States to the 2005 Hague Convention (n 306).

validity of choice of court agreements. Applying the *lex fori* in Chinese judicial practice is not the same as applying the law of the chosen court of the State in the 2005 Hague Convention. As for the formal validity of choice of court agreements, Chinese law does not list the different forms of “writing”, and does not adopt a wider wording such as Article 3(c) of the 2005 Hague Convention.³⁵⁰ The most different aspect of Chinese law is the need to consider the substantial connection between the chosen court and the dispute when determining a validity of choice of court agreement.³⁵¹ Although it is not very common that there are other places having substantial connections besides the five listed places in Article 34,³⁵² this kind of legislative approach for essential validity (direct listing) is still open to question.

From the perspective of recognition and enforcement of judgments, a domestic court is sometimes reluctant to enforce foreign judgments, partly due to concerns about judicial sovereignty.³⁵³ This, to some extent, has hindered effective international judicial cooperation. Recognition and enforcement of judgments not only means the recognition of judicial authority in foreign countries, but also directly affects the protection of parties’ rights and interests. When a judgment is given, if it cannot be recognized and enforced, the judgment cannot be realised. As a result, the proper rights and interests of parties cannot be protected, and the security of international transactions cannot be guaranteed. When a party seeks to enforce a judgment in a foreign country, the court addressed firstly will determine the validity of the choice of court agreement. After the court addressed makes a positive decision, the judgment can be recognized and enforced successfully. The recognition and enforcement of judgments is also an important aspect of international judicial cooperation.³⁵⁴ If foreign judgments can be recognized and enforced smoothly, the international circulation of judgments can be realised. Only by resolving the free

³⁵⁰ See part 4.4 in Chapter 4.

³⁵¹ Mei Zhang, ‘Theories on China’s accession to the feasibility and necessity of Convention on Choice of Court Agreement’ (2017) 1 *Journal of Political Science and Law* 139, 144.

³⁵² See part 3.5.2 in Chapter 3.

³⁵³ Dan Song, ‘Web alert - China signs The Hague Choice of Court Convention - A step towards international judicial cooperation’ (*The Standard Club*, 31 January 2018) <<https://www.standard-club.com/news-and-knowledge/latest-updates/2018/01/web-alert-china-signs-the-hague-choice-of-court-convention-a-step-towards-international-judicial-cooperation.aspx>> accessed 13 September 2019.

³⁵⁴ Giesela Rühl (n 305) 99.

circulation of judgments on a global scale will parties be encouraged to choose litigation instead of arbitration.³⁵⁵ In addition, as an important achievement of the Hague Conference “Judgments Project” since 1992,³⁵⁶ the 2019 Hague Judgments Convention has been finalised.³⁵⁷ Under the 2019 Hague Convention, choice of court agreements can be regarded as a base for recognition and enforcement of foreign judgments (Article 5.1(e)). The increasing attraction of the 2019 Hague Judgments Convention is likely to provide a motivation for China to ratify the 2005 Hague Convention.

Although in China the National People’s Congress has not approved the 2005 Hague Convention, some Chinese courts have already made decisions that take into account certain provisions of that Convention. For example, in *Cathay United Bank Co., Ltd. v. Chao Gao*, the Shanghai High Court took into account Article 3 of the 2005 Hague Convention and decided that choice of court agreements should be exclusive unless the parties stated otherwise, thus declining jurisdiction in favour of a Taiwanese Court.³⁵⁸ Article 3 of the 2005 Hague Convention is also referred to in several other similar cases in explaining the exclusivity of choice of court agreements.³⁵⁹

If the 2005 Hague Convention enters into force in China, Chinese courts will be able to apply the Convention directly and Chinese judgments can be recognized and enforced within all the Contracting States. In order to attract more cases and exercise jurisdiction more widely, Chinese courts will be more motivated to improve judicial efficiency and ensure judicial justice. It is helpful to strengthen the litigation expectations of Chinese parties and, in turn, positively impact the development of international business between

³⁵⁵ Tao Du (n 347) 89; Guojian Xu, ‘To Establish an International Legal System for Global Circulation of Court Judgments: Legislative Materials and Comments on Proposed Draft Convention on the Recognition and Enforcement of Foreign Judgments’ (2017) 5 *Wuhan University International Law Review* 100, 100.

³⁵⁶ The Judgments Project <<https://www.hcch.net/en/projects/legislative-projects/judgments>> accessed 13 September 2019.

³⁵⁷ Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

³⁵⁸ Shanghai High People’s Court, [2016] Hu Min Xia Zhong No. 99.

³⁵⁹ *Standard Chartered Bank (China) Co., Ltd. v. Changshu Xingyu Xinxing Building Materials Co., Ltd.*, Jiangsu Province High People’s Court, [2010] Su Shang Wai Zhong Zi No. 0052; *Guangzhou Xingji Film Co., Ltd. v. Xinghao Entertainment Co., Ltd.*, Guangdong Province High People’s Court, [2016] Yue Min Xia Zhong No. 312; *May Delight Ltd., Good Prosper Holdings Ltd., Total Fortune Investments Ltd., and Long Life International (Hong Kong) Co., Ltd. v. Fulai International (Shanghai) Co., Ltd.*, Shanghai High People’s Court, [2017] Hu Min Xia Zhong No. 96; *Shanzheng International Securities Co., Ltd. v. Kai YANG*, Supreme People’s Court, [2018] Gui Gao Fa Min Xia Zhong No. 28.

China and BRI countries. Therefore, in this author's view, China ought to take steps to ratify the 2005 Hague Convention in order specifically to enhance judicial coordination with countries which are both EU Member States and BRI countries.

6.2.4 The Future of Chinese Law in This Area

6.2.4.1 Article 25 of Brussels I Recast as a Model for China?

As examined in Chapters 3 and 5, Chinese law is different to Article 25 of Brussels I Recast in regards to choice of court agreements. Article 25 of Brussels I Recast is a rule allocating jurisdiction among EU Member States. The *lis pendens* rule in Brussels I Recast emphasises the jurisdiction of the court first seised despite the exception in Article 31(2). Brussels I Recast can be a valuable model of legislation for any Regional Economic Integration Organization. But for China, is Article 25 a valuable model to follow?

The author's view is that as China is a single country, it is not a valuable model for Chinese domestic law to follow Article 25 of Brussels I Recast. China can be seen only as a single country rather than a Regional Economic Integration Organization like the EU, which means that its national law can be more direct and specific rather than coordinating jurisdiction among Member States. More importantly, considering Chinese special political situation of "one country, two systems", it is wise to consider that the approach of Article 25 of Brussels I Recast may be modified to adapted for the use among the four legal regions in China. But it is not a valuable model for Article 34 of the 2017 Chinese CPL to follow. Therefore, although Chinese law may borrow the rule of severability and formal validity from Article 25 of Brussels I Recast, Article 25 is not a valuable model for Chinese law.

6.2.4.2 Modify or Accede?

Although China revised its Civil Procedure Law on 27 June 2017, no changes were introduced in the area of jurisdiction and there are still some differences between the

Chinese CPL and the 2005 Hague Convention with respect to choice of court agreements. According to Article 260 of the Chinese CPL, “if an international treaty concluded or acceded to by the People’s Republic of China contains provisions that differ from that of this law, the provisions of the international treaty shall apply, except those on which China has made reservations.”³⁶⁰ Therefore, it could be concluded that, if China should accede to the 2005 Hague Convention in the future, it does not need to modify its provisions on choice of court agreements in the Chinese CPL to coincide with the Convention. If the 2005 Hague Convention were to become effective within China, it would be directly applied in civil and commercial cases. But considering the significance of substantial connection in Chinese law,³⁶¹ it is very likely that China would make reservations about the requirement of substantial connection when China ratifies the 2005 Hague Convention.

In some cases in the past, China amended its domestic law in harmony with an international treaty before it ratified or acceded to the treaty.³⁶² In the period when China does not ratify the 2005 Hague Convention, there are some recommendations from this author’s view to deal with the conflict rules and to enhance Chinese law. Firstly, the severability and applicable law for choice of court agreements can be added into Article 34. It will be good to allow parties to choose a separate applicable law for choice of court agreements and the law of the chosen court of the state will be applied when the parties do not choose the separate applicable law. Furthermore, it will be essential to follow the relaxed trend of formal requirements for choice of court agreements. Finally, it is important to add the protection of the weaker party for insurance, consumer and employment matters, as Brussels I Recast does.

6.3 Conclusion

Based on the principle of party autonomy, choice of court agreements are playing an increasingly positive and important role in international civil and commercial law. After

³⁶⁰ Translated Article 260 of the 2017 Civil Procedure Law of the People’s Republic of China <<http://en.pkulaw.cn/display.aspx?cgid=d33df017c784876fbdfb&lib=law>> accessed 13 September 2019.

³⁶¹ See part 3.5.2 in Chapter 3.

³⁶² Zheng Sophia Tang, ‘Effectiveness of Exclusive Jurisdiction Clauses in the Chinese Courts—A Pragmatic Study’ (2012) 61(2) *International and Comparative Law Quarterly* 459, 483.

examining the basic features of choice of court agreements, this thesis has reviewed the different rules that apply in three legal regimes: Chinese law, the 2005 Hague Convention and Brussels I Recast. They are different from each other, but also have something in common. Each regime's rules concerning choice of court agreements have their own benefits and drawbacks. The examined aspects of choice of court agreements in the three regimes include severability, applicable law, formal validity and essential validity, as well as the remedies for breach of choice of court agreements.

The examination of Chinese law and Chinese judicial practice concerning choice of court agreements has shown some interesting discoveries. Chinese courts have used discretion to decide the validity of choice of court agreements when the legislation is lacking or outdated. This kind of flexibility can generate reasonable judgments in practice, but also can lead to inconsistent and unpredictable results. Therefore, Chinese law needs to be improved and consistent guidance needs to be provided. "The reform requires a review of a broad range of issues".³⁶³ The 2005 Hague Convention and Brussels I Recast are "self-standing instruments in their respective normative contexts",³⁶⁴ and both of them are not perfect. Although the attitude of the Chinese legislative body is hard to predict,³⁶⁵ it is not enough for China only to ratify the 2005 Hague Convention. Becoming a Contracting State to the Convention will not solve the problem once for all. There may be more to learn from those two instruments for China to improve its laws about choice of court agreements. China is playing an increasingly important role in international trade and economy, as well as in international judicial cooperation. China's signing the 2005 Hague Convention has been a great step forward in international judicial cooperation. Although it is hard to predict when ratification may take place, such a change is only a matter of time. We should hold a positive view that China will definitely be more engaged in international civil and commercial matters, and that it will move from isolation to cooperation, following the international trend.

³⁶³ *ibid*, 484.

³⁶⁴ Matthias Weller (n 309) 129.

³⁶⁵ Zheng Sophia Tang (n 362) 483.

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