Exclusivity of Choice of Court Agreements: Party Autonomy in Forum Selection

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Abstract

Choice of court agreements are contractual agreements where parties exercise autonomy to agree on a forum to which the parties are voluntarily subject to should a dispute arise from their commercial transactions or other civil relationships. Exclusivity is an issue concerning how a choice of court agreement is to be enforced. Presumption of exclusivity is a doctrine aimed at ensuring an effective enforcement of the agreement as such. Acceptance of the doctrine has become a growing trend internationally, as illustrated by the 2005 Hague Convention on Choice of Court Agreements.

In American courts, choice of court agreements are generally presumed valid and enforceable. The underlying rationale of this presumption, however, does not always extend to exclusivity of the agreement. The resistance in the United States to the presumption of exclusivity is obviously at odds with the general practice in the international community. This Article argues that the legal framework of forum selection in the U.S. needs to be reshaped, and the exclusivity should be set as a default rule for choice of court agreements.

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I. INTRODUCTION

A choice of court agreement ("CCA") is an agreement under which private parties designate a specific court or courts to adjudicate the disputes that have arisen or may arise from a civil relationship created between them.[1] The agreement may take two different forms:

1. *See* Symeon C. Symeonides, *What Law Governs Forum Selection Clauses*, 78 LA. L. REV, 1119, 1120 (2018) [hereinafter Symeonides, *What Law Governs Forum Selection Clauses*]; ALEX MILLS, PARTY AUTONOMY IN PRIVATE INTERNATIONAL LAW, 91 (Cambridge Univ. Press 2018); Hague Convention on Choice of Court Agreements, HCCH (2005), art. 3(a), [hereinafter Convention on Choice of Court Agreements] https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf [https://perma.cc/W42P-Z8JA].

a choice of court clause in a contract or a separate CCA.[2] The effect of a valid and enforceable CCA is that it establishes the jurisdiction that a chosen court may otherwise not have.[3] In broader terms, it provides private parties with freedom and power to select a mutually desired forum for dispute settlement.[4]

Like a choice of law agreement, a CCA is also premised on party autonomy,[5] a commonly accepted doctrine that allows the parties to make "binding agreements as to the forum in which their disputes will be resolved, or the law that governs their legal relationships."[6] Rooted in the principle of freedom of contract,[7] party autonomy is viewed as "an essential component of the liberal model of market regulation."[8] In the modern conflict of laws (or private international law), party autonomy has become a conflict of law principle that is followed by almost all jurisdictions in the world.[9]

A CCA serves two functions: jurisdiction and defense. The jurisdiction function is that the CCA constitutes a legal basis for the chosen court to exercise jurisdiction. The defense function means that the CCA can be asserted by a party as a defense to the jurisdiction of

2. *See* Kevin M. Clermont, *Governing Law on Forum-Selection Agreements*, 66 HASTINGS L. J. 643, 645 (2015).

3. *See* MILLS, *supra* note 1, at 113.

4. *See* Clermont, *supra* note 2, at 645.

5. *See* MILLS, *supra* note 1, at 1.

6. *Id.* at 1.

7. *See* Mo Zhang, *Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law*, 20 EMORY INT'L L. REV., 511, 552–53 (2006).

8. *See* Horatio Muir Watt, *"Party Autonomy" in International Contracts: From the Makings of a Myth to the Requirements of Global Governance*, 6 EUR. REV. CONT. L. 250, 254 (2010), https://web.archive.org/web/20121115064226id_/http:/www.columbia.edu:80/cu/alliance/Papers/Article_Horatia-Muir-Watt.pdf.

9. *See id.*, at 2. A new trend is that the exercise of party autonomy is being expanded from the realm of contractual obligations to the area of non-contractual obligations, which makes it possible to have the contractual choice of law and CCAs applied beyond contractual claims. *See* Mo Zhang, *Party Autonomy in Non-Contractual Obligations: Rome II and Its Impacts on Choice of Law*, 39 SETON HALL L. REV. 861, 8628–64 (2009). Within the past decade, a growing number of companies have incorporated forum selection clauses into their bylaws, requiring any lawsuit against the company or its board to be filed with a particular court. John Coyle, William Dodge & Aaron Simowitz, *Choice of Law in the American Courts in 2022: Thirty-Sixth Annual Survey*, 71 AM. J. COMPAR. L. 251, 268 (2023).

the "seised" court—a non-chosen court in which the case is filed. In the U.S., when viewing CCAs, the courts often make a distinction between CCAs considered "outbound" and those considered "inbound."[10]

From the court's perspective, an outbound CCA is an agreement that "designates a forum other than the court,"[11] or a contractual clause providing for trial outside of the forum where the suit is brought. [12] By contrast, an inbound choice of law agreement is an agreement under which a party "seeks to enforce the clause to keep the lawsuit in the forum chosen" by the parties to the contract,[13] or a provision instructing that any disputes over the contract be litigated in the court with which the case is filed.[14] In the inbound situation, the jurisdiction function of the CCA takes place because the parties' agreement on forum selection forms a jurisdictional basis for the chosen court. On the other hand, in the outbound situation, the defense function of the CCA plays a role when a party asks the non-chosen court to dismiss the case on the ground that the parties have agreed to resolve the disputes elsewhere.[15]

In conflict of law, party autonomy is viewed as an "incontestable" principle,[16] and any opposition to this principle is considered difficult, if not impossible, to imagine.[17] There is no doubt that in today's business and commercial transactions, contractual parties enjoy ample freedom to select a forum before or even after disputes between them occur.[18] The degree and level of recognition and acceptance of party autonomy in forum selection, however, varies

10. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2018: Thirty-Second Annual Survey*, 67 AM. J. COMPAR. L., 1, 38–42 (2019).

11. Salesforce.com, Inc. v. GEA, Inc., No. 19-cv-01710-JST, 2019 U.S. Dist. LEXIS 136745, at *1,*15 (N.D. Cal. Aug. 13, 2019).

12. *See id.*

13. *Id.*

14. *Id.*

15. For general discussion on both inbound and outbound choice of court agreements, see John. F. Coyle & Katherine C. Richardson, *Enforcing Inbound Forum Selection Clauses in State Court*, 53 ARIZ. ST. L. J. 65 (2021), and John. F. Coyle & Katherine C. Richardson, *Enforcing Outbound Forum Selection Clauses in State Court*, 96 IND. L. J. 1089 (2021).

16. MILLS, *supra* note 1, at 3.

17. *See id.*

18. *See* Clermont, *supra* note 2, at 645.

from country to country. With respect to the CCAs, several issues remain unsettled and subject to further debates.

The first issue is the exclusivity of a forum selection clause. To be more specific, the issue is whether the forum selection clause as agreed upon by the parties is exclusive or nonexclusive.[19] At the center of debate is a matter of presumption. On one end of the spectrum is the presumption that a CCA is exclusive unless otherwise indicated by the parties. When exclusive, it is mandatory, meaning that a dispute between the parties should be resolved in the chosen court. The most noteworthy provision in favor of presumption of exclusivity of a forum selection clause is Article 3 of the Convention on Choice of Court Agreements ("Choice of Court Convention").[20] Adopted on June 30, 2005, the Choice of Court Convention seeks to "ensure the effectiveness" of the CCAs in transnational cases so as to help "enhanc[e] access to justice and creat[e] a climate more favourable to international trade and investment."[21] Under Article 3(b) of the Choice of Court Convention, "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."[22]

On the other end of the spectrum is the argument that a CCA should be treated as exclusive only when the agreement contains certain words to the effect of exclusivity or, in short, the "language of exclusivity."[23] Put differently, a forum selection clause is presumably nonexclusive, or permissive, unless it explicitly indicates the parties' intent to make the chosen court an exclusive or sole forum for dispute litigation.[24] For example, in the U.S., generally, the simple selection

19. *See* John F. Coyle, *"Contractually Valid" Forum Selection Clauses*, 108 IOWA L. REV., 127, 140 (2022) [hereinafter Coyle, *"Contractually Valid" Form Selection Clauses*].

20. Convention on Choice of Court Agreements, art. 3.

21. HCCH, Outline of 2005 Choice of Court Convention, [hereinafter HCCH 2005 Outline] https://assets.hcch.net/docs/89be0bce-36c7-4701-af9a-1f27be046125.pdf [https://perma.cc/5LGM-EQV7].

22. Convention on Choice of Court Agreements, art. 3(b).

23. Coyle, "*Contractually Valid" Forum Selection Clauses*, *supra* note 19, at 140.

24. *Id.*

of a court by the parties in their agreement is insufficient to make the choice of forum exclusive.[25]

The second issue involves enforcement of a CCA. Three questions pertain to the enforcement. The first question is whether a CCA is valid. If a CCA is found invalid, it will have "no legal effect."[26] The second question is whether a CCA is enforceable. Enforceability is closely related to validity because only if a CCA is valid may it be enforced. But enforceability may still be questioned even if a CCA is valid. The third question is how a CCA is to be interpreted. Although the issue of exclusivity may be considered an interpretative matter, interpretation itself often deals with concerns such as the scope of a CCA, referring to the intended coverage of the agreement.[27]

From the conflict of laws perspective, the answer to those three questions largely relies on the applicable law or governing law. Since the courts in different jurisdictions may take different approaches, the law to be applied is far from uniform. To determine the validity of a CCA, courts may use the law of the forum, the law that governs the underlying contract, or the law of the chosen court's jurisdiction under the agreement, which depends on where the case is filed.[28]

A third issue concerns the restrictions imposed on CCAs. Based on party autonomy, the parties to a contract often have ample freedom to determine where and how to resolve their disputes. This freedom, however, is not without limits. In fact, a forum selection clause, like a contract, may face certain restrictions. As far as the enforcement is concerned, questions commonly raised include, among others, (1) whether the chosen court must have some connections with the parties,

25. Walter W. Heiser, *The Hague Convention on Choice of Court Agreements: the Impact on Forum Non-Conveniens, Transfer of Venue, Removal, and Recognition of Judgments in United States Courts*, 31 UNIV. PA. J. INT'L L., 1015–16 (2010); MILLS, *supra* note 1, at 100 n.31; *see* John F. Coyle, *Interpreting Forum Selection Clauses*, 104 IOWA L. REV., 1791, 1839, n.239 (2019) [hereinafter Coyle, *Interpreting Forum Selection Clauses*].

26. Coyle, "*Contractually Valid*" *Form Selection Clauses*, *supra* note 19, at 133.

27. *See* Hannah L. Buxbaum, *The Interpretation and Effect of Permissive Forum Selection Clauses Under U.S. Law*, 66 AM. J. COMPAR. L., 127, 135 (2018).

28. For general discussion about the governing law of choice of court agreements, see Symeonides, *What Law Governs Forum Selection Clauses*, *supra* note 1, at 1121.

transactions, or disputes; (2) whether a CCA can be asymmetric or floating; and (3) whether a CCA may affect a third party.

This Article discusses these issues with a focus on the exclusivity of CCA. The main argument is that, absent the parties' indication to the contrary, a valid CCA should be presumed exclusive. The argument is based on the notion that the presumption of exclusivity would better reflect the essence of party autonomy and help advance certainty and predictability—the conflict of law values that are of particular importance in today's global economy.[29] This Article analyzes the provisions of the Convention on the Choice of Court Agreements in comparison with the theories and practices in the U.S. and other countries. It reviews certain issues that would affect the exclusivity of agreements on choice of court.

Part II of this Article offers an analytical review of the party autonomy doctrine and its application in choice of court by the parties. Choice of court in a contract is an exercise of the sovereign power of the contractual parties under the law. Part III discusses the presumptive effect of a CCA, arguing that exclusivity should be a default rule for a valid agreement on choice of court. The discussion focuses on the exclusivity of the CCA as well as basic requirements. Part IV examines the effectiveness issues of CCAs, in particular, the validity, enforceability, and interpretation of an agreement on choice of court. It analyzes the conceptual differences between validity and enforceability, and governing law in the determination of effectiveness. Part V turns to certain factors that might affect CCAs and addresses practical issues involving these agreements. Part VI concludes the discussion, suggesting that given the wide acceptance of presumption of exclusivity of a CCA in the international legal community, U.S. courts should reshape the legal framework of CCAs to align with common international practices.

II. PARTY AUTONOMY AND CONTRACTUAL CHOICE OF COURT

Party Autonomy is a well-developed civil principle that regards the will of parties as the primary power source in the determination of

29. *See* Christopher L. Ingrim, *Choice-of-Law Clauses: Their Effect on Extraterritorial Analysis–A Scholar's Dream, A Practitioner's Nightmare*, 28 CREIGHTON L. REV. 663, 664 (1995).

their commercial or business engagement under a contract.[30] Although the path of its development was not smooth,[31] party autonomy has been "widely accepted by the countries" and has become "the common core of legal systems" in today's world.[32] The key elements of party autonomy include: (1) voluntary engagement, (2) true intent, (3) self-sovereignty, and (4) reasonable expectation.[33]

Party autonomy refers to the authority of the parties to govern their own affairs when they deal with each other.[34] Parties exercise this authority through a mutual agreement in the form of contract. As some have argued, the parties undertake lawmaking authority when entering into a contract,[35] meaning they make the rules by which they agree to be bound.[36] Because a contract is a mutual exchange made voluntarily by the parties themselves through a process of bargaining,[37] and a voluntary assumption of legal duty,[38] the engagement between the parties to exercise their private power must also be voluntary.

Party autonomy to a great extent is a matter of contract.[39] Forming a contract is a process in which "two alert individuals, mindful of their self-interest, hammer out an agreement via a hard bargain."[40] Thus, exercise of party autonomy is in fact an outward expression of

30. *See* Ernest G. Lorenzen, *Validity and Effects of Contracts in Conflict of Laws*, 30 YALE L. J. 565, 573 (1921).

31. *See* MILLS, *supra* note 1, at 30.

32. *See* OLE LANDO, *Contracts*, III-24, INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, 3 (Kurt Lipstein ed., 1971).

33. *See* MILLS, *supra* note 1, at 84–90; *see also* Mo Zhang, *Rethinking Contractual Choice of Law: An Analysis of Relation Syndrome*, 44 STETSON L. REV. 831, 840–41 (2015) [hereinafter Zhang, *Rethinking Contractual Choice of Law*].

34. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §187 cmt. e (AM. L. INST. 1988).

35. *See* MILLS, *supra* note 1, at 9 (discussing the concept of parties exercising lawmaking authority when making a contract).

36. *See* JOSEPH M. PERILLO, CONTRACTS, 7 (7th ed., 2014).

37. *See* E. ALLAN FARNSWORTH, CONTRACTS 6 (3d ed., Aspen Publishers 1999) ("In a market economy, the terms of such direct bilateral exchanges are arrived at voluntarily by the parties themselves through this process of bargaining.").

38. *See* JEFF FERRIELL, UNDERSTANDING CONTRACTS 2 (2d ed., LexisNexis 2009) ("Contractual obligations, therefore, are voluntarily assumed.").

39. *See* MILLS, *supra* note 1, at 2 (stating that "party autonomy is indeed such an omnipresent feature of modern contracting practice . . . .").

40. *See* PERILLO, *supra* note 36, at 5.

the parties' intent, an action that transforms what the parties have in their minds to an external act or conduct producing legal effect.[41] Therefore, as long as the intent of the parties so expressed is proven true, it shall be honored.[42] Given a general notion that "the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts,"[43] party autonomy will be respected by the courts only if the reasonable meaning of the words and acts of the parties representing their intent can be ascertained.

In effect, party autonomy is a legally granted private power.[44] Established on the will of the parties, such power is centered on the self-sovereignty of the parties.[45] From the parties' viewpoint, the legitimacy of an exercise of self-sovereignty derives primarily from their agreement.[46] In this context, it has been argued that "party autonomy has evidently ceased to imply subordination of private actors to state authority, but actually reverses this relationship."[47] A further argument is that "party autonomy can only be justified if one ignores the state relations . . ." and "accepts that the parties are the center of the conflicts problem."[48]

The expectation of the parties is what the parties have hoped for at the time of contract. Upon breach, the contractual parties' interest is to be in as good a position as the parties would have been had the contract been performed.[49] Although some argue that party autonomy is not solely concerned with the expectations of the parties, but instead

41. There are two standards to determine what the parties have intended in their agreement: subjective and objective. The subjective standard looks to the actual intention of the parties while the objective standard focuses on external appearance of the parties' intention as manifested by their words or actions. For an overview of the theoretical basis for both standards, see PERILLO, *supra* note 36, at 26–27; FARNSWORTH, *supra* note 37, at 116–17 (distinguishing between the objective and subjective theories of mutual assent).

42. *See* FARNSWORTH, *supra* note 37, at 116–17.

43. Lucy v. Zehmer, 84 S.E. 2d 516, 521 (Va. 1954).

44. MILLS, *supra* note 1, at 6.

45. *See* Lorenzen, *supra* note 30, at 573.

46. MILLS, *supra* note 1, at 9.

47. *See* Watt, *supra* note 8, at 258.

48. Matthias Lehmann, *Liberating the Individual from Battles Between States: Justifying Party Autonomy in Conflict of Laws*, 41 VAND. J. TRANSNAT'L L., 381, 415 (2008).

49. *See* FARNSWORTH, *supra* note 37, at 44.

their "agreed wishes,"[50] the ultimate goal of party autonomy is to protect and realize the parties' expectations.[51] On the other hand, to the extent that a contract is based on voluntary and mutual assent, the parties' agreed wishes and their expectation interests are synonymous, depending on how and from which angle they are addressed.[52]

Generally, the protection of the parties' expectations "is but one basic policy" in contracts[53] because the benefits of the bargain between the parties when entering into contract are the expectation interests the parties intend to achieve.[54] In conflict of laws, certainty and predictability are viewed as the values that have particular importance. Certainty to some extent would depend on predictability because a thing cannot be certain if it is unpredictable. By giving effect to party autonomy, predictability will be attained and as a result parties' expectations will be protected.[55]

For conflict of law purposes, party autonomy applies to both choice of law and forum selection. For choice of law, party autonomy is held to mean that "the parties are free to choose the law that governs their contract, subject to certain limitations . . . ."[56] As applied to selection of forum, party autonomy is viewed as "encapsulat[ing] the idea of jurisdiction as a matter of individual right."[57] In both cases, the concept of party autonomy is believed to have "taken over a steadily growing field of the law."[58]

50. MILLS, *supra* note 1, at 19.

51. PETER HAY ET AL., CONFLICT OF LAWS 1085–86 (5th ed. 2010).

52. *See* JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS (5th ed. 2011) ("A reliable system of assured future exchanges provides a basis for understanding the purpose of contract law: to ascertain the fulfillment of those expectations that have been induced in the promisee by the voluntary conduct of the promisor in making the promise."); *see also* JAMES W. HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836-1915, at 297 (1964) ("[C]ontract law provided a framework of reasonably assured expectations within which men might plan and venture.").

53. HAY ET AL., *supra* note 51, at 1085.

54. *See* FARNSWORTH, *supra* note 37, at 44.

55. *See* HAY ET AL., *supra* note 51, at 1085.

56. *Id.* at 1085–86.

57. MILLS, *supra* note 1, at 10.

58. Lehmann, *supra* note 48, at 383.

Party autonomy as a choice of law principle is considered "as ancient as conflicts law itself,"[59] and over the course of its development has become "universally observed."[60] By contrast, since the court's jurisdiction is traditionally viewed "as a matter of state power, leaving little room for party autonomy,"[61] the parties' selection of forum or CCA has taken a much longer path to recognition. Historically, a recognition of choice of court by the parties could be found in a decree issued in Hellenistic Egypt as early as 120–118 BC, under which the parties could be deemed to have chosen a forum when choosing the language of their contracts.[62]

U.S. courts used to be hostile to the parties' freedom in choice of court. But in 1972, the Supreme Court in *Bremen v. Zapata Off-Shore Co.* departed from the traditional notion that the effect of contractually selecting a court was to "oust the jurisdiction of the courts" and upheld a choice of forum clause in a contract.[63] *Bremen* involved an ocean transportation contract between Unterweser, a German corporation, and Zapata, a U.S. firm.[64] Under the contract, Unterweser agreed to tow Zapata's drilling rig from Louisiana to Italy by Unterweser's deep sea tug Bremen. During transportation, the rig was damaged and was towed to Tampa, Florida.[65] Zapata later filed suit in a U.S. district court in Florida, seeking damages against Unterweser *in personam* and the *Bremen in rem on the grounds of* negligent towage and breach of contract.[66]

The contract contained a forum selection clause which provided that "any dispute arising must be treated before the London Court of

59. SYMEON C SYMEONIDES & WENDY C. PERDUE, CONFLICT OF LAWS: AMERICAN, COMPARATIVE INTERNATIONAL CASES AND MATERIALS 442 (3d ed. 2012) [hereinafter SYMEONIDES & PERDUE].

60. *Id.*

61. MILLS, *supra* note 1, at 37.

62. *See* SYMEONIDES & PERDUE, *supra* note 59, at 442. It was provided in the decree "that contracts written in the Egyptian language were subject to the jurisdiction of Egyptian courts, which applied Egyptian law, whereas contracts written in Greek were subject to the jurisdiction of Greek courts, which applied Greek law." *Id.*

63. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 6 (1972).

64. *Id.* at 2.

65. *Id.*

66. *Id.*

Justice."[67] Asserting as a defense the forum selection clause in the contract, Unterweser moved to dismiss for lack of jurisdiction.[68] The District Court refused to enforce the forum selection clause and denied the motion.[69] The Court of Appeals for the Fifth Circuit affirmed, relying on the traditional view that the effect of a CCA is to "oust the jurisdiction of the courts."[70] The Supreme Court granted certiorari and vacated the Fifth Circuit's judgment.[71]

In its decision, the Supreme Court upheld the choice of court clause and rejected the ouster argument.[72] According to the Supreme Court, "the argument that such clauses are improper because they tend to 'oust' a court of jurisdiction is hardly more than a vestigial legal fiction."[73] The Supreme Court made clear that "the threshold question is whether that court should have exercised its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause."[74] In other words, to enforce the forum selection clause is to at least effectuate the parties' legitimate expectations. Additionally, the Court emphasized that we "cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."[75]

Several factors promoted the *Bremen* ruling. First was the need to adapt to a new reality.[76] As the Court pointed out, it was "an era when all courts are overloaded[,] and when businesses[,] once essentially local[,] now operate in world markets."[77] Thus, in the dramatically changed world, there existed "compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power . . . should be given

67. *Id.*
68. *Id.* at 4.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 12.
73. *Id.*
74. *Id.*
75. *Id.* at 9.
76. *Id.* at 12–13.
77. *Id.*

full effect."[78] The Court concluded that "in the light of present-day commercial realities and expanding international trade . . . the forum clause should control absent a strong showing that it should be set aside."[79]

The second factor related to certainty and foreseeability. In its analysis, the Court was concerned that "much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where the Bremen or Unterweser might happen to be found."[80] Therefore, "the elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting."[81]

The third factor involved fairness and reasonableness. While reversing gears against selection of forum by private parties, the Supreme Court in *Bremen* did suggest that a CCA would not be held effective if "it would be unfair, unjust, or unreasonable to hold that party to his bargain."[82] The Court specifically held that "the correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."[83]

Although the *Bremen* Court did not specifically answer what would constitute an unreasonable choice,[84] the question itself is multifaceted, requiring a case-by-case analysis. The Court considered it reasonable for the parties to select a London forum because the choice "was clearly a reasonable effort to bring vital certainty to this international transaction and to provide a neutral forum experienced

78. *Id.*

79. *Id.* at 15.

80. *Id.* at 13.

81. *Id.* at 13–14.

82. *Id.* at 18.

83. *Id.* at 15.

84. *See* HAY, ET AL., *supra* note 51, at 539 ("Another difficult question of application is when the chosen forum is so unreasonable as the negate the parties' choice. Federal courts have shown little sympathy for parties who agree to a forum and then argue that the choice is so unreasonably inconvenient that they should be relieved of the agreement.").

and capable in the resolution of admiralty litigation."[85] In this context, one can infer that reasonableness, to a certain extent, is dependent on the efforts the parties have made in their exercise of autonomy to choose a court prior to litigation.

Nineteen years later in 1991, the Supreme Court revisited the choice of court issue in another landmark case *Carnival Cruise Lines, Inc. v. Shute*, and refined *Bremen*'s analysis in the determination of enforceability of a CCA based on fairness and reasonableness.[86] In *Shute*, a Washington State couple purchased passage on a ship owned by Florida-based Carnival Cruise Lines.[87] The tickets sent from Florida to the couple contained a clause designating Florida courts as the chosen forum for the resolution of disputes. [88] The couple boarded the ship in Los Angeles.[89]

While on the cruise in international waters, Mrs. Shute was injured when she slipped on a deck mat.[90] Upon their return, the couple filed a suit against Carnival for damages in the Washington District Court.[91] Carnival cited the forum selection clause on the tickets and moved to dismiss, asserting a lack of personal jurisdiction in Washington.[92] The District Court granted the motion on grounds of insufficient contacts with the state of Washington for personal jurisdiction.[93] The Court of Appeals reversed.[94] In its reversal, the Court of Appeals held that the defendant's contacts in Washington were sufficient for the purpose of personal jurisdiction and then refused to enforce the forum selection clause.[95] The Supreme Court took the case upon Carnival's request.[96]

Both *Bremen* and *Shute* were cases involving admiralty. However, they differed in at least two major respects. First, *Bremen*

85. *Bremen*, 407 U.S. at 17.
86. Carnival Cruise Lines v. Shute, 499 U.S. 585, 587 (1991).
87. *Id.*
88. *Id.*
89. *Id.* at 588.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*

involved a business-to-business contract.[97] The parties to the contract were considered not only sophisticated in the line of their business but also possessed equal bargaining power.[98] By contrast, *Shute* dealt with a consumer contract where the parties in general were not at the same or similar level of bargaining position.[99] Put differently, in a consumer contract, the consumer is often in a weaker position compared to a business party due to "an *asymmetry of information or expertise or bargaining power* in relation to the contract terms."[100]

Second, and more significantly, the choice of court clause in *Bremen* was a product of a freely negotiated contract, while in *Shute*, the clause was provided in a standard contract prepared by the cruise line company.[101] A standard contract, also known as contract of adhesion, refers to a form contract in which the terms and conditions are all printed and presented by one party on a take-it-or-leave-it basis, and the other party may not negotiate but must simply adhere to the terms and conditions as provided.[102] In short, contracts of adhesion require no bargaining between the parties.[103]

In *Shute*, the Court of Appeals held that the forum selection clause "should not be enforced because it was 'not freely bargained for.'"[104] According to the Court of Appeals, "a non[-]negotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining."[105] The Supreme

97. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 2 (1972).

98. *Id.* at 12.

99. *Shute*, 499 U.S. at 593.

100. *Commission Notice Guidance on the Interpretation and Application of Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts (2019/C 323/04)*, 2019 OFF. J. OF THE EUR. UNION (C 323) 4, 9, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC0927(01).

101. *Compare Bremen*, 407 U.S. at 12, *with Shute*, 499 U.S. at 593.

102. *See* Todd D. Rakoff, *Contract of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177 (1983).

103. *See* Albert A. Ehrenzweig, *Adhesion Contract in Conflict of Laws*, 53 COLUM. L. REV. 1072, 1075 (1953) ("[T]he contracts involved in these cases were 'contracts of adhesion,' i.e., agreements in which one party's participation consists in his mere "adherence," unwilling and often unknowing, to a document drafted unilaterally and insisted upon by what is usually a powerful enterprise.").

104. *Shute*, 499 U.S. at 585, 589.

105. *Id.* at 593.

Court, however, disagreed.[106] While underscoring that "forum-selection clauses contained in form passage contracts were subject to judicial scrutiny for fundamental fairness," the Court concluded that including a reasonable forum clause in a form contract of this kind well may be permissible for such reasons as (1) a special interest in limiting the fora, (2) salutary effect of dispelling any confusion about locale of possible lawsuit, and (3) benefit from reduced fares.[107]

When *Bremen* was decided, the question was raised as to whether its holding had a general application because of the admiralty nature of the case.[108] The concern was whether *Bremen* could apply as precedent to non-admiralty cases.[109] *Shute* reinforced *Bremen* and extended its application to non-negotiated form contracts. However, the general reactions were quite negative.[110] The main criticism was that the Court ruling was too "harsh"[111] and "profoundly anti-consumer."[112]

Nevertheless, given its significance, *Shute* is a dramatic shift in American jurisprudence. Additionally, an analysis shows that the principles set forth in *Bremen* and *Shute* in favor of enforcement of forum selection clauses are widely applied in all non-diversity of citizenship federal cases.[113] Even in diversity of citizenship cases in which the federal courts are required to apply substantive law and conflict of law of the state where they sit,[114] there exists "no real

106. *Id.*

107. *Id*. at 593–95.

108. HAY ET AL., *supra* note 51, at 538.

109. *See id*.

110. *See* Linda S. Mullenix, Carnival Cruise Lines, Inc. v. Shute*: The Titanic of Worst Decisions*, 12 NEV. L. J. 549, 549 (2012).

111. Charles L. Knapp, *Contract Law Walks the Plank:* Carnival Cruise Lines, Inc. v. Shute, 12 NEV. L. J. 553, 558 (2012).

112. Mullenix, *supra* note 110, at 549.

113. *See* HAY ET AL., *supra* note 51, at 542 ("As discussed in the last section, in federal cases in which the basis for jurisdiction is one other than the diversity of the parties, courts universally apply the principles of *Bremen* and [*Shute*] favoring enforcement of exclusive forum clauses.").

114. Erie R.R. v. Tomkins, 304 U.S. 64, 90–91 (1938) (holding that a federal court must apply the substantive law of the state where the federal court is situated when exercising diversity jurisdiction). In *Klaxon Co. v. Stentor Elec. Mfg. Co.*, the Supreme Court extended the *Erie* doctrine to the field of conflict of laws. Known as the *Klaxon* rule, it requires that when a federal court deals with choice of law issues

difficulty" because "the law of most states is in accord with the pro-enforcement philosophy of [] *Bremen* and [*Shute*]."[115]

Elsewhere in the world, party autonomy in choice of forum has experienced vast development in modern conflict of laws legislation and practices.[116] CCAs have become "a commonplace feature in international commercial contracts and dealings."[117] It is generally believed that by helping eliminate "venue risk"[118] and providing the "parties with much needed certainty regarding the place of litigation and its likely income,"[119] forum selection clauses, along with choice of law clauses, facilitate "the smooth flow" of international commerce.[120] This trend of development leads to "increasingly widespread adoption of party autonomy in the context of jurisdiction" and "greater acceptance of choice of court agreements."[121]

In Europe, the EU Member States are bound by rules of choice of court set forth in the Brussels I Regulation ("BIR").[122] Under Article

in a diversity of citizenship case, the court is bound by the choice of law rules of the state where the court is located. 313 U.S. 487, 503 (1941).

115. HAY ET AL., *supra* note 51, at 542.

116. *See* Clermont, *supra* note 2, at 645 ("The [choice of court] agreement overcomes territorial jurisdiction, venue, and related defenses, with valid consent able to override even constitutionally based aspects of those defenses.").

117. *See* Poomintr Sooksripaisarnkit & Sai Ramani Garimella, *Choice of Court Agreements: Selected Common Law Jurisdiction and Indian Laws Compared—Time for the Convention of 30 June 2005 on Choice of Court Agreements?*, 30 FLA. ST. U. J. TRANSNAT'L L. & POL'Y 1, 1–2 (2020).

118. *Id.* at 2.

119. Symeonides, *What Law Governs Forum Selection Clauses*, *supra* note 1, at 1160–61.

120. *Id.* at 1160.

121. MILLS, *supra* note 1, at 43.

122. Commission Regulation 1215/2012, 2012 O.J. (351) 1 [hereinafter BIR]. The BIR can be traced back to the original 1957 Treaty of Rome where the member states promised to "enter into negotiations with each other with a view to securing for the benefit of their nationals . . . the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards." Treaty of Rome, art. 20, Mar. 25, 1957. The 1968 Brussels Convention laid down detailed rules dealing with the circumstances under which the courts in the Member States might exercise jurisdiction and rules addressing specific civil and commercial legal areas. 1968 Brussels Convention, 1972 O.J. L. 299, 31.12. In March 2002, the BIR was adopted as a replacement of the Brussels Convention and

25 of the BIR (recast), parties with a particular legal relationship may choose by agreement a specific jurisdiction for any dispute arising from that relationship.[123] Pursuant to the BIR, CCAs will be respected if the agreement meets certain requirements.[124] In the UK, parties to a contract have been allowed to choose a court by agreement to exercise jurisdiction over the claims arising from the contract.[125] Before Brexit, the UK followed the BIR.[126] After January 2021, as a result of Brexit, the 2005 Hague Choice of Court Convention has been the key legal framework for choice of court in the UK.[127]

Brazil, once reputed the "most prominent objector" to party autonomy, has also recognized the legitimacy of the parties' exercise of their power to choose a court under the freedom of contract.[128] According to Precedent No. 335 of the Brazilian Supreme Court, "Choice of forum clauses are valid for lawsuits arising from the contract."[129] The New Brazilian Code of Civil Procedure adopted on March 16, 2015, explicitly provides that judicial authority is not competent to judge the matter if the international contract contains exclusive choice of foreign jurisdiction.[130]

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then was amended in 2012 to become the current version: the BIR (recast). 1215/2012 O.J. (351) 1.

123. BIR *supra* note 122, at ch. II, § 7, art. 25(1).

124. The requirements include that the agreement be (1) in writing or evidenced in writing; (2) in a form which accords with practices which the parties have established between themselves; or (3) 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. *See id.* at ch. I, art. 1(2)(a)–(c).

125. *See Chapter 2: The Brussels I Regulation (recast)*, UK PARLIAMENT, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1215 [https://perma.cc/K3YE-32VP].

126. *Id.*

127. *See* THE LAW SOCIETY, *Choice of Court Agreements after Brexit* (Feb. 10, 2021), https://www.lawsociety.org.uk/topics/brexit/choice-of-court-agreements-after-brexit [https://perma.cc/MU4T-TX9W].

128. MILLS, *supra* note 1, at 92.

129. *See* Ana Paula Terra Caldeira, *Brazil: Choice of Forum Clauses in International Contracts with Obligations Enforceable in Brazil*, CHAMBERS & PARTNERS (Nov. 29, 2016), https://chambers.com/articles/brazil-choice-of-forum-clauses-in-international-contracts-with-obligations-enforceable-in-brazil.

130. Código de Processo Civil [CPC] art. 25 (March 18, 2016) [Brazilian Code of Civil Procedure], effective March 18, 2016, art. 25. A full text of the Code in

In Japan, the law and policy are generally in favor of enforcing the parties' agreements in choice of court. In Japan, the parties may decide by agreement the country in which they may file an action. A CCA will be enforced if it is in writing and is concerned with an action arising from specific legal relationships. For purposes of choice of court, an agreement is deemed to be in writing if it is recorded in an electromagnetic record, including electronic form, magnetic form, or any other form unrecognizable to human perception, which is used for information processing by computers. [131]

Party autonomy is also a settled principle governing foreign-related civil cases in China.[132] In 1985, when the Law of Foreign Economic Contract was adopted, party autonomy on choice of law became a statutory rule that governed foreign-related contracts. The choice of court under party autonomy was recognized in the country when the 1982 Provisional Civil Procedure was replaced by the Civil Procedure Law in 1991.

The primary target of party autonomy rule under Chinese Civil Procedure Law is on the choice of a Chinese court and its application

English is available at https://www.lawyerinbrazil.com/wp-content/uploads/2019/06/BRAZILIAN_CODE_OF_CIVIL_PROCEDURE-1.pdf [https://perma.cc/N7TH-PVQE].

131. *See* Koji Takahashi, *Optional Choice of Court Agreements Under Japanese Law*, 100 INT'L. CONF. ON CORPUS LOGISTICS AND PRAGMATICS 14, available at https://www1.doshisha.ac.jp/~tradelaw/PublishedWorks/OptionalChoiceOfCourtAgreementsJapan.pdf.

132. According to the Supreme People's Court of China ("SPC"), foreign-related civil cases refer to the case where:

> [(1)] one or both parties concerned are foreigners, stateless persons, or foreign enterprises or organizations; (2) the habitual residences of one or both parties concerned are beyond the territory of the People's Republic of China; (3) the subject matter is located outside the territory of China; (4) the legal facts generating, altering or terminating civil relations occur outside the territory of China; or (5) other situations based on which the case can be regarded as a foreign-related case.

See the SPC, Interpretations on Application of the Civil Procedure Law of the People's Republic of China, issued on January 30, 2015, art. 522 [hereinafter SPC]. A full text of the English version is available at https://ipkey.eu/sites/default/files/legacy-ipkey-docs/interpretations-of-the-spc-on-applicability-of-the-civil-procedure-law-of-the-prc-2.pdf [https://perma.cc/844C-XNUT].

in selection of a foreign court is not mentioned in the Special Provisions on Foreign-Related Civil Proceedings of the Civil Procedure Law.[133] Relying on Article 259 of the Civil Procedure Law, however, the Supreme People's Court, expanded the choice of court rule via its interpretation to the choice of foreign courts.[134] Although the Supreme People's Court does not have the function of making law, its opinions are binding to all courts in country (except for Hong Kong and Marco) for application of law.

According to the Supreme People's Court of China, the parties involved in a dispute arising out of a foreign-related contract or property interest may select as the competent court, in written form, the foreign court at (1) the domicile of the defendant, (2) the place of contract performance, (3) the place of execution of a contract, (4) the domicile of the plaintiff, (5) the place where the subject matter is located, (6) the *locus delicti commissi*, or (7) foreign courts in other locations with an actual connection to the dispute.[135]

At the international level, the most notable development in advancement of forum selection is the adoption of the Choice of Court Convention. With a purpose to promote certainty and ensure the effectiveness of the CCA,[136] the Convention is a product of international collaboration to help achieve harmony and uniformity of the rules on jurisdiction in global civil activities and commercial

133. Under Article 35 of the Civil Procedure Law of China (as amended 2017), the parties to a contractual dispute or any other property dispute may agree in writing to be subject to the jurisdiction of the People's Court at the place having a connection with the dispute, such as where the defendant is domiciled, where the contract is performed, where the contract is signed, where the plaintiff is domiciled or where the subject matter is located. However, such an agreement does not violate the provisions of the Law regarding court-level jurisdictions and exclusive jurisdictions. Civil Procedure Law of the People's Republic of China (2017 Amendment), art. 35. A full text of the Civil Procedure Law of China in English is available at https://cicc.court.gov.cn/html/1/219/199/200/644.html [https://perma.cc/6BAJ-T9D5].

134. Pursuant to Article 259 of the Civil Procedure Law, the Special Provisions on Foreign Related Civil Proceedings "shall apply to civil actions within the territory of the People's Republic of China involving foreign parties." For matters not addressed in the Special Provisions, "the other relevant provisions of the Law shall apply." *Id.*, at art. 259.

135. *See* SPC, *supra* note 132, at art. 531.

136. *See* HCCH 2005 Outline, *supra* note 21.

transactions.[137] The Convention took effect on October 1, 2015, and now applies in EU Member States and other countries including Mexico, UK, Singapore, and Ukraine.[138]

A significant feature of the Choice of Court Convention is the rule of exclusivity or the "deeming rule," on the CCA. Under this rule, a CCA is deemed to exclude the jurisdiction of all courts other than the chosen court unless the parties agree otherwise.[139] Given its impact, the Choice of Court Convention is viewed as "one of the most significant private international law treaties of this century."[140] More importantly, as many anticipate, the Choice of Law Convention would "substantially alter existing rules in many [other] jurisdictions" governing CCAs.[141]

III. PRESUMPTIVE EFFECT OF CHOICE OF COURT AGREEMENTS

As noted, the very purpose of a CCA is to make certain and predictable the place of litigation for resolution of disputes which have arisen or may arise between the parties in connection with a particular legal relationship.[142] To that end, an effect granted to the CCA

137. *See* Convention on Choice of Court Agreements, at art. 1; *see also* Rian Matthews & Max Oehm, *The Hague Convention on Choice of Court Agreements: An Unexpected Game Changer for English Schemes of Arrangement*?, BUTTERWORTHS J. INT'L BANKING AND FIN. L., at 641–44 (Dec. 2016).

138. *See* HCCH, Status Table of Convention on Choice of Court Agreements (Nov. 21, 2024), [hereinafter HCCH Status Table] available at https://www.hcch.net/en/instruments/conventions/status-table/?cid=98 [https://perma.cc/N4WA-56NL].

139. *See* Gary Born, *Hague Convention on Choice of Court Agreements: A Critical Assessment*, 169 U. PENN L. REV., 2079, 2090 (2021) [hereinafter Born, *Hague Convention on Choice of Court Agreements*] ("Thus, Article 3(b) provides that 'a choice of court agreement which designates the courts of one Contracting State . . . shall be deemed to be exclusive unless the parties have expressly provided otherwise.'" (quoting Convention on Choice of Court Agreements, art. 3(b))).

140. *See id.* at 2080 ("The Convention would substantially alter existing rules in many jurisdictions, including the United States, governing the recognition and enforcement of both international choice-of-court agreements and judgments obtained in proceeding based on such agreements.").

141. *Id.*

142. *See, e.g.*, TREVOR HARTLEY & MASATO DAGOUCHI, EXPLANATORY REPORT OF THE CONVENTION OF 30 JUNE 2005 ON CHOICE OF COURT AGREEMENTS, ¶

becomes critical in any given case. A question considered fundamental in evaluating the effect is whether the CCA is exclusive or non-exclusive.[143]

A. Exclusivity Versus Non-Exclusivity

Again, if a CCA is exclusive, the jurisdiction for dispute settlement will rest only with the chosen court.[144] By contrast, when a CCA is non-exclusive, litigation in the chosen court will be merely optional and the adjudication of disputes may take place in a different court.[145] What presumptive effect a CCA may have differs among countries.[146] Thus, although there is a consensus that the parties should have autonomy to select a forum by agreement, the exclusivity of such agreement has always been an issue in foreign or international cases.[147]

In essence, the presumptive effect is a matter of how a CCA should be deemed pertaining to its enforcement. More specifically, it is a question as to whether a CCA should be presumed exclusive or non-exclusive in the first place. If a CCA is presumed exclusive, the jurisdiction in the chosen court is mandatory unless the contract provides otherwise.[148] On the contrary, if a CCA is deemed non-exclusive, the chosen court's jurisdiction will be only permissive except that the parties agree otherwise under the contract.[149]

As is often the case, the presumptive effect of a CCA would depend on the language or words used in the agreement, or more generally, on the parties' intent.[150] Thus to determine what effect a

48 at 41 (2005), https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf [https://perma.cc/R2K6-LNPB]. *See also supra* Part I.

143. *See* HAY ET AL., *supra* note 51, at 534 ("In evaluating the effect of a private agreement between parties as to forum choice, a fundamental question is whether the agreement is exclusive or non-exclusive.").

144. *See supra* Part II.

145. *See supra* Part II.

146. *See supra* Part II.

147. *See supra* Part II.

148. *See supra* Part II.

149. *See supra* Part II.

150. *See* Walter Heiser, *The Hague Convention on Choice of Court Agreements: The Impact on Forum Non Conveniens, Transfer of Venue, Removal, and Recognition of Judgment in United States Courts*, 31 U. PA. J. INT'L L., 1013, 1015 (2010) ("The determination of whether a particular agreement is exclusive or nonexclusive depends

CCA should have, the court with which the suit is filed "must look to the precise words" utilized in the agreement.[151] A general pattern is that with a different presumption, the triggering words are different.

Under the presumption of exclusivity, a CCA is exclusive unless such words as "may,"[152] "non-exclusive,"[153] "does not prevent,"[154] or "does not limit"[155] are used in the agreement to prescribe the choice.[156] The presumption of non-exclusivity is just the opposite. The language of exclusivity representing the intent of the parties to litigate only in the chosen court must be stated in order to make the CCA exclusive.[157] Otherwise, the choice made by the parties would be presumed non-exclusive.[158] Words considered to implicate exclusivity include: "shall," "must," "sole," "only," or "exclusive."[159]

There are, however, certain cases in which a CCA contains no language of either exclusivity or non-exclusivity. For example, a contract only provides that the parties agree to submit and consent to

on the intent of the parties, which in turn requires an interpretation of the language of the agreement.").

151. Coyle, *Interpreting Forum Selection Clauses*, *supra* note 25, at 1795.

152. Example: "*A suit arising out of or related to this agreement may be commenced and maintained in the court of Tokyo, Japan."*

153. Example: "*This Agreement is governed by and construed in accordance with the laws of Hong Kong SAR. The Parties submit to the non-exclusive jurisdiction of the courts of Hong Kong SAR."*

154. Example: "*The jurisdiction clause as agreed does not prevent a party from taking proceedings relating to the dispute arising from the contract to any other courts with jurisdiction."*

155. Example: "*The submission to the jurisdiction of the court in China under this agreement does not and is not to be construed to limit the rights of a party to take proceedings against the other party in a court of competent jurisdiction outside China.*"

156. *See* Coyle, *"Contractually Valid" Forum Selection Clauses*, *supra* note 19, at 140.

157. *See id.* ("To determine whether a forum selection clause is mandatory or permissive, the courts will look to see whether the clause contains so-called 'language of exclusivity' that expresses an intent to litigate in the chosen courts and nowhere else." (quoting Coyle, *Interpreting Forum Selection Clauses*, *supra* note 25, at 1800.)).

158. *See* Coyle, *"Contractually Valid" Forum Selection Clauses*, *supra* note 19, at 140

159. *Id.* (quoting Coyle, *Interpreting Forum Selection Clauses*, *supra* note 25, at 1800).

the jurisdiction of a particular court regarding any disputes arising from the contract. In this situation, the exclusivity of the choice would require further determination. Normally, in a court upholding the presumption of exclusivity, the choice would be considered exclusive because there is no indication that the choice is non-exclusive.[160] However, in taking the non-exclusivity approach, the choice would be deemed non-exclusive due to the lack of the language of exclusivity.[161]

B. Exclusivity in Application

In many countries, the general policy regarding CCAs is in favor of the presumption of exclusivity. In Europe, the BIR requires EU Member States to hold the jurisdiction chosen by the parties to be presumably exclusive.[162] Under Article 25 of the BIR, if the parties 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, such jurisdiction shall be exclusive unless the parties have agreed otherwise.[163]

In Japan, the law "is generally in favour of enforcing the parties' agreement [regarding] jurisdiction."[164] Despite the lack of clear statutory provisions, Japanese courts tend to "characteri[z]e a choice-of-court agreement as exclusive unless otherwise indicated."[165] When evaluating the effect of a CCA, Japanese courts normally rely on "factual appreciation and their own sense of reasonableness" to determine the exclusivity of the choice.[166] A court in Japan even held a choice of agreement to be exclusive because the agreement gave "one of the parties the right to decide where to sue from a list of fora."[167]

160. *See* MILLS, *supra* note 1, at 96–97 (discussing presumptions regarding exclusivity).

161. Animal Film, LLC v. D.E.J. Productions, Inc., 193 Cal. App. 4th 466, 472 (Cal. Ct. App. 2011).

162. *See* BIR, *supra* note 122, art. 25 ("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 . . . [s]uch jurisdiction shall be exclusive unless the parties agree otherwise.").

163. *See id.*

164. Takahashi, *supra* note 131, at 100.

165. *See id.*

166. *See id.* at 103.

167. *Id.*

By contrast, common law has a tradition of not presuming exclusivity of CCAs.[168] In the U.S., courts had refused to honor choice of court clauses until the early 1950s. A theory commonly held at that time was that the choice resulted in ousting the court of its jurisdiction.[169] As discussed, after *Bremen* and *Shute*, there was a "decided shift" in American courts "from mainly treating forum-selection clauses as per se unenforceable . . ." to "mainly letting parties select their forum in growing recognition of party autonomy."[170]

However, most state and federal courts in diversity do not assume exclusivity of forum selection clauses. Instead, the courts generally require specific language of exclusion or "magic words" to the effect of exclusivity in the forum selection clause.[171] Thus, it is considered a general rule in American courts that a forum selection clause is presumptively non-exclusive, and the presumption of non-exclusivity may only be overcome if the clause contains "language of exclusivity."[172] The Ninth Circuit held that a choice of court clause with the word "shall" is insufficient to make the choice exclusive because the clause did not prohibit the contracting parties from seeking other courts.[173]

Conversely, British courts traditionally took no position either in favor or against the exclusivity of CCAs.[174] This tradition, however, seems to have changed. In recent cases the courts have shown a tendency to endorse exclusivity, at least when the jurisdiction agreement is governed by the English law.[175] For example, in 2000, the court in *Sinochem International Oil (London) Ltd. v. Mobil Sales & Supply Corp.*, the court held that the test for distinguishing an exclusive

168. *See* Brooke A. Marshall & Mary Keyes, *Australia's Accession to the Hague Convention on Choice of Court Agreements*, 41 MELBOURNE U. L. REV. 246, 253 (2017).

169. *See* HAY, ET AL., *supra* note 51, at 534–35.

170. *See* Clermont, *supra* note 2, at 647.

171. *See* Coyle, *Interpreting Forum Selection Clauses*, *supra* note 25, at 1800.

172. *See* John F. Coyle, *A Primer on Forum Selection Clauses*, TRANSNAT'L LITIG. BLOG (Mar. 26, 2022), https://tlblog.org/a-primer-on-forum-selection-clauses [hereinafter *Primer on Forum Selection Clauses*].

173. *See* Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 76 (9th Cir. 1987) ("The courts of California . . . shall have jurisdiction over the parties in any action at law relating to the subject matter or the interpretation of this contract.").

174. *See* MILLS, *supra* note 1, at 98.

175. *Id.* at 99.

from a non-exclusive jurisdiction clause is whether on its proper construction the clause obligates the parties to resort to the relevant jurisdiction, irrespective of whether the word "exclusive" is used.[176] This holding may hardly be a clear indication of judicial acceptance of presumption of exclusivity. However, it suggests that a choice of court clause can be exclusive absent the word "exclusive."

C. Exclusivity Under the Choice of Court Convention

An essential feature of the Choice of Court Convention is that it makes the presumption of exclusivity a general principle that governs CCAs.[177] As noted, pursuant to Article 3(b) of the Convention, if a CCA designates "the courts of one Contracting state" or "one or more specific courts of one Contracting state," the agreement is deemed to be exclusive unless otherwise expressly provided.[178] The Convention is aimed at making the CCA as effective as possible[179] and ensuring enforcement of CCA and the judgment rendered by the chosen court.[180] The significance of the Choice of Court Convention is that it establishes uniform international rules for the CCAs.[181]

As provided in Article 1, the Choice of Court Convention applies "in international cases to exclusive choice of court agreements

176. Sinochem International Oil (London) Ltd. v. Mobil Sales & Supply Corp. [2000] 1 Lloyd's Rep. 670.

177. *See* Born, *Hague Convention on Choice of Court Agreements*, *supra* note 139, at 2090; *see also supra* text accompanying notes 139–40.

178. *See* Convention on Choice of Court Agreements, art. 3(b) (interpreting Article 3(b) of the Choice of Court Convention to mean that the CCA may refer either to the courts of a Contracting state in general or to one or more specific courts in one Contracting State). *See* HARTLEY & DAGOUCHI, *supra* note 142, at 51. Also, the term "deemed" rather than "presumed" used in the Choice of Court Convention is said to be "deliberate." It is aimed at avoiding "entanglement in local evidence law." It is held that "[t]he Convention creates a legal categorization of choice of court agreements as exclusive for Convention purposes . . . ." At any rate, "[u]nder the Convention, a choice of court agreement will be exclusive unless it explicitly says otherwise." Put differently, "[i]f parties wish a choice of court agreement to be non-exclusive, they will have to say so." *See* RONALD BRAND & PAUL HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS: COMMENTARY AND DOCUMENTS 42–43 (3d ed. 2008).

179. *See* HARTLEY & DAGOUCHI, *supra* 142, at 31.

180. Heiser, *supra* note 150, at 1013.

181. *See id.*

concluded in civil or commercial matters."[182] A case is "international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State."[183] In addition, a case is also considered "international where recognition or enforcement of a foreign judgment is sought."[184]

For purposes of the Choice of Court Convention, an exclusive CCA is defined as an agreement that (a) is concluded by two or more parties, (b) meets the formality requirements, and (c) designates the courts of a member state, or one or more specific courts of a member state, to decide past or future disputes in connection with a particular legal relationship.[185] Under the formality requirements, an exclusive CCA 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."[186]

There are three basic rules in the Choice of Court Convention that rest on the presumption of exclusivity. The first rule is the jurisdiction rule under which the chosen court must hear the case. Under Article 5 of the Convention, the court named in an exclusive CCA must hear and decide any dispute that falls within the scope of that agreement. [187] Article 5 further provides that the chosen court shall not decline to exercise jurisdiction on grounds that the dispute should be decided in a court of another State, except when the CCA is null and void.[188]

The second rule is the declination rule, which prevents non-chosen courts from hearing the case. Under Article 6 of the Convention, if an exclusive CCA applies to a dispute, any court in a Contracting State other than the chosen court must suspend or dismiss its proceedings.[189] The application of the declination rule, however, is subject to several specific exceptions. One exception, for example, is that the non-chosen court may not suspend or dismiss proceedings

182. Convention on Choice of Court Agreements, art. 1, § 1.

183. *Id.* at art. 1, § 2.

184. *Id.* at art. 1, § 3.

185. *See id.* at art. 3.

186. *See id.* at art. 3, § c.

187. *See id.* at art. 5.

188. *See id.*; *see also* HARTLEY & DAGOUCHI, *supra* note 142, at 31.

189. *See* Convention of Choice of Court Agreements, art. 6.

when the choice of law agreement is "null and void under the law of the State of the chosen court."[190]

The third rule is recognition and enforcement rule that applies to the judgment entered by the chosen court under the CCA. Article 8 of the Convention provides that "a judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States," and "the recognition or enforcement may be refused only on the grounds specified in this Convention."[191] The underlying notion is that "the value of a choice of court agreement will be greater if the resulting judgment is recognized and enforced in as many other states as possible."[192]

The presumption of exclusivity of CCAs under the Choice of Court Convention serves two primary functions: a positive function and a negative function.[193] The positive function means that the chosen court must hear the case.[194] In other words, the CCA provides the chosen court with an exclusive jurisdiction over disputes between the parties.[195] A direct result of the positive function of a CCA is that the doctrine of *forum non-conveniens* will no longer be applied because, under the Convention, the chosen court has no discretion to dismiss the case brought on the basis of the CCA for *forum non-conveniens*.[196]

The negative function is the function of declination, referring to a mandate that the non-chosen court must stay or dismiss the case unless any of the exceptions as provided in the Convention applies.[197] The effect of the negative function is that the court not chosen would have no jurisdiction.[198] Note that both the positive and negative functions will also exclude the application of *lis alibi pendens* (suit

190. *See id.* at art. 6, § a.

191. *Id.* at art. 8 § 1. Most grounds for refusal are set out in Article 9 of the Convention, including null and void choice of court agreement, lack of capacity, lack of sufficient notice to defendant, fraud, "manifestly incompatible with the public policy," and inconsistent judgment. *Id.* at art. 9 § a-g.

192. *See* HARTLEY & DAGOUCHI, *supra* note 142, at 31.

193. MILLS, *supra* note 1, at 113.

194. *See* HARTLEY & DAGOUCHI, *supra* note 142, at 31.

195. *Id.*

196. *See id.*

197. *See id. See generally* MILLS, *supra* note 1, at 113.

198. *See* HARTLEY & DAGOUCHI, *supra* note 142, at 31.

pending elsewhere),[199] which is a civil doctrine that gives the jurisdiction to the court seized first.[200] More specifically, the positive function prohibits the chosen court from refusing to exercise jurisdiction on the ground that there was a court of another State with which the case was first filed.[201] On the other hand, the negative function bars the court that was not chosen from taking the case no matter whether the case was brought to it in the first place.[202]

D. Trend Toward Presumption of Exclusivity

As noted, the Choice of Court Convention went into force on October 1, 2015, after the EU ratified it. In addition to the EU, six other countries have now ratified or made accession to the Choice of Court Convention.[203] Many other countries are either examining the convention for the purpose of ratification or accession or making efforts to adapt to the Convention rules. In Australia, for example, the Joint Standing Committee on Treaties recommended that Australia accede to the Choice of Court Convention.[204] Experts anticipate that Australia will also implement the Choice of Court Convention in its proposed International Civil Law Act.[205]

China is another example. Pending ratification of the Choice of Court Convention by China's legislative body, the Supreme People's Court, instructed the nation's courts to honor the CCA under the doctrine of presumption of exclusivity. According to the Supreme People's Court, if a jurisdiction agreement, signed by the parties to a foreign-related contract or other dispute over property rights, expressly

199. *Id.*

200. *Lis Alibi Pendens* is a doctrine that allows the court to stay its proceeding when a case with the same cause of action and between the same parties is seized first by another court. *See generally* Gerhard Walter, *Lis Alibi Pendens and Forum Non Conveniens: From Confrontation via Co-ordination to Collaboration*, 4 EUR. J. L. REFORM 69, 77 (2002).

201. *Id.*

202. *Id.*

203. The six countries are Denmark (May 30, 2018), Mexico (September 26, 2007), Montenegro (September 18, 2018), Singapore (June 2, 2016), Ukraine (April 28, 2023), and UK (September 20, 2020). HCCH Status Table, *supra* note 138.

204. *See* Marshal & Keyes, *supra* note 168, at 247.

205. *See* Michael Douglas, *Choice of Court Agreements Under an Int'l Civil Law Act*, 24 J. OF CONT. L., 186, 186 (2018).

stipulates that the court of a country has jurisdiction, but does not specify that the jurisdiction agreement is non-exclusive, it shall be presumed that the jurisdiction agreement is exclusive.[206]

As discussed, the EU has a long-standing pro-presumption-of-exclusivity policy.[207] The jurisdiction of the courts based on CCAs among its Member States is governed by the BIR.[208] Under the BIR, parties may not circumvent CCAs by seizing other courts in violation of the agreements as such.[209] However, the application of the BIR is limited to the EU members. In the EU, the BIR does not govern the enforcement of CCAs in favor of third state courts.[210]

In its proposal for the EU ratification of the Choice of Court Convention, the European Commission embraced the expansion of the presumption of exclusivity beyond the BIR by joining the Choice of Court Convention. The Commission opined that party autonomy would need to be ensured not only within the EU but also beyond the EU borders. The Commission also expressed confidence that the Choice of Court Convention would "give EU business the necessary legal certainty that their choice of court agreements in favour of a court outside the EU are in the EU, and that agreements in favour of a court in the EU are respected in third states."[211]

Singapore ratified the Choice of Court Convention on June 2, 2016. In Singapore, it is believed that the ratification will bolster the country's position as a dispute resolution hub in Asia. If a Singapore

206. *See* the SPC, Minutes of the Symposium on Foreign-related Commercial and Maritime Adjudication in All Courts of the Nation, issued on Jan. 24, 2022, Section I (1) [hereinafter Minutes of the Symposium] https://cicc.court.gov.cn/html/1/218/62/409/2172.html.

207. *See* European Commission Press Release IP/14/1110, Choice of Court Convention: EU Businesses Receive a Major Boost for International Trade (Oct. 10, 2014) ("The recent reform of the so-called Brussels I Regulation paved the way for today's ratification" of the Choice of Court Convention), available at https://ec.europa.eu/commission/presscorner/detail/en/IP_14_1110.

208. *See* European Commission, *Proposal for a Council Decision on the Approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements*, at 2 [hereinafter *Proposal for a Council Decision*] https://eur-lex.europa.eu/resource.html?uri=cellar:f8f73fa2-8a8a-11e3-87da-01aa75ed71a1.0022.01/DOC_1&format=PDF.

209. *Id.* at 3.

210. *Id.* at 2–3.

211. *Id.* at 3–4.

court is the chosen court of an exclusive CCA covered by the Convention, the dispute must be heard in Singapore only. The application of Convention rules, as Singapore Ministry of Law points out, "strengthens the enforcement of agreements which specify Singapore courts as the exclusive dispute resolution forum."[212]

The UK made an application to the Choice of Court Convention on September 28, 2020. The UK has been bound by the Choice of Court Convention since October 1, 2015, by means of its EU membership. The 2020 accession ensures the continuity in the application of the Convention following the nation's withdrawal from the European Union.[213] In the UK legal community, English CCAs are viewed as "a key component of the UK's success as a leading centre" for civil and commercial dispute resolution.[214] As noted, the UK used to follow the BIR. In both BIR and the Choice of Court Convention, presumption of exclusivity of a CCA is a well-established rule.

Australia is not a signatory to the Choice of Court Convention. However, it is now considering joining the Convention. In its recommendation for accession, the Joint Standing Committee on Treaties of the Parliament of Australia states that the Convention on Choice of Court Agreements sets out how courts will treat jurisdiction clauses in private contracts, and in those clauses, the contracting parties agree in which court system they will resolve any disputes. According to the Joint Standing Committee, "Australia's accession to the Convention will provide greater clarity and certainty in [the] area [of private contracts]."[215]

212. *See* Singapore Ministry of Law, Singapore Ratifies Hague Convention on Choice of Court Agreements (June 2, 2016), available at https://www.mlaw.gov.sg/news/press-releases/singapore-ratifies-hague-convention-on-choice-of-court-agreement.

213. *See* HCCH, Continuing Application of the Choice of Court Convention and the Child Support Convention for the United Kingdom, available at https://www.hcch.net/en/news-archive/details/?varevent=778.

214. *See* Michael McParland QC, *"Deal or No Deal" – Protecting English Choice of Court Agreements in the Post-Brexit World: the UK and the Hague Convention on Choice of Court Agreements*, 39 ESSEX CHAMBERS, (November 12, 2018), https://www.39essex.com/information-hub/insight/deal-or-no-deal-protecting-english-choice-court-agreements-post-brexit.

215. Joint Standing Committee on Treaties, Parliament of Australia, *Implementation Procedures for Airworthiness-USA; Convention on Choice of Courts-accession; GATT Schedule of Concessions-amendment; Radio Regulations-partical*

In short, it is evident that with adoption of the Choice of Court Convention, there has been a growing trend favoring the doctrine of presumption of exclusivity for CCAs, and rules of the Choice of Court Convention have been well received among its Member States. The underlying notion is that the effectiveness of CCAs ensured by the Choice of Court Convention helps promote certainty and predictability in international commercial transactions and other civil activities through enhanced judicial cooperation.[216]

In the EU, ratification of the Choice of Court Convention is viewed as "the external dimension of 'Justice for Growth': a great example of how justice policy serves to boost economic growth and job creation by creating the right conditions for European businesses to flourish in their trading with non-European partners."[217] The rules set forth in the Choice of Court Convention, according to one EU Justice Commissioner, "will simplify life for European businesses and make their environment more predictable," which "can help to create all the right incentives for European businesses to expand their operations in the international arena, without them having to worry about what happens in the case of a dispute."[218] However, despite the growing trend toward the exclusivity of CCAs internationally, American courts continue to struggle with the exclusive effect of such agreements.

E. Dilemma Facing American Courts

U.S. courts generally disfavor the presumption of exclusivity when determining the effect of a CCA. As discussed in *Bremen* and *Shute*, the Supreme Court established a fundamental rule that forum

revision, Executive Summary (Report 166, November 2016), https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/ChoiceofCourts/Report_166/section?id=committees%2freportjnt%2f024013%2f24177.

216. *See* Convention on Choice of Court Agreements, recital. *See also* MILLS, *supra* note 1 at 97. The parties to an exclusive jurisdiction agreement may benefit significantly in terms of legal certainty, and it is not unreasonable for that benefit to give rise to an interpretative presumption that parties to commercial contracts will ordinarily have the intention of achieving exclusivity when nominating a forum. *Id.*

217. European Commission Press Release IP/14/1110, Choice of Court Convention: EU Businesses Receive a Major Boost for International Trade (October 10, 2014), https://ec.europa.eu/commission/presscorner/detail/en/IP_14_1110.

218. *Id.*

selection clauses "are *prima facie* valid" and should be enforced unless enforcement is shown to be unreasonable and unjust under the circumstances.[219] The Supreme Court noted that "the elimination of . . . uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting."[220]

The Supreme Court's philosophy in *Bremen* and *Shute*, however, does not seem to apply when the exclusivity of forum selection clauses become an issue. The Supreme Court never had a chance to address this important determination. Thus, U.S. courts are generally reluctant to find that a forum selection clause is exclusive absent specific language excluding jurisdiction elsewhere. [221] More specifically, the approach taken by some U.S. courts is a presumption of non-exclusivity.

The U.S. is the first country that signed the Choice of Court Convention.[222] More interestingly, the intellectual origin of the project eventually resulting in the Convention came from proposals introduced by Arthur T. von Mehren, a late professor at Harvard Law School.[223] Nonetheless, U.S. courts have taken a position contrary to the basic presumption on which the Choice of Court Convention relies in respect to the exclusivity of forum selection clauses or CCAs.[224]

As both a theoretical and practical matter, U.S. courts are at a crossroads in respect to CCAs: to join the international mainstay or to stay intact at home. The former would require changes to the law and practice in the U.S. while the latter would render the U.S. isolated from the rest of the world. If the U.S. becomes a member of the Choice of Court Convention, there are likely "several aspects of existing U.S. law

219. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10-13 (1972); Carnival Cruise Lines v. Shute, 499 U.S. 585, 589 (1991).

220. *Bremen*, 407 U.S. at 13–14.

221. *See* Heiser, *supra* note 150, at 1015.

222. The United States signed the Choice of Court Convention on January 19, 2009, followed by European Union on April 1, 2009. Mexico is the first country that ratified the Convention (September 26, 2007) but did not sign it. *See* HCCH Status Table, *supra* note 138.

223. *See* HARTLEY & DOGAUCHI, *supra* note 142, at 25.

224. National Conference of Commissioners on Uniform State Laws, Draft Uniform International Choice of Court Agreements Act (Draft Uniform Act), Prefatory Note IV.

that will be affected by the Convention" and the significant changes are mainly "in the jurisdiction or enforcement of the choice of law clauses . . . ."[225]

In the American legal system, a change of law may happen either through legislation or via court rulings. Since the adoption of the Choice of Court Convention, there have been ongoing calls in American legal community for legislative action in favor of the Convention. The legislation may take the form of state law and/or a federal statute implementing the treaty ratified by Congress. Under the Constitution, the treaties to which the U.S. is party possess the effect of "the supreme Law of the Land."[226] Also, implemented federal statute may include "provisions for states to choose to opt into the Uniform Law . . . ."[227]

On the state uniform law level, the National Conference of Commissioners on Uniform State Laws drafted the Uniform International Choice of Court Agreement Act in 2010 with an aim to incorporate the Choice of Court Convention into the state laws.[228] According to the drafters, the Choice of Court Convention is "the product of over a decade of multilateral negotiations . . ." and it "validates party autonomy by enforcing exclusive choice of court agreements and judgments that result from them."[229] The draft explicitly states that the Choice of Court Convention is "an immeasurably valuable treaty that will help create certainty and predictability for transactional planning, validate party autonomy, facilitate the free movement of judgments, and provide foundation for further cooperation and harmonization of law."[230]

On the federal level, the U.S. Department of State published, for the purpose of discussion, a Draft Federal Implementing Legislation on April 24, 2012.[231] The draft legislation states that "the Convention will

225. U.S. CONST. art. VI, cl. 2 ("all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land").

226. Draft Uniform Act, *supra* note 224, Prefatory Note I.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. Office of the Legal Advisor, Draft Federal Implementing Legislation to Choice of Court Agreements Convention Implementation Act, Apr. 24, 2012, Ch. 1

provide assurances that exclusive choice of court agreements concluded in civil or commercial matters will be effective," and "those assurances will enhance certainty in commercial contracts."[232] The draft legislation also emphasizes that the Act should be interpreted in light of "the Convention's international character and [] the need to promote uniformity in its application."[233]

In both the proposed Uniform Act and the proposed Federal Implementing Act, the exclusive CCA is described as "[a] choice of court agreement that designates the courts of one contracting party or one or more specific courts of one contracting party shall be deemed to be exclusive unless the parties have expressly provided otherwise."[234] This definition is an adapted version of Article 3(a) of the Choice of Court Convention.[235] The definition, as provided in the drafts, reflects a considerable degree of consensus and the need to reverse gears in American courts from "anti" to "pro" presumption of exclusivity for forum selection clauses.

Indeed, the reversal would be the most significant change to the existing U.S. law in this area.[236] But the change is necessary and would be beneficial in two ways. First, the presumption of exclusivity would better protect the reasonable expectations of the parties. As noted, a forum selection clause provides a court with personal jurisdiction and establishes a venue for disputes that have arisen or may arise between the contracting parties.[237] When parties agree on a forum selection clause, inferring that they have intended to subject the disputes between them to the jurisdiction of the chosen courts is reasonable.

One advantage of having a forum selection clause is that it allows the court to ascertain whether it has jurisdiction over the disputes, and, particularly, whether it has personal jurisdiction over

(Jan. 19, 2023), https://2009-2017.state.gov/s/l/releases/2013/211156.htm [https://perma.cc/B6D6-Q8EU].

232. *Id.*

233. *Id.*

234. *Id.* § 104(i); Draft Uniform Act, *supra* note 224, at § IV(A).

235. *See* Convention on Choice of Court Agreements, art. 3(a).

236. *See* Office of the Legal Advisor, *supra* note 231, at §104(i); Draft Uniform Act, *supra* note 224, at § IV(A).

237. *See* David Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMP. L. REV. 785, 792 (1993); *see also supra* Part II.

foreign defendants.[238] With a forum selection clause, the parties can predict the place and process of litigation when a dispute occurs. The parties can also anticipate the costs of litigation and take certain strategies to reduce litigation expenses and conserve judicial resources.[239]

Additionally, when negotiating a forum selection clause, the parties would normally choose a convenient or neutral court, or a court with which they both feel comfortable.[240] Therefore, naturally, once the forum selection has been agreed on, the parties expect not to resort to alternative courts unless they clearly indicate that as an option in the forum selection clause already made or in a new agreement modifying the selection. In this context, it is not difficult to conclude that the parties' reasonable expectations would be destroyed or substantially compromised if an agreed-upon forum selection clause is presumed to be non-exclusive, allowing either party to walk away from the chosen court unless the other party can prove the exclusivity of the agreed-upon forum selection clause.

Since the *Bremen* decision that rejected the "ouster" theory, courts have recognized that "forum selection clauses advance many important public policies."[241] As one analysis shows, the enforcement of forum selection clauses "protects the expectations of contracting parties,"[242] "preserves the equities of the agreement,"[243] "respects freedom of contract,"[244] "encourages trade,"[245] and "conserves judicial resources by limiting pretrial struggles over where to litigate."[246] In the 2013 case, *Atlantic Marine Construction Company v. United States District Court*, the U.S. Supreme Court explicitly held that the enforcement of valid forum selection clauses, bargained for by the parties, protects their legitimate expectations and further promotes vital

238. *See generally Primer on Forum Selection Clauses*, *supra* note 172.

239. *See* Taylor, *supra* note 237, at 785.

240. *See* HAY ET AL., *supra* note 51, at 534.

241. Leandra Lederman, *Viva* Zapata*!: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases,* 66 N.Y.U. L. REV., 422, 424 (1991).

242. *See id*.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

interests of the justice system.[247] Those goals can be reached more effectively under the presumption of exclusivity.

The second benefit relates to the achievement and maintenance of certainty and predictability. As discussed, certainty, predictability, and the protection of parties' expectations are the conflict of law values[248] considered to have particular importance in today's global economy.[249] Given the uncertainties that "almost inevitably exist with respect to any contract" involving multiple countries,[250] a forum selection clause becomes "an almost indispensable precondition" to the achievement of certainty and predictability "essential to any international business transaction."[251]

Seen as "a manifestation of party autonomy . . . to provide a measure of foreseeability and predictability with respect to any potential litigation,"[252] a forum selection clause serves as an effective means for the parties to obviate the danger that a dispute between the contractual parties "might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved."[253] However, if the forum selection clause is presumed to be non-exclusive, it would leave at least one party in a uncertain situation

247. Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 61 (2013).

248. *See generally* Willis Reese, *The Ever Changing Rules of Choice of Law*, 9 NETH. INT'L L. REV., 389, 392 (1962); *see also* Lea Brilmayer & Daniel Listwa, *A Common Law of Choice of Law*, 89 FORDHAM L. REV., 889, 902 (2020).

249. *See* Ingrim, *supra* note 29, at 664 ("In general, the correct choice-of-law analysis has been the focus of extensive intellectual debate for centuries . . . . While inherently disturbing to the international business community which requires a reasonable amount of certainty and predictability in order to trade freely and efficiently in today's global economy, it arguably is equally or, perhaps, even more disturbing to the legal profession which is called upon to advise that community.").

250. *See* SYMEONIDES & PERDUE, *supra* note 59, at 873 ("Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of orderliness and predictability essential to any international business transaction.").

251. *Id.*

252. Tanya J. Monestier, *When Forum Selection Clauses Meet Choice of Law Clauses*, 69 AM. U. L. REV. 325, 329–30 (2019).

253. SYMEONIDES & PERDUE, *supra* note 59, at 873.

that they intended to avoid by agreeing to the forum selection. It would also make many things related to litigation unpredictable.

Benefits aside, more significantly, the presumption of exclusivity has become a commonly accepted doctrine in the world.[254] Given that the "unmistakable trend has been towards wider enforcement of choice of court agreements, both in terms of the number of legal systems in which they are recognised, and the degree of effectiveness that is given to them,"[255] it is highly advisable that U.S. courts make a switch to the doctrine of presumption of exclusivity. The presumption of exclusivity not only represents mainstream international practices, but it also ensures the effectiveness and enforcement of forum selection clauses agreed upon by the parties.

However, there are some concerns about presumption of exclusivity. One such concern is that the presumption of exclusivity may result in "undue restrictions on the general right of parties of access to justice and relief in any court with jurisdiction over a dispute," and thus is "[i]nconsistent with concepts of party autonomy."[256] This concern misses the point of forum selection clauses; party autonomy is not weakened but enhanced by the exclusivity presumption.

Party autonomy, as noted, provides the parties with the right and freedom to determine the law that governs their bargain and the forum that adjudicates their disputes.[257] The core element of party autonomy is the "will of the parties."[258] The presumption of exclusivity

254. *See* MILLS, *supra* note 1, at 97–98 (stating that the Choice of Court Convention Rule "under which jurisdiction agreements are 'deemed' to be exclusive in the absence of express provision to the contrary" suggests "a growing international acceptance of a presumption in favour of exclusivity.").

255. *Id.* at 92.

256. *See* Born, *Hague Convention on Choice of Court Agreements*, *supra* note 139, at 2119.

257. *See* Zhang, *Rethinking Contractual Choice of Law*, *supra* note 33, at 840–841 ("The corollary of party autonomy is the freedom of parties to choose the law applicable to their contract, and the very centerpiece of this doctrine is the parties' intent."); *see also* MILLS, *supra* note 1, at 8–11 ("From a contrasting private party-cent[e]red perspective, it might be argued that private parties have an inherent autonomy, particularly where they act beyond the boundaries of a single legal order, and it is states that are recogni[z]ing that underlying reality in accepting the freedom of private parties to choose a forum or law."); *see also supra* Part II.

258. *See* Lorenzen, *supra* note 30, at 573 ("[W]ith respect to contracts the principle [is] that the will of the parties is sovereign, and that, if the will is not

implicates a notion that when the parties designate in their agreement a specific jurisdiction to adjudicate their disputes, a court need not second guess whether the parties actually intended that designated jurisdiction absent clear language in the agreement to the contrary.

Therefore, the presumption of exclusivity imposes no restriction on the parties' access to justice but provides protection for the parties' choice. The doctrine does limit a party from resorting jurisdiction to any non-chosen court unless the forum selection specifically allows for it.[259] However, it does not prevent the parties from contractually modifying the existing forum selection clause or reaching a new agreement to choose a different court. In short, once the parties agree to a particular court through a forum selection clause, it is reasonable to presume that the parties have made up their minds on a particular court and intend to be bound by the clause if nothing is expressed to the contrary.

The other concern stems from a doctrine of waiver. In the U.S., there is a belief that an agreement to litigate a dispute in a specified court constitutes a waiver of the contracting parties' right to bring a lawsuit elsewhere.[260] A waiver of the right to sue elsewhere is then considered "a waiver of the right to contest personal jurisdiction in the chosen court," and also as "a waiver of the right to object to venue in the chosen court."[261] Therefore, some argue that when a party objects to the jurisdiction of a court because their contract contains an exclusive forum selection clause, the court must determine if the other party has waived their right to sue elsewhere.[262] As a result, the parties would be deemed to "have waived their right to sue elsewhere only when a forum selection clause contains 'language of exclusivity.'" [263]

expressed, it must be sought in the surrounding circumstances, the place of contract being one, but only one, of these circumstances."); *see also supra* Part II.

259. *See* Born, *Hague Convention on Choice of Court Agreements*, *supra* note 139, at 2096–97.

260. *See* Coyle, *Interpreting Forum Selection Clauses*, *supra* note 25, at 1799 ("An exclusive forum clause may be usefully conceptualized as a form of waiver. By agreeing to litigate a dispute in a specified forum, the contracting parties waive their right to bring a lawsuit elsewhere.").

261. *Id.* at 1799–1800.

262. *Id.* at 1800.

263. *Id.*

The waiver doctrine makes sense in terms of waiving the rights of the parties, but it does not justify that a CCA reached by the parties must be presumed non-exclusive. In fact, when agreeing to the forum selection, the parties have settled their expectations on the court for dispute settlement. Thus, as the Supreme Court in *Atlantic Marine* pointed out, "[w]hen parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations."[264] According to the Supreme Court, a "forum selection clause, after all, may have figured centrally in the parties' negotiations and may have affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place."[265] In this regard, the presumption of exclusivity would better serve the purpose of the forum selection clause that was negotiated by the parties in advance.

The scope of the application of presumption of exclusivity is a third concern. One criticism of the Choice of Court Convention is that it "deems all choice-of-court agreements to be exclusive forum selection clauses."[266] The gist of this concern is that the deeming provision in the Choice of Court Convention is "a significant intrusion on the autonomy of the commercial parties to structure their dispute resolution mechanisms in the manner they consider most appropriate."[267] Put differently, the application of the deeming rule of the Choice of Court Convention could arguably become too broad to be manageable.

In fact, the application of the exclusivity rule, as provided in the Choice of Court Convention, is within a certain boundary. First, the application of Choice of Court Convention rules is limited to (1) exclusive CCAs, (2) in international cases, and (3) involving civil or commercial matters.[268] Second, the Choice of Court Convention contains a laundry list of the matters to be excluded from the scope of the Convention.[269] Third, the Convention is aimed at providing

264. Atl. Marine Constr. Co., v. U.S. Dist. Ct.., 571 U.S. 49, 66 (2013).

265. *Id.*

266. Born, *Hague Convention on Choice of Court Agreements*, *supra* note 139, at 2120.

267. *See id.* at 2120.

268. Convention of Choice of Court Agreements, art. 1(1).

269. *See id.* at art. 2.

uniform rules on jurisdiction which would help prevent misuse or abuse of the rules of the Convention.[270] Finally, and most significantly, there are exceptions clearly provided in the Convention to the rule of exclusivity.[271]

IV. EXCEPTIONS TO THE EXCLUSIVITY AND DETERMINATION

When the exclusivity of a CCA is presumed, it is not absolute but rebuttable. Like party autonomy, or even freedom of contract, the exclusivity is subject to exceptions. Under the Choice of Court Convention, there are five specific exceptions to the exclusivity rule. Under Article 6 of the Convention, the exclusivity rule does not apply when (1) "the agreement is null and void under the law of the State of the chosen court;" (2) "a party lacked the capacity to conclude the agreement under the law of the State of the court seised;" (3) "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 seised;" (4) "for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed;" or (5) "the chosen court has decided not to hear the case."[272]

These exceptions are also incorporated into the domestic legislation of the countries that have ratified the Choice of Court Convention. In the EU's ratification of the Convention, the exceptions uniformly apply to all Member States.[273] Singapore adopted a Choice of Court Agreements Act in 2016.[274] Article 12 of the Act requires a Singapore court, if not designated in the CCA, to stay or dismiss any case or proceeding to which the agreement applies, unless—under the determination of the Singapore court—any of the Article 6 exceptions of the Choice of Court Convention applies.[275]

270. *Id.* at Preamble.

271. *See id.* at arts. 5(1), 6; *see also supra* text accompanying note 139 (providing definition of rule of exclusivity).

272. Convention on Choice of Court Agreements, art. 6.

273. *See Proposal for a Council Decision*, *supra* note 208 (recommending the EU approve the Convention of Choice of Court Agreements).

274. Choice of Court Agreements Act 2016 (Sing.), https://sso.agc.gov.sg/Act/CCAA2016?ValidDate=20211231&WholeDoc=1.

275. *Id.* at art. 12.

Among the exceptions, the first two are the issue of validity.[276] The third and fourth exceptions involve a matter of enforceability.[277] The last exception refers to a denial of jurisdiction by the chosen court on certain grounds, such as violation of the rule of subject matter jurisdiction or venue requirement.[278] The purpose of this exception is to avoid a denial of justice or a situation where the chosen court refuses to hear the case, but other courts are barred from hearing the case.[279] The notion is that "it must be possible for some court to hear the case."[280]

The exceptions to exclusivity and its application involve two basic issues. The first issue is what may fall within the exceptions, while the second issue is how to determine it. The former is a matter of substance or the contents of each of the exceptions, which often appear to be a question of interpretation. The latter is essentially about choice of law or the law applicable to or governing the determination of exceptions. Because countries take different approaches when dealing with those issue, it is necessary to discuss each separately.

A. Validity and Enforceability of Choice of Court Agreements

A CCA or forum selection clause is a contract and, thus, is subject to the defenses to the formation and performance of a contract. As such, the validity and enforceability of a CCA are essentially the same as the validity and enforceability of a contract. The only difference, if any, is that the forum selection clause is narrowly tailored

276. Convention on Choice of Court Agreements, art. 6(c)–(d).

277. *Id.*

278. Convention on Choice of Court Agreements, art. 6(e). Under Section 201(c) of the Draft Federal Implementing Legislation, *supra* note 231, a chosen court shall refuse to accept jurisdiction to decide a dispute to which an exclusive choice of court agreement applies if the assumption of jurisdiction by the chosen court would violate: "(1) jurisdictional limits placed on the chosen court by applicable law relating to subject matter or amount in controversy; or (2) [the] rules regarding international allocation . . . among courts . . . including venue requirements."

279. *See* BRAND & HERRUP, *supra* note 178, at 95 ("The policy underlying the Article 6(e) exception is that Convention rules should not work to produce a result in which a court chosen in an exclusive choice of court agreement decides not to hear the case, while courts in other Contracting States would otherwise be barred from hearing it.").

280. HARTLEY & DOGAUCHI, *supra* note 142, at 63.

to the jurisdiction, but contract is a more general term. Therefore, the rule that governs contracts will equally apply to a forum selection agreement pertaining to the issues of validity and enforceability.

1. Validity Versus Enforceability

Validity and enforceability are different issues, though they are often intertwined. In contract law, validity concerns formation or existence of a contract,[281] and enforceability refers to the binding force of a contract.[282] An enforceable contract must always be valid, but a valid contract may not necessarily be enforceable. That is, even though all the essential elements for the formation of a contract are present, a court may still not enforce it under certain circumstances. Such circumstances include when the performance of the contract is proven to be impossible or impractical,[283] the performance is excused on certain legal grounds,[284] or enforcement of the contract is considered incompatible with public policy.[285] The same is true for CCAs.

The validity of a contract consists of formal validity and substantive validity. Formal validity involves formality requirements, a violation of which makes the contract legally voidable. Substantive validity involves essential elements of the formation of a contract, a lack of which would result in the voidness of the contract, or the factors critical to the effect of a contract. In theory of contract, factors that may affect the substantive validity of a contract include substance, status, and behavior.[286]

Substance refers to the contents of contract. A common question about substance is whether the terms of a contract are substantially fair and reasonable.[287] The status is about the "capacity

281. *See* PERILLO, *supra* note 36, at 21 ("A contract is void . . . when it produces no legal obligation[s] . . . . It would be more exact to say that no contract was created.").

282. *See* FERRIELL, *supra* note 38, at 31.

283. GERALD E. BERENDT ET AL., CONTRACT LAW AND PRACTICE 805–06 (2d ed. 2007).

284. *See* DAVID EPSTEIN ET AL, MAKING AND DOING DEALS: CONTRACTS IN CONTEXT 669–70 (2d ed. 2006).

285. *See* FARNSWORTH, *supra* note 37, at 321.

286. *See id.* at 224.

287. *See id.*

to contract," which relates to a legal inquiry as to whether the parties to a contract are able to "represent their own interests in the bargaining process."[288] This behavior involves the conduct of the parties, or more specifically, the misbehavior that constitutes abuse of bargaining process, such as misleading or coercive conduct.[289] All of these factors are also determinative to the validity of a forum selection agreement.

2. Validity as a Defense

General defenses to the formation of a contract include, among others, illegality, incapacity, misrepresentation, fraud, duress, mistakes, and unconscionability.[290] A contract is invalid if it "was never properly formed" or "the existence of a viable defense" can be established.[291] Those defenses are equally applicable to the CCA. Under the Choice of Court Convention, the chosen court may refuse to take the case,[292] and the non-chosen court would not be obligated to suspend or dismiss the proceedings if the exclusive CCA is null and void.[293] Additionally, validity is also a defense when a judgment is sought to be enforced in a foreign court.[294]

Article 6 of the Choice of Court Convention specifically singles out lack of capacity and makes it a separate ground to shield the non-chosen court from being required to suspend or dismiss the proceedings under the rule of exclusivity.[295] The incapacity exception is also implied in Article 5 of the Choice of Court Convention under which the chosen court is allowed to decline jurisdiction when the CCA is found null and void.[296] A reason for separating lack of capacity from validity in general is that unlike other issues affecting the validity of

288. *Id.* at 225–26.

289. *See id.* at 241.

290. *See* FERRIELL, *supra* note 38, at 587–88.

291. *See* Coyle, *"Contractually Valid" Forum Selection Clauses*, *supra* note 19, at 133.

292. *See* Convention on Choice of Court Agreements, art. 5.

293. *See id.* at art. 6.

294. *See id.* at art. 9.

295. *Id.*

296. *See* Convention on Choice of Court Agreements, art. 5.

the CCA, the capacity is to be "determined both by the law of the chosen court and by the law of the court seised."[297]

3. Enforcement

Enforcement of CCA is an issue often encountered by the court not chosen but seized. Even though the CCA is valid under the law of the chosen court, the law chosen by the parties, or the law applicable under the choice of law rules absent the parties' choice, the court seized may have to determine if the enforcement would be acceptable as a matter of law. For the court seized, the major concerns include the public policy, interests of the parties, mandatory rules on jurisdiction, and possibility of performance.

Under Article 6(c) of the Choice of Court Convention, a CCA will not be enforced in the court seized if giving effect to the agreement would lead to a "manifest injustice" or would be "manifestly contrary to public policy of the State of the court."[298] For purposes of the Choice of Court Convention, the "manifest injustice" applies to the situation where the interests of a particular individual, including a party, are at stake while "public policy" refers to the interests of general public.[299] Put differently, the former has a specific focus, but the latter contains a much broader scope that covers the public at large.[300]

Mandatory rules cannot be derogated from the agreement of the parties.[301] Thus, a CCA would have to yield to the mandatory provisions of law on jurisdiction. Pursuant to Article 5 of the Choice of Court Convention, the CCA shall not affect the rules on jurisdiction related to the subject matter or to the value of claim and on the internal allocation of jurisdiction among the courts of a contracting state. All those rules are of a mandatory nature.[302]

Mandatory jurisdiction provisions vary in different countries. For example, China mandates that a CCA should not violate the provisions of tier jurisdiction or exclusive jurisdiction of Chinese

297. HARTLEY & DAGOUCHI, *supra* note 142, at 61.

298. Choice of Court Convention, *supra* note 20, art. 6(c).

299. HARTLEY & DAGOUCHI, *supra* note 142, at 61.

300. *Id.* at 61.

301. For general discussion on mandatory rules in the context of choice of law, see Zhang, *Rethinking Contractual Choice of Law*, *supra* note 33, at 855–60.

302. *See* Convention on Choice of Court Agreements, art. 5(3).

courts.[303] Tier jurisdiction is the jurisdiction allocated among courts in China for the first instance trial, which is also called court level jurisdiction.[304] The exclusive jurisdiction means that for certain cases only Chinese courts may exercise jurisdiction, and any foreign jurisdiction over those cases is prohibited.[305]

The U.S. Supreme Court in *Atlantic Marine Construction Company v. United States District Court* upheld a motion to transfer under 28 U.S.C. 1404(a).[306] The case concerned the procedure available for a defendant in a civil case who seeks to enforce a forum selection clause.[307] The issue was whether the lower court erred in refusing to transfer the case, despite the valid forum selection clause.[308] Reversing the lower court, the Supreme Court held that when the chosen court under a forum selection clause is a federal court in a different federal district, 28 U.S.C 1404(a) governs.[309] According to

303. *See* Civil Procedure Law of the People's Republic of China (2017 Amendment), art. 34 ("Article 34: The parties to a contractual dispute or any other property dispute may agree in writing to be subject to the jurisdiction of the people's court at the place having connection with the dispute, such as where the defendant is domiciled, where the contract is performed, where the contract is signed, where the plaintiff is domiciled or where the subject matter is located, etc., provided that such agreement does not violate the provisions of the Law regarding court-level jurisdictions and exclusive jurisdictions."). A full text of the Civil Procedure Law in English is available at https://cicc.court.gov.cn/html/1/219/199/200/644.html.

304. Courts in China consist of four tiers (levels): trial court, intermediate court, high (provincial) court, and supreme court. The judicial proceeding contains two instances: trial and appeal. Although the trial courts are the basic courts of jurisdiction over most cases for the first instance trial, each of the higher tier courts may take a case at first instance depending on the money amount involved in controversy or significance of the case. Judiciaries Worldwide, China, https://judiciariesworldwide.f(jc.gov/country-profile/china (last visited Feb. 23, 2025).

305. Under Article 266 of the Civil Procedure Law of China, an action instituted for a dispute arising from the performance in the People's Republic of China of a Sino-foreign equity joint venture contract, a Sino-foreign cooperative joint venture contract or a contract for Sino-foreign cooperative exploration and development of natural resources shall come under the jurisdiction of the people's courts of the People's Republic of China. Civil Procedure Law of the People's Republic of China (2017 Amendment), art. 266.

306. Atl. Marine Constr. Co. v. United States Dist. Ct., 571 U.S. 49, 68 (2013).

307. *Id.*

308. *Id.* at 62.

309. *Id.* at 62–63.

the Supreme Court, whether a venue is proper depends on whether the statutory requirements are met, irrespective of any forum selection clause.[310]

4. Rule of Separability

Separability (or severability), also known as the rule of independence,[311] is a theory under which a forum selection clause, like a choice of law clause or arbitration clause, is considered entirely separate from the underlying contract.[312] Under this theory, when the underlying contract's validity and enforceability are questioned, the CCA contained in the contract shall remain intact.[313] Thus, an attack on the contract in whole or in part will not affect the CCA itself, which means that in order to challenge a CCA, a specific assertion must be made against the agreement.[314]

The Choice of Court Convention provides a rule of separability. According to Article 3(d) of the Convention, "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."[315] The validity of an exclusive CCA cannot be contested solely on the ground that the contract of which it forms is not valid.[316] Therefore, the validity of the CCA must be determined independently. Consequently, the underlying contract could be held invalid "without depriving the choice of court agreement of validity."[317] But, to make a specific

310. *Id.* at 50.

311. GARY BORN, INTERNATIONAL ARBITRATION AGREEMENTS, 190 (Wolters Kluwer-Aspen Publishers 2d ed. 2015) [hereinafter BORN, INTERNATIONAL ARBITRATION AGREEMENTS]; Ronán Feehily, *Separability in International Commercial Arbitration; Confluence, Conflict, and the Appropriate Limitations in the Development and Application of the Doctrine*, 34 ARB. INT'L 355–83 (Sept. 2018).

312. *See* MILLS, *supra* note 1, at 100–01; *see also* BORN, INTERNATIONAL ARBITRATION AGREEMENTS, *supra* note 311, at 190.

313. *See* RONALD BRAND & PAUL HERRUP, *supra* note 178, at 47 (explaining how CCAs are not wholly invalid if the underlying contract is invalid).

314. *Id.*

315. Convention on Choice of Court Agreements, art. 3(d).

316. *Id.*

317. HARTLEY & DAGOUCHI, *supra* note 142, at 53.

challenge to the CCA, the ground on which the underlying contract is invalid may equally apply.[318]

B. Interpretation of Choice of Court Agreements

Enforcement of a CCA often depends on how it is to be interpreted. Although it may overlap with determination of the validity issue, the interpretation, as noted, primarily deals with such enforcement matters as (1) what effect a CCA should have and (1) the coverage of the CCA.[319] The first matter involves the exclusivity of the CCA and the second matter is about the scope of it. Closely related to those two matters is the law applicable to CCAs.

1. Effect of Choice of Court Agreements

The effect of a CCA often involves whether the parties "have agreed to litigate their dispute exclusively" in the chosen court, or they "have merely consented to jurisdiction or venue" in the chosen court.[320] As a matter of interpretation, this question would need to be dealt with at the very beginning of the litigation because it determines whether a non-chosen court may have valid jurisdiction. If the choice is exclusive, the jurisdiction would rest only with the chosen court unless exceptions apply. Otherwise, a court other than the chosen court may take the jurisdiction as well.

Determining of the effect of a CCA is largely dependent on the presumption under which an interpretation should be made. As noted, under the presumption of exclusivity, the CCA is deemed exclusive unless the parties have indicated otherwise.[321] In contrast, if an interpretation is made on the presumption of non-exclusivity, the CCA will be considered non-exclusive unless the court ascertains the parties' intent to the contrary.

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318. *Id.*

319. In addition to the exclusivity and scope, the choice of law, effect on third parties, and the relationship between state and federal courts may also be deemed interpretive issues concerning CCAs. For purposes of this Article, those issues are addressed separately in other parts. *See supra* Sections IV.*B*.1, IV.*B*.2; *infra* Section V.*A*–*F*.

320. Coyle, *Interpreting Forum Selection Clauses*, *supra* note 25, at 1795.

321. *See supra* Parts II, III.

In contract theory, interpretation is generally defined as "a process by which a court ascertains the meaning that it will give to the language used by the parties."[322] A rudimental rule of interpretation is the plain meaning rule, which requires that a term or clause of a contract be interpreted using the ordinary meaning of the term or clause or within the "four corners" of the contract.[323] The focus then is on the language.[324] As a common practice, when the language of a contract is found to be clear, the court will presume that the parties intended what they expressed.[325] In some courts, a contextual interpretation is preferred, indicating that the meaning of the language in question should be determined "in light of all of the surrounding circumstances."[326] However, if the language is ambiguous, certain extrinsic evidence may be used to ascertain its meaning.[327]

To determine the exclusivity of a CCA, both the presumptions of exclusivity and non-exclusivity look at certain language expressed by the parties.[328] The presumption of exclusivity requires courts to interpret whether the parties have expressly provided otherwise, which would render the CCA or forum selection clause non-exclusive.[329] The presumption of non-exclusivity will do the opposite: a CCA is interpreted to be non-exclusive absent clear language indicating otherwise.[330]

Under the Choice of Court Convention, the language of non-exclusivity must be expressly provided by the parties in the CCA. Because it is required that the non-exclusive CCAs be clearly stated, an expression of the parties to make the CCA non-exclusive must be contained in the agreement through its terms. In this context, no

322. FARNSWORTH, *supra* note 37, at 452.

323. *See* PERILLO, *supra* note 36, at 139.

324. *See id.*

325. *Id.*

326. FERRIELL, *supra* note 38, at 322.

327. *See* PERILLO, *supra* note 36, at 136–38 (discussing the plain meaning rule and how courts handle ambiguities in contracts).

328. Coyle, "*Contractually Valid" Forum Selection Clauses*, *supra* note 19, at 140; MILLS, *supra* note 1, at 96–97; *see also supra* Part III.

329. Coyle, "*Contractually Valid" Forum Selection Clauses*, *supra* note 19, at 140; MILLS, *supra* note 1, at 96–97; *see also supra* Part III.

330. Coyle, "*Contractually Valid" Forum Selection Clauses*, *supra* note 19, at 140; MILLS, *supra* note 1, at 96–97; *see also supra* Part III.

extrinsic evidence is needed to prove the non-exclusivity of a CCA. Note that the Choice of Court Convention contains a special provision that allows designation by the parties of the court or courts of a country with non-unified legal systems. Under Article 25(c) of the Convention, in relation to a contracting state in which two or more systems of law apply in different territorial units, any refence in the CCA "to the court or courts of the State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit."[331]

2. Scope of Choice of Court Agreements

The scope of a CCA often requires interpretation. At the heart of the scope issue is what disputes or claims the parties have agreed to include in their forum selection clause or CCA.[332] Whether the forum selection clause applies to contract claims or if it also covers certain non-contractual claims is a common dispute regarding the scope issue.[333] "[T]he language in the clause" is the determinative factor for ascertaining the scope.[334]

The interpretation of a CCA's scope differs from country to country. U.S. courts have struggled with phrases used in forum selection clauses when identifying and ascertaining the scope of those clauses. The phrases that often generate debates include "arising under," "arising hereunder," "arising out of," "arising from," "relating to," "in connecting with," "with reference to," "associated with," and "regarding."[335] In the meantime, words such as "all disputes," "disputes," "any dispute," "the claims," "any claim," etc. used by the parties also affect the determination of the scope of the forum selection clauses.[336]

Some courts interpreted the phrase "arising under" or "arising hereunder" as indicating a narrow scope, covering only the "disputes

331. Convention on Choice of Court Agreement, art. 25(c).

332. *See* BORN, INTERNATIONAL ARBITRATION AGREEMENTS, *supra* note 311, at 517 (addressing the scope issue in light of international arbitration agreement).

333. *See* Coyle, *Interpreting Forum Selection Clauses*, *supra* note 25, at 1803–04 (explaining that courts determine whether the choice of law clauses may govern contract, tort, and statutory claims).

334. *Id.* at 1803–04

335. *See id.* at 1805, n.56.

336. *See id.* at 1805.

and controversies relating to the interpretation of the contract and matters of performance."[337] Regarding the phrase "arising out of," some courts construed it to have "the same limited scope" as the phrase "arising under."[338] Other courts disagree, suggesting that "arising out of" is broader than "arising under."[339] Additionally, some courts have held the phrase "arising out of" is narrower than the phrase "relating to."[340] Although, some courts, have held this phrase is the "functional equivalent" of "relating to" or "in connection with," indicating a broader scope.[341]

While treating the clauses containing such language as "arising out of" or "arising hereunder" as "generic" forum selection clauses, an analysis identifies different interpretative methodologies developed in U.S. judicial practices.[342] Generally, a generic forum selection clause covers only contractual claims unless other factors such as the "same operative facts," "contract analysis," "existence of a contractual relationship," or a "hybrid" of all of the above.[343] But given the

337. In re Kinoshita & Co., 287 F.2d 951, 953 (2d Cir. 1961); *see also* Mediterranean Enters., Inc. v. Ssangyong Corp., 708 F.2d 1458, 1461 (9th Cir. 1983) (showing another instance where an arbitration clause used the phrase "arising hereunder").

338. Tracer Rsch. Corp. v. Nat'l Env't Servs., Co., 42 F.3d 1292, 1295 (9th Cir. 1994).

339. Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 92–93 (4th Cir. 1996).

340. *See* Coyle, *Interpreting Forum Selection Clauses*, *supra* note 25, at 1805, n.56 (first citing Huffington v. T.C. Grp. LLC, 637 F.3d 18, 23 (1st Cir. 2011); then citing Phillips v. Audio Active, Ltd., 494 F.3d 378, 389 (2d Cir. 2007)).

341. *Id.* (citing Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1361 (2d Cir. 1993)).

342. *See id.* at 1807.

343. *See id.* The interpretive methodologies that assign a scope to a generic forum selection clause are:

> 1. *Origination*. A generic forum selection clause never covers non-contractual claims because these claims do not originate in the contract.
>
> 2. *Same Operative Facts*. A generic forum selection clause covers non-contractual claims only when these claims arise out of the same operative facts as a parallel contract claim.
>
> 3. *Contract Analysis*. A generic forum selection clause covers non-contractual claims only when (a) the claims relate in some way to the interpretation of the contract, (b) the court must construe the contract to resolve the claims, i.e., read implied terms into it, or (c) the claims

interpretative chaos, some analysis suggests that to resolve the ambiguity concerning the scope of forum selection clauses, the courts make "informed guesses as to what *most* contracting parties *probably* would have wanted at the time of drafting to assign a meaning to the clause."[344]

C. Governing Law

Which law governs a CCA is a much more complicated issue because it involves the laws of all relevant countries. More specifically, the laws that may become applicable include the law of forum (the *lex fori*), the law selected by the parties through a choice of law clause, and the law that would be applied absent the parties' choice (the *lex causae*).[345] With respect to CCAs, the law of forum may refer to the law of the place of the chosen court or the law of the place of the court seized.

From the conflict of laws perspective, choice of court and choice of law are two separate but related issues. Generally, a choice of law clause does not function as a selection of forum, but it may be viewed, for example, as "evidence of purposeful availment" to establish personal jurisdiction.[346] On the other hand, a choice of forum clause does not necessarily mean a choice of the forum's law. In some countries, however, a choice of forum clause may be held as an

> cannot be adjudicated without determining whether the defendant is in compliance with the contract.
>
> 4. *Existence of a Contractual Relationship*. A generic forum selection clause covers non-contractual claims only when (a) the claims would not have arisen but for the contractual relationship between the parties, or (b) the claims have a direct relationship to the contract.
>
> 5. *Hybrid*. A generic forum selection clause covers non-contractual claims only when (a) they arise out of the same operative facts as a parallel contract claim, (b) they require contractual analysis, or (c) they depend upon the existence of a contractual relationship.

Id.

344. *Id.* at 1806.

345. *See* HAY ET AL., *supra* note 51, at 1147–48.

346. *Id.* at 1147.

implication of a choice of the forum's law,[347] although many other countries require that a choice of law be expressly made.[348]

When handling a forum selection clause or CCA, a court often encounters such questions as (1) whether the clause or agreement is valid; (2) whether the clause or agreement, though valid, is enforceable; and (3) whether the clause or agreement applies to the claim or controversy at issue.[349] The questions involve validity, enforceability, and applicability of the clause or agreement respectively.[350] To answer those questions, the court must first ask which law governs.[351]

There are two inquiries related to deciding the governing law. The first inquiry is which law the court applies.[352] This inquiry looks to the applicable law externally to determine which country or state law should be applied; the determination is normally made through a choice of law analysis (an analysis under applicable choice of law rules).[353] The second inquiry is what law the court applies.[354] The "what law" inquiry requires an internal examination to determine which applicable law the "first inquiry" refers.[355]

More specifically, the second inquiry is whether the applicable law determined would mean the "whole law," which includes choice of law rules, or refers only to substantive law (or local law).[356] If the

347. *Id.* at 1148.

348. In China, for example, under the Choice of Law Statute, a choice of law by the parties must be made expressly, and no implied or tacit choice is allowed. *See* Mo Zhang, *Codified Choice of Law in China: Rules, Processes and Theoretic Underpinnings*, 37 N. C. J. INT'L. & COM. REG., 83, 118 (2011) [hereinafter Zhang, *Codified Choice of Law in China*].

349. *See* Symeonides, *What Law Governs Forum Selection Clauses*, *supra* note 1, at 1120.

350. *See* Symeonides, *What Law Governs Forum Selection Clauses*, *supra* note 1, at 1120–21.

351. *See id.* at 1120.

352. *See id.*

353. *See id.* at 1120, 1126–27.

354. *See id.* at 1120, 1126–28.

355. *See id.*

356. *See* Joseph Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws: A Study of Problems Involved in Determining Whether or Not the Forum Should Follow Its Own Choice of a Conflict-of-Laws Principle*, 14 S. CAL. L. REV. 221, 254–55 (1941).

choice of law rules are included, a "*renvoi*" situation may occur.[357] "Renvoi," the French word for "return,"[358] is choice of law jargon that refers to situations where the law of a foreign jurisdiction—directed by the choice of law of a forum—that will be applied is viewed to mean the entire law or whole law of that jurisdiction, including choice of law rules, if the forum and foreign jurisdiction follow different choice of law rules, the applicable law may be "remitted" to the law of the forum or "transmitted" to the law of a third jurisdiction.[359]

In American conflict of laws, *renvoi* is generally rejected with certain exceptions. Under section 8 of the *Conflict of the Law Restatement (Second)*, when "directed by its own choice-of-law rule to apply 'the law' of another state, the forum applies to the local law of another state."[360] The "local law" is defined in the Restatement as "a state's law exclusive of its choice-of-law rules."[361] There are limited exceptions under the Restatement to the section 8 rule, including "validity and effect of a transfer of interests in land," "validity and effect of a transfer of interests in a chattel," and "succession to interests in movables."[362]

The law governing a forum selection clause or CCA varies depending on the issues involved and the choice of law rules applied by the forum. The law to be applied would be both issue specific and choice of law rule specific. For example, the validity of a forum selection clause may be determined by the law of the place of the chosen court, the law of forum (the court seized), the law of the place of contract, the law of the state that has the closest connection with or

357. Symeonides, *What Law Governs Forum Selection Clauses*, *supra* note 1, at 1127.

358. *See* Cormack, *supra* note 356, at 249.

359. *See* Royal E. Thompson, *Conflict of Laws - Renvoi Theory - Conflicts Restatement*, 35 MICH. L. REV. 1298, 1300 (1937). *See generally*, Ernest Lorenzen, *The Renvoi Doctrine in the Conflict of Laws—Meaning of "the Law of a Country"*, 27 YALE L. J. 509 (1917–1918).

360. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8(1) (AM. LAW. INST. 1988).

361. *See id.* cmt. a.

362. *See id*. cmt. b.

the most significant relationship to the case, or the law chosen by the parties.[363]

As noted, the Choice of Court Convention separates the validity issue from other issues that may affect CCAs. Under Article 5 of the Choice of Court Convention, the issue as to whether a CCA is null and void or if the validity of the agreement is to be determined under the law of the state of the chosen court.[364] To determine the validity of the agreement, the law of the state of the chosen court is understood to include choice of law rules of that state.[365] In other words, the provision of Article 5 of the Choice of Court Convention does not exclude "*renvoi*," which means that under the choice of law rules of the chosen forum's state, the law applied when determining validity of the agreement may be the law of a state to which the choice of law rules refer.[366]

But the Choice of Law Convention makes the capacity issue, though a matter of validity, subject to both the law of the state of the chosen court and the law of the state of the court seized. Except for validity, the court seized, authorized by Article 6 of the Choice of Court Convention, may determine under its own law whether an effect should be given to the CCA.[367] More specifically, the court seized may decide not to enforce the CCA on the grounds of "manifest injustice," that it is "manifestly contrary to the public policy," or for "exceptional reasons beyond the control of the parties."[368]

However, the Choice of Court Convention contains no provisions on the law applicable to the interpretation of CCA. Article 6(e) of the Convention allows the court seized to take the case when

363. *See* Symeonides, *What Law Governs Forum Selection Clauses*, *supra* note 1, at 1122.

364. *See* Convention on Choice of Court Agreements, art. 5(1).

365. *See* HARTLEY & DAGOUCHI, *supra* note 142, at 31, 55.

366. *See id.* ("Thus, if the chosen court considers that the law of another state should be applied under its choice-of-law rules, it will apply that law."). To illustrate, under the Convention, the validity of a CCA should be governed by the law of the state of chosen court. But under the choice of law rule of the state of the chosen court, the validity of a CCA shall be determined by the law of the place where the agreement was made. Thus, if the agreement is concluded in the state of the court seized or forum state, the forum state law will be applied instead. However, if the agreement is made in a third state, the law of the third state will apply.

367. Convention on Choice of Court Agreement, art. 6(b).

368. *Id.* at art. 6(c)(d).

the chosen court has decided not to hear it.[369] But Article 6 is unclear as to what should constitute the reasons for a chosen court's decision not to hear the case. One possible reason for the chosen court to throw the case out is that the chosen court interprets the claims as falling outside of the scope of the CCA. Thus, what remains is the question of whether the interpretation is made under the law of the state of the chosen court or the law selected by the parties in the contract.

Another choice of law issue relates to the law chosen by the parties to govern their CCA. Given the rule of separability, it is possible that the forum selection clause and the underlying contract are governed by different laws.[370] The question then is whether the CCA could be governed by the law chosen to govern the underlying contract if the parties have not made a separate choice of law applicable to the CCA. Often the choice of law clause governing the underlying contract applies to the jurisdiction clause, too, unless the parties specifically indicate otherwise.[371] Other countries, however, take a different approach requiring a specific choice of law by the parties to govern dispute settlement clauses.[372]

369. *Id.* at art. 6(e).

370. Symeonides, *What Law Governs Forum Selection Clauses*, *supra* note 1, at 1121; Clermont, *supra* note 2, at 651.

371. For example, in the 2020 landmark case of *Enka v. Chubb*, the UK Supreme Court held that the express choice of law maintained in the main contract would extend to the jurisdiction clause. [2020] UKSC 38, available at https://www.supremecourt.uk/cases/uksc-2020-0091. Similarly, in the 2023 case of *China Railway (Hong Kong) Holding Limited v. Chung Kin Holdings Co. Limited*, a Hong Kong Court ruled that if a dispute resolution clause does not specify a choice of law, the express choice of law clause of the underlying contract generally will apply to the dispute resolution clause as well. [2023] HKCFI 132; *see* Morrison Foerster Client Alert, *Hong Kong Court Confirms that the Governing Law of the Underlying Contract Will Apply Where the Dispute Resolution Clause Is Silent on the Choice of Law*, (May 5, 2023), https://www.mofo.com/resources/insights/230505-hong-kong-court-choice-of-law.

372. In China, under Article 18 of the Choice of Law Statute, the parties may by agreement choose the law applicable to their arbitration agreement. If the parties make no such choice, the law of the place where the arbitration body is situated or the law of the place of arbitration shall apply. Zhang, *Codified Choice of Law in China*, *supra* note 348, at 152 (Appendix). According to the SPC's interpretation, if the parties have neither selected the law applicable to the arbitration agreement, agreed on the arbitration institution or the place of arbitration, or the agreement is unclear, the people's court may apply the laws of the People's Republic of China to determine

U.S. courts have yet to reach a consensus on the law governing CCAs, and, as such a mess remains in finding the answers to the questions arising from the determination of the law.[373] The scenarios facing American courts on the law governing forum selection clauses can be divided into three categories: action in the (1) chosen court, (2) court seized with a choice of law clause, and (3) court seized without a choice of law clause.[374] The governing law in each of these categories differs.[375]

First, in an action at a chosen court, the forum law is usually applied.[376] Second, if an action took place in the court seized, the courts may apply the law (1) of the forum, (2) of the state of the chosen court, or (3) that governs the underlying contract.[377] The governing law of the underlying contract would be the law chosen by the parties if there was a choice of law clause in the contract, or the law determined by the court seized under its choice of law rules if there was no choice of law clause, or the choice of law clause was set aside.[378]

U.S. courts do not specifically address the validity issue because, as noted in *Bremen* and *Shute*, a choice of court clause is presumed to be valid.[379] Thus, the issue normally goes to enforceability. The cases reveal that the enforceability of a CCA is generally governed by the law of forum—the court chosen or the court seized.[380] This practice is based on the notion that enforceability is a procedural issue.[381] For interpretation questions, many courts apply the

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the validity of the arbitration agreement. SPC, *Interpretation on Several Issues Concerning the Application of the Law on the Choice of Law Statute*, (Dec. 29, 2012) Art. 12, https://cicc.court.gov.cn/html/1/218/62/84/2131.html.

373. *See* Clermont, *supra* note 2, at 652; *see also* Symeonides, *What Law Governs Forum Selection Clauses*, *supra* note 1, at 1130.

374. *See* Symeonides, *What Law Governs Forum Selection Clauses*, *supra* note 1, at 1122.

375. *Id.* at 1121–22.

376. Symeonides, *What Law Governs Forum Selection Clauses*, *supra* note 1, at 1122–26.

377. *Id.* at 1126.

378. *Id.* at 1135.

379. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972); Carnival Cruise Lines v. Shute, 499 U.S. 585, 591 (1991).

380. *See Bremen*, 407 U.S. at 10; *Shute*, 499 U.S. at 591.

381. Symeonides, *What Law Governs Forum Selection Clauses*, *supra* note 1, at 1157; *see also* Clermont, *supra* note 2, at 655.

law chosen by the parties under a choice-of-law clause, but other courts stay with the law of forum despite the choice of law clause.[382]

Given its complexity and lack of uniformity, the governing law of CCAs has been an issue leading to "far more confusion than is optimal or justifiable" confronted by the courts.[383] The Choice of Court Convention provides a good opportunity to improve this situation. This Article suggests the following approaches to provide clarity and lessen the complexity of the law governing CCAs.

First, the validity of an exclusive CCA is governed by the law of the state of the chosen court, including the applicable choice of law rules of the state.[384] When the parties by agreement choose a court located in a particular state, the legality of their choice is expected to be subject to the law of that state, and the chosen court shall then apply the law of its own state. Doing so protects the parties' expectations and ensures that the chosen court's jurisdiction is valid under the chosen court's law. Additionally, the inclusion of the choice of law rules of the chosen court's jurisdiction provides both flexibility and possibility for the chosen court to apply a foreign law under its choice of law rules.

Second, the enforceability of a CCA is governed by the law of the state of the court seized.[385] When a CCA is valid under the law of the place where the chosen court is situated, it will be enforced in the chosen court.[386] But it does not necessarily mean that the agreement will be enforced elsewhere.[387] On the contrary, whether a CCA is enforceable will be an issue in any court other than the chosen court.[388] Thus, the determination of the enforceability of a CCA would have to be made under the law of the non-chosen court's jurisdiction or the court seized.[389] If a CCA is found unenforceable, the non-chosen court's jurisdiction will then be justified.

382. *See* Symeonides, *What Law Governs Forum Selection Clauses*, *supra* note 1, at 1135–36; s*ee also* John Coyle, *Interpreting Choice-of-Law Clauses*, CONFLICT OF LAWS.NET: VIEWS AND NEWS IN PRIV. INT'L L. (Mar. 25, 2019), https://conflictoflaws.net/2019/interpreting-choice-of-law-clauses.

383. Clermont, *supra* note 2, at 673.

384. *Supra* Part IV.

385. *Supra* Part IV.

386. *Supra* Section IV.*A*.1–3.

387. *Supra* Section IV.*A*.1.

388. *See supra* Section IV.*A*.3

389. *Supra* Section IV.*A*.3

Third, interpretations of a CCA are governed by the law the parties chose within the CCA, or by the law provided in the choice of law clause of the underlying contract.[390] To ascertain the actual meaning of a disputed or ambiguous term or condition of the CCA, it is important to follow the intent of the parties as much as possible.[391] When the parties have agreed on the law applicable to the CCA or to the contract as a whole, they both intend to be bound by the law.[392] Therefore, an application of the law chosen by the parties as the interpretation of the CCA will best serve the parties' interests.

Fourth, absent the choice of law clause—or when the choice of law clause is invalid or unenforceable—interpretations are to be governed by the law identified under the choice of law rules of the place of the forum.[393] The forum in this context may refer to the chosen court or the court seized, depending on where the litigation takes place.[394] This is a "catch-all" approach that applies to the situation where there is no choice of law clause in the CCA or underlying contract, or there is an invalid or unenforceable choice of law clause.[395] As a last resort, the function of the "catch-all" approach is to avoid incompleteness of the law applicable to the interpretation of the agreement.

V. OTHER ISSUES RELATED TO THE EXCLUSIVITY OF CHOICE OF COURT AGREEMENTS

The presumption of exclusivity facilitates enforcement of CCAs, but "no court blindly enforce[s]" them.[396] In fact, almost every CCA is subject to judicial scrutiny. In many cases, a party to the CCA sought to sue in a non-chosen forum, which would require the court seized to decide whether the CCA should be recognized and enforced. The Choice of Court Convention provides a set of rules aimed at ensuring effective enforcement of the exclusive CCA.[397] But there are certain issues that need to be further addressed because of their possible

390. *Supra* Section IV.*A.*
391. *See supra* Section IV.*B.*
392. *Supra* Section IV.*B.*
393. *See supra* Section IV.*B.*
394. *Supra* Part IV.
395. *See supra* Part IV.
396. Sooksripaisarnkit & Garimella, *supra* note 117, at 23.
397. *See* Convention of Choice of Court Agreements.

impacts on the exclusivity of CCAs in both theory and practice. The major issues, among others, include forum *non-conveniens*, the connection requirement, asymmetric choice, floating choice, agreements of adhesion, as well as impacts on third parties.

A. Forum Non-Conveniens

Forum *non-conveniens* is a common law doctrine that allows a court under circumstances to "remit the parties to trial in another available form."[398] Providing courts with a discretionary power to decline jurisdiction, the doctrine is designed to help "avoid hardship on the defendant" that "can result from undue forum shopping,"[399] and to help courts "avoid conducting complex exercises in comparative law."[400] Some courts in civil law countries, however, do not have the discretion to deny jurisdiction because jurisdictional power is conferred by statute and may only be given up with statutory authorization.[401]

As discussed, the jurisdiction rule in Article 5 of the Choice of Court Convention does not permit a chosen court to deny jurisdiction on the ground of *forum non-conveniens*.[402] The denial of *forum non-conveniens* under Article 5 is based on the notion that the application of the doctrine would defeat the exclusivity of CCAs because it permits a court with jurisdiction (the chosen court) "to stay (suspend) or dismiss the proceedings if it considers that another court would be a more appropriate forum,"[403] and thus "can frustrate the operation of party choice."[404]

In the U.S., the doctrine of *forum non conveniens* is widely applied in federal courts and in most state court systems.[405] The

398. HAY ET AL., *supra* note 51, at 534.

399. *Id.* at 550.

400. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 251 (1981).

401. *See* ARTHUR VON MEHREN, ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW: A COMPARATIVE STUDY, 317 (2007); *see also* Louise Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 AM. J. COMPAR. L. 543, 549 (2005).

402. Choice of Court Convention, art. 5(2); *see* HARTLEY & DAGOUCHI, *supra* note 142, at 57.

403. HARTLEY & DAGOUCHI, *supra* note 142, at 57.

404. BRAND & HERRUP, *supra* note 178, at 12.

405. *See* Draft Uniform Act, *supra* note 224, at 3.

practice in American courts conflicts with Article 5 of the Choice of Court Convention pertaining to *forum-non-conveniens*.[406] A significant change would be expected in this area if the Choice of Court Convention applied in U.S. courts.[407] However, a closer look at the cases involved reveals two instances in which the doctrine of *forum non-conveniens* applies: cases taken in the chosen court and cases filed in the court seized.

In the first instance, the court dismisses the proceeding on the ground of *forum non conveniens* despite the exclusive CCA designating it the chosen court.[408] A study found that in several cases the dismissal was made on the ground that an exclusive CCA would not preclude the court from granting a *forum non conveniens* motion.[409] The reason for the dismissal is that a CCA "removes only the parties' private convenience interests from consideration, but not the various other private and public interests."[410] Those interests include, among others, the "convenience of witnesses, jurors, judges, and the judicial system."[411]

The second instance is where the court seized is asked to send the parties back to the court designated in a forum selection clause. In *Atlantic Marine*, the plaintiff initiated the action in federal district court in Texas, and the defendant asserted as a defense a forum selection clause within the contract that designated Virginia state court the litigation forum between the parties.[412] The defendant moved for dismissal or transfer of the lawsuit based on the forum selection clause, and alternatively, transfer of the case to federal court in Virginia under 28 U.S.C. 1404(a).[413]

In its reversal of the lower court decision denying the defendant's motion, the Supreme Court clarified that "the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*."[414] The Court

406. *See* Convention of Choice of Court Agreements, art. 5.
407. Draft Uniform Act, *supra* note 224, at 3.
408. *See* Heiser, *supra* note 150, at 1019.
409. *See* Heiser, *supra* note 150, at 1019 n.31.
410. *Id.* at 1020.
411. *Id.*
412. Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 49 (2013).
413. *Id.*
414. *Id.* at 60.

also held that section 1404(a) is "a codification of the doctrine of *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system."[415] According to the Court, section 1404(a) "was drafted in accordance with the doctrine of *forum non conveniens*, permitting transfer to a more convenient forum, even though the venue is . . . proper."[416] With regard to a nonfederal forum, section 1404(a) has no application, "but the residual doctrine of *forum non conveniens* 'has continuing application in federal courts.'"[417]

The Supreme Court ruling on *Atlantic Marine* conforms with its holding in *Piper* that convenience is the focus of the doctrine of *forum non-conveniens*.[418] Thus, the *forum non-conveniens* inquiry in American courts is routine upon a motion to continue, stay, dismiss, or transfer a case at both the federal and state levels. Since the jurisdiction rule under the Choice of Court Convention applies only to the chosen court, the conflict between American practice and the Convention rule would not be as significant as it might appear to be.

Therefore, a change in the area of *forum non-conveniens* in U.S. courts is manageable if Convention applies. In light of the benefits that the jurisdiction rule of the Convention would bring to the enforcement of CCAs, and to the promotion of international business transactions in general, it is a change worth making. Additionally, the Choice of Court Convention has a defined application scope and applies it only to Member States.[419] Thus, in cases where the Convention does not apply, a *forum non-conveniens* dismissal may still be viable in a chosen court whether or not there is an exclusive forum selection clause.[420]

B. Connection Requirement

Like in choice of law, an issue that frequently arises in choice of court is whether the chosen court must have a certain connection with the parties, transactions, or controversies. Put differently, the question is whether the parties may select a neutral forum for a dispute

415. *Id.*

416. *Id.*

417. *Id.* at 60–61.

418. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 (1981) ("[T]he central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient.").

419. Convention on Choice of Court Agreements, art. 2.

420. *See* Heiser, *supra* note 150, at 1020.

resolution. If a connection is required, a choice of neutral forum may not be given effect. A violation of connection requirement could be a validity issue or enforceability issue.[421] In either case, the connection, if required, is mandatory and may not be altered by the parties' agreement.

In many countries, the contractual parties are permitted to choose any law to govern their contract regardless of connection, but for a CCA to be legally effective, a connection must exist. In China, for example, under the Choice of Law Statute, the parties may expressly choose the law applicable to foreign-related civil relations without considering connection.[422] In respect to a CCA, the Civil Procedural Law requires that the parties choose the court in a jurisdiction that has an actual connection with the dispute, such as the defendant's domicile, the plaintiff's domicile, the place of the performance of contract, the place of the signing of contract, or the place of the subject matter of dispute.[423]

In the U.S. there is a different approach. In American conflict of laws, connection or relation are essential elements to contractual choice of law.[424] The parties to a contract may only choose the law of the state to which the contract "bears a reasonable relation,"[425] or with which the parties or transactions have a "substantial relationship" and "a reasonable basis for the parties' choice."[426] This connection requirement, however, does not seem to apply to CCAs.

In *Bremen*, the parties chose the London Court of Justice, a court of "neutrality," as the forum.[427] In upholding the choice, the Supreme

421. For example, if the validity of a CCA is governed by the law of the state of the chosen court, and connection is mandated by the law of that state, the lack of connection with the chosen court would render the CCA null and void, or the chosen court may refuse to take the case because of the violation of mandatory rule. From the perspective of the court seized, this would be an enforceability issue. The missing required connection would make the CCA unenforceable.

422. *See* Zhang, *Codified Choice of Law in China*, *supr*a note 348 (discussing China's Choice of Law Statute).

423. *See* Civil Procedure Law of the People's Republic of China (2017 Amendment), art. 34.

424. *See* Zhang, *Rethinking Contractual Choice of Law*, *supra* note 33, at 867–71.

425. U.C.C. §1-301 (AMER. L. INST. & UNIF. L. COMM'N 2022).

426. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. L. INST. 1971).

427. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 11–12 (1972).

Court emphasized that when a choice of forum "was made in an arm's length negotiation" and "absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts."[428] Later in *Shute*, the Supreme Court reiterated its ruling in *Bremen* and further held that forum selection clauses contained in form passage contracts "are subject to judicial scrutiny for fundamental fairness."[429] Nothing here implicates that a connection with the chosen forum would be required.

In the Choice of Court Convention, the connection is not a required element for exclusive CCAs. But in consideration of different practices among countries, the Convention allows a Member State to make a declaration pertaining to connection requirements. According to Article 19 of the Convention, "[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."[430]

Article 19 renders it possible for a member state to impose connection restrictions on CCAs. In its draft Uniform International Choice of Court Agreement Act, the National Conference of Commissioners proposed two alternatives to the jurisdiction rule on the chosen court: (1) to treat connection as an issue of subject matter jurisdiction or (2) to consider it as a ground for a refusal to decide the dispute.[431] But since connection is not a requirement in the U.S. for CCAs, it is not necessary to require it for the purpose of Choice of Court Convention because doing so could add another barrier to the enforcement of CCAs.

428. *See id.* at 12.

429. Carnival Cruise Lines v. Shute, 499 U.S. 585, 595 (1991).

430. Convention on Choice of Court Agreements, art. 19.

431. *See* Draft Uniform Act, *supra* note 224 at 28 (explaining that alternative 1 is where a chosen court of a state does not have subject matter jurisdiction if, except for the choice of that court, there is no relationship between a state and the parties or the dispute, and alternative 2 is where a chosen court of a state may refuse to decide a dispute to which an exclusive CCA applies if, except for the location of the chosen court, there is no connection between a state and the parties or dispute.).

C. Asymmetric Choice of Court Agreement

An asymmetric CCA refers to a contractual clause that allows one party to bring a suit against another party in any jurisdiction but limits the other party to sue in only one exclusive jurisdiction.[432] Simply put, a CCA is asymmetric when the agreement is exclusive for one party but non-exclusive for the other.[433] The asymmetric jurisdiction clauses are often in financing documents, such as loan agreements or guarantees.[434] The purpose is, while restricting the borrower to take legal action only in the preferred jurisdiction, to give the lender some flexibility so that the lender may sue the borrower where the borrower is located, where the borrower conducts business, or where the borrower's assets are situated.[435]

Two questions concern asymmetric CCAs. First is whether it is valid and enforceable because the power of the parties to select a forum is imbalanced. In some jurisdictions, courts tend to invalidate asymmetric jurisdiction clauses because they view them as "one way" jurisdiction agreements.[436] In many jurisdictions, asymmetric CCAs are enforceable but with exceptions.[437] According to an observation by a British appellate court in *Etihad Airways PJSC v. Flother*, the past quarter-century has witnessed widespread use of the asymmetric clause.[438] The court also opined that a common reason for the acceptance of the asymmetric jurisdiction clause is that it serves a legitimate commercial purpose.[439]

In China, asymmetric jurisdiction agreements are generally enforced. In cases where a jurisdiction agreement signed by the parties

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432. *See* HARTLEY & DAGOUCHI, *supra* note 142, at 51.

433. *See* MILLS, *supra* note 1, at 163–64.

434. *See* Sooksripaisarnkit & Garimella, *supra* note 117, at 33.

435. *See id.* at 33–37.

436. MILLS, *supra* note 1, at 159.

437. *See* Louis Merrett, *The Future of Asymmetric Jurisdiction Agreements*, 67 INT. COMP. L. Q. 37, 44 (2018) ("[A] mere imbalance will make no difference to enforcement."); *see also* MILLS, *supra* note 1, at 163 ("The English courts have held that even a one-way jurisdiction agreement that purported to confer jurisdiction on every court in the world for the benefit of only one party, while the other party would be subject to a single exclusive forum, would not violate the principle of equal access to justice.").

438. Etihad Airways PJSC v. Flöther [2020] EWCA (Civ) 1707, (Eng.).

439. *See id.*

clearly states that one party may file a lawsuit in a court from more than one country, while the other party may only file a lawsuit in a specific country, if one party moves to invalidate the agreement on the ground of obvious unfairness, the court will not grant the motion. However, exceptions exist if the asymmetric jurisdiction agreement involves the rights and interests of consumers or employees, or if it violates the exclusive jurisdiction of the court provided by the Civil Procedure Law.[440] Similarly, in Japan, asymmetric CCAs are enforceable as long as they are validly formed, unless enforcement would harm consumer interests under Japanese law.[441]

The second question is whether an asymmetric CCA is exclusive or should be deemed exclusive. In most cases, courts treat this question as a matter of interpretation, which means that the agreement by itself will not be presumed or deemed exclusive.[442] For example, in *Etihad Airways PJSC v. Flother*, the choice of court clause in a loan agreement reached by the parties contained two parts: an exclusive agreement to claims brought by borrower and non-exclusive agreement to claims brought by the lender.[443]

When a dispute occurred, the borrower started proceedings in Germany despite the jurisdiction agreement providing that the English court had exclusive jurisdiction over the related claim made against the lender.[444] The lender then started proceedings in England.[445] The borrower applied for the English proceedings to be stayed on the basis that the German court was first seized.[446] The trial court dismissed the borrower's application.[447] On appeal, the Court of Appeal denied, holding that the asymmetric jurisdiction agreement is exclusive regarding the claim brought against the lender.[448]

440. *See* the SPC, *supra* note 132, at § 1(2).

441. *See* Takahashi, *supra* note 131, at 105.

442. *See* Sooksripaisarnkit & Garimella, *supra* note 117, at 33–37.

443. Etihad Airways PJSC v. Flöther [2020] EWCA (Civ) 1707 [68].

444. *Etihad Airways PJSC* ¶ 63.

445. *Id.* ¶ 14.

446. *Id.* ¶ ¶ 13–16.

447. *Id.* ¶ 16.

448. *See id.* (The Court of Appeal interpreted the asymmetric jurisdiction clause in light of Article 31(2) of Brussels Recast, noting that there is nothing in the wording of Article 31(2) Brussels Recast to suggest that asymmetric agreements fall outside the scope of an exclusive jurisdiction agreement. The Court of Appeal also noted that

In other jurisdictions, the exclusivity of asymmetric CCAs might be precluded. In *Industrial and Commercial Bank of China (Asia) Ltd v. Wisdom Top International Ltd*, a Hong Kong court held that an asymmetric jurisdiction clause would not be regarded as an exclusive jurisdiction clause.[449] The decision was made on the court's interpretation of the Ordinance implementing the 2006 Arrangement for recognition and enforcement of judgments between Mainland China and Hong Kong.[450] The purpose of the Arrangement is to facilitate judicial cooperation between the two parts of the country.[451]

However, some courts have held that for purposes of the Choice of Court Convention, asymmetric CCAs are considered non-exclusive.[452] The idea is that in order for the Convention to apply, a CCA "must be exclusive irrespective of the party bringing the proceedings."[453] On this ground, the asymmetric CCA is not exclusive because it excludes "the possibility of initiating proceedings in other courts for only one of the parties."[454] Nevertheless, the rules of the Convention on recognition and enforcement may apply to asymmetric CCAs if "the States in question have made declaration under Article 22" of the Convention.[455]

"[i]f asymmetric agreements are not included within the ambit of Article 31(2), the path remains wide open to the kind of abusive litigation tactics which Article 31(2) was admittedly designed to counter.") (Article 31(2) of Brussels Recast provides: "Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement." *See* BIR, *supra* note 122, art. 31(2).

449. [2020] HKCFI 322 (C.F.I.), available at https://vlex.hk/vid/industrial-and-commercial-bank-847717053.

450. *Id.*

451. *See* Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region, H.K.-China, Jul. 14, 2006, Ordinance Cap. 597 (H.K.) (The Arrangement seeks to establish a more comprehensive mechanism for reciprocal recognition and enforcement of judgments in civil and commercial matters between Hong Kong and the Mainland).

452. *See* HARTLEY & DAGOUCHI, *supra* note 142, at 51.

453. *Id.*

454. *Id.* at 85.

455. *Id.* at 51.

D. Floating Choice of Court Agreement

A floating CCA is a forum selection clause that subjects a contracting party to jurisdiction and venue based on a "mutable fact" of the case.[456] Depending on the nature of the fact, the forum could be a court in one country if one party initiates a claim, or in another country if the other party initiates the claim.[457] It could also be in a country where an assignee of one contracting party is located even if the assignee is unknown or unidentified at the time of the contract.[458] The purpose of a broader floating clause is to allow litigation in any place one contracting party chooses upon a dispute.[459]

The distinctive feature of floating clauses is that a chosen court, though agreed on by the parties at the time of contract, may only be ascertained when a certain fact is present or a lawsuit is initiated. Thus, a question that often arises with a floating forum selection clause is whether a forum has been selected.[460] Although some reasons may justify a floating forum selection clause,[461] the uncertainty of such

456. *See* John Coyle & Robin Effron, *The Puzzle of Floating Forum Selection Clause*, 56 N.Y.U. J. INT'L L. & POL. 183 (2023).

457. *See e.g.*, Abbott Lab'ys v. Takeda Pharm. Co., 476 F.3d 421 (7th Cir. 2007). In that case, a forum selection clause in the contract provided that in the event of a dispute between the parties arising from, concerning or in any way related.

458. Preferred Capital, Inc. v. Power Engineering Group, Inc., 860 N.E.2d 741 (Ohio 2007). The case involved a commercial lease. The lease agreement contained a forum selection clause, stating: "This agreement shall be governed by the laws of the State in which Renter's principal offices are located or, if this Lease is assigned by Renter, the State in which the assignees' principal offices are located and all legal actions relating to this Lease shall have a venue exclusively in a state or federal court located within that State." *Id. See also* Coyle & Effron, *supra* note 456, at 2.

459. *See* Coyle & Effron, *supra* note 456, at 3 ("[Some] floating clauses stipulate that litigation shall occur in any jurisdiction selected by one of the parties after the dispute arises.").

460. *See* Paul Hartman Cross & Hubert Oxford, IV, *"Floating" Forum Selection and Choice of Law Clauses*, 48 S. TEX. L. REV. 125, 135 (2006).

461. *See e.g.*, John F. Coyle, *Floating Forum Selection Clauses*, CLS BLUE SKY BLOG (May 15, 2023), https://clsbluesky.law.columbia.edu/2023/03/15/floating-forum-selection-clauses ("There are at least three reasons . . . . First, a floating clause may provide the company with an edge in future litigation. . . . Second, a floating clause may facilitate the creation of a market for contracts. . . . Third, a floating clause may help foreign companies attract U.S. business.").

clause could "undermine the benefits that flow from enforcing the forum selection clause."[462]

Another question is whether a floating forum selection clause has an effect on exclusivity. Many have cast serious doubt that a forum selection clause, if floating, may satisfy the exclusivity requirements because the chosen forum is changeable after the contract is made, indicating that the clause lacks exclusivity.[463] U.S. courts have taken a different approach to the enforcement of floating CCAs. Those refusing to enforce a floating forum selection clause question the validity of the clause because they believe that the clause "fail[s] to identify a specific jurisdiction."[464]

E. Adhesive Choice of Court Agreement

A contract of adhesion, also called a standard contract or form contract, is a legal term referring to a contract that is prepared by one party in a printed form and entered into on a no-bargain or "take-it-or-leave-it" basis.[465] A contract of adhesion serves companies in mass production and distribution to minimize the potential risks arising from contracts.[466] Today, contracts of adhesion are commonly used in consumer Internet transactions.[467] Most online transaction contracts contain a forum selection clause.[468] The consumer party consents to the forum selection clause by simply clicking a pre-set "agree" box on

462. *Id.*

463. Cross & Oxford, *supra* note 460, at 141 ("A 'floating' clause restricts litigation to the forum of the assignor, and then it restricts litigation to an unnamed forum of the assignee once the agreement is assigned. The change of the required forum may indicate lack of exclusivity . . . .").

464. *Id.* at 139–40.

465. Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 AKRON L. REV. 123, 123 (2008) [hereinafter Zhang, *Contracts of Adhesion and Party Autonomy*].

466. *Id.* at 124.

467. *See* Barry Werbin, *Ensuring Enforceability of Online E-commerce Agreements*, 34 NYSBA INSIDE 45, 45 (2016), https://www.herrick.com/content/uploads/2016/06/Ensuring-Enforceability-of-Online-E-commerce.pdf (discussing how online terms and conditions and terms of use are challenged as contracts of adhesion).

468. *See id.* (discussing the ubiquitous nature of forum selection clauses embedded in the terms of service portion of an online contract).

the screen.[469] Other types of contracts that often use standard forms are insurance contracts as well as franchising agreements.

The question often raised concerning forum selection clauses in contracts of adhesion is whether the clause is valid and enforceable. In the U.S., the Supreme Court in *Shute* rejected the Court of Appeal's holding that a non-negotiated forum selection clause is never enforceable simply because it was not the subject of bargain.[470] Examining the validity and enforceability of the clause on the basis of fairness and reasonableness, the Court held that "[i]ncluding a reasonable forum clause in such a form contract . . . may be permissible for several reasons . . . ."[471] For one, "a clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, [thereby] sparing litigants the time and expense . . . and conserving judicial resources . . . ."[472] Thus, despite the adhesive nature of the contract, *Shute* followed *Bremen* in that a CCA is per se valid. More precisely, *Shute* extended the *Bremen* rule to the CCA in contracts of adhesion.[473]

In other countries, a forum selection clause contained in a standard form contract is enforceable but subject to certain restrictions. In the EU, under the BIR (recast), a consumer, an employee, or an insured may only be sued in the country of their domicile.[474] In Australia, the forum selection clause may not trump the policy of protecting franchisees and insured parties.[475] For example, any jurisdiction agreement, other than those that designate the state or

469. *See* Zhang, *Contracts of Adhesion and Party Autonomy*, *supra* note 465, at 125 ("The most common contract forms . . . employed electronically are . . . 'click-wrap' agreements . . . . Click-wrap[] [agreements] refer to the electronic form agreements set up by one party to which the other party may assent by clicking on the 'I agree' icon . . . .").

470. Carnival Cruise Lines v. Shute, 499 U.S. 585, 593–95 (1991).

471. *Id.* at 593.

472. *Id.* at 593–94.

473. *See* Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After* Carnival Cruise*: A Proposal for Congressional Reform*, 67 WASH. L. REV., 55, 72 (1992) ("'Common Sense' . . . dictate[s] that enforcement of form contracts must be possible without showing actual bargaining.").

474. *See* BIR, *supra* note 122, at arts. 14, 18, 22 (discussing some limitations placed on suing an individual in the European Union).

475. Marshall & Keyes, *supra* note 168, at 279.

territory in which the franchised business is located, would have no effect because a franchisee is typically not as well-resourced as a franchisor and thus is considered the weaker party.[476]

In China, courts employ a "reasonableness" standard for form contracts regarding cross-border consumer online shopping. The "reasonableness" standard consists of two rules: the reasonable notice rule and the convenience rule.[477] Under the reasonable notice rule, when an online business platform fails to provide consumers with reasonable notice of the jurisdiction clause in its standard cross-border shopping contract, the court will grant the consumer's request to remove the jurisdiction clause.[478] The convenience rule applies where the jurisdiction clause instructs that the lawsuit shall be filed in a court of a country other than the country where the consumer is domiciled, which unreasonably increases the cost of seeking relief for consumers. In these situations, the court should, upon the request of the consumers affected, invalidate the jurisdiction clause.[479]

476. *Id.*

477. Minutes of the Symposium, *supra* note 206, at § I(3).

478. *Id.* The statutory source of the "reasonable notice" rule is Article 496 of the Civil Code of China, which provides:

> Upon concluding a contract, where a standard clause is used, the party providing the standard clause shall determine the parties' rights and obligations in accordance with the principle of fairness, and shall, in a reasonable manner, call the other party's attention to the clause concerning the other party's major interests and concerns, such as a clause that exempts or alleviates the liability of the party providing the standard clause, and give explanations of such clause upon request of the other party. Where the party providing the standard clause fails to perform the aforementioned obligation of calling attention or giving explanations, thus resulting in the other party's failure to pay attention to or understand the clause concerning his major interests and concerns, the other party may claim that such clause does not become part of the contract.

Code of the People's Republic of China (promulgated by Standing Comm. Nat'l People's Cong., May 28, 2020, effective Jan. 1, 2021), art. 496 (China).

479. *Id*. at art. 497. The convenience rule is derived from Article 497 of the Civil Code, which provides: "A standard clause is void [when] . . . the party providing the standard clause unreasonably exempts or alleviates himself from the liability, imposes heavier liability on the other party, or restricts the main rights of the other party." *Id.*

The exclusivity of adhesion CCAs is not a hotly debated issue because its validity and enforceability are mostly affected by policy concerns. In *Shute*, although the exclusive choice of court clause was the center of dispute, the Court did not question the exclusivity of the clause while determining its validity. This issue is also not addressed in the Choice of Court Convention, but the Convention excludes from its scope both consumer and employment contracts.[480] The justification is that consumers and employees are presumptively weaker than their counterparts, and thus a special protection is needed under the laws of the country involved.[481]

F. Choice of Court Agreement and Third Party

In the realm of contract law, a third party is a person who is not a party to a contract but is related to or affected by the performance of the contract. Under classic contract theory, only a person in "privity" can enforce the contract.[482] Privity refers to a relationship that exits between the contracting parties.[483] Under the theory of privity, a valid contract has effects on, or produces consequences for, the parties to the contract and does not externally affect others.[484] A settled principle in contract is that contracts may not be concluded to the detriment of a third party (*res inter alios acta alteri non nocet*).[485]

Generally, a contract may not create duties for, or impose obligations on, a third party without the effective consent of the third party.[486] But in several situations, a third party may be implicated in a contract. For example, the parties to a contract could agree to have the contract performed *for the benefit* of a third party, which makes the

480. Choice of Court Convention, at art. 2(1)(a)–(b).

481. Marshall & Keyes, *supra* note 168, at 278.

482. FERRIELL, *supra* note 38, at 878.

483. *Id.*

484. *See id.*

485. KLAUS PETER BERGER, THE CREEPING CODIFICATION OF THE NEW LEX MERCATORIA 385 (2d ed. 2010).

486. THE LAW REFORM COMMISSION OF HONG KONG (HKLRC) REPORT: PRIVITY OF CONTRACT 2, 16 (Oct. 25, 2005), available at https://www.hkreform.gov.hk/en/docs/rprivity-e.pdf. The privity doctrine, also known as the "third party rule," has two aspects. As a general rule, a person cannot acquire and enforce rights under a contract to which he is not a party; and a person who is not party to a contract cannot be made liable under it. *Id.*

third party a "third party beneficiary."[487] Another example is a situation where one of the parties to the contract transfers his rights to a third party. In this situation the third party may be an assignee if the transfer assigns the contractual rights without switching the party to the contract[488] or a new party to the contract if the transfer results in a novation or substituted contract.[489]

A third example occurs in a situation where a party who enters into a contract with the another is actually an agent of the real party to the contract.[490] A fourth example is a situation in which a contract is entered between a party to the underlying contract and the third party for the purpose of the fulfillment of the obligations provided in the underlying contract. Take a bill of lading ("B/L") as an example. A B/L is an agreement between shipper (seller) and carrier for the transportation of the goods covered by the contract between the shipper and consignee (buyer).[491] Another example is a secondary contract, like a guarantee agreement, which is premised on the existence of another contract and cannot exist independently.[492]

In any of the above situations, the common question is whether the third party should be bound by the contract at issue. If the answer to this question is positive, the next question is to what extent should the third party be subject to the terms and conditions provided in the contract involved. The third-party issue is not directly addressed in the Choice of Court Convention. However, the CCA consented to by the original parties may bind a third party who did not expressly consent to it if the third party takes over the rights and obligations of one of the original parties under national law.[493] In this scenario, the third party would be a beneficiary of the underlying contract who wants to enforce it. This practice is seen in Australia, Canada, New Zealand, and Hong Kong, where when a third party seeks to enforce a contract made for its benefit, the third party will be bound by the terms of the contract, including forum selection clauses.[494] But the questions as to whether

487. FERRIELL, *supra* note 38, at 877.

488. *See id.*

489. PERILLO, *supra* note 36, at 758.

490. MILLS, *supra* note 1, at 165.

491. *Id.*

492. Minutes of the Symposium, *supra* note 206 § I(4).

493. *See* HARTLEY & DAGOUCHI, *supra* note 142, at 51.

494. MILLS, *supra* note 1, at 167.

the third party is a beneficiary and the rights of a third-party beneficiary, is a matter of the law of the specific country.

Another situation arises where A and B have a contract with an exclusive CCA in favor of the court in X country, and B has a contract with C containing no forum selection clause.[495] In a lawsuit brought by C against B in the court of Y country based on B's contract with A, B wants to join A in the suit. If X and Y are all Member States of the Choice of Court Convention, the court in Y must suspend or dismiss the suit, even though Y's laws allow its court to exercise jurisdiction over A.[496] In this kind of situation, the "Convention would override the domestic law provisions" of a member State that might otherwise permit its court jurisdiction.[497]

If, however, the third party is not a beneficiary of, but related to, the underlying contract, the third party may not be bound by the forum selection clause in the underlying contract. In Bill of lading (B/L) cases, for example, the courts often view the terms of the B/L to prevail over the contract because, according to one commentary, the courts rely on the following reasons: (1) the B/L is usually prepared by the shipper; (2) the B/L usually comes after the contract and serves as an amendment to the contract; and (3) the B/L is a more specific agreement relating to an individual shipment.[498]

A guarantee agreement is another example. In China, courts treat guarantee agreements differently from the underlying contracts with respect to the forum selection clause, and enforce them separately. Therefore, if the main contract and the guarantee contract respectively specify the jurisdiction of the courts of different countries or regions, and the agreement does not violate the exclusive jurisdiction provisions of the Chinese Civil Procedure Law, the correct courts will be determined respectively according to the jurisdiction agreement.[499]

495. *See* HARTLEY & DAGOUCHI, *supra* note 142, at 59.

496. *Id.*

497. *Id.*

498. One analysis found that the courts tend to enforce the B/L terms over those in the underlying contract for several reasons. *Bill of Lading vs. Transportation Contract*, CHAUVEL & GLATT (June 12, 2019), https://www.chauvellaw.com/post/bill-of-lading-vs-transportation-contract.

499. *See* Minutes of the Symposium, *supra* note 206 § I(4).

VI. CONCLUSION

Premised on party autonomy, a CCA reflects the freedom enjoyed by the parties to select a forum as they desire to resolve disputes that may arise or have arisen in their international civil and commercial engagement. The agreement also represents the consent of the parties to be voluntarily subject to a particular jurisdiction pertaining to their multinational activities. An effective enforcement of CCAs helps maintain certainty and predictability—the two important variables in cross-border commercial transactions and other civil activities—and thus benefits the parties in meeting their expectations.

The exclusivity of the CCAs affects the nature and effect of forum selection. The presumption of exclusivity has become an internationally common practice that ensures the effectiveness of the parties' choice of jurisdiction and minimizes the risk of being dragged into unexpected forums. Since a CCA is what the parties bargained for in their negotiation on a dispute settlement mechanism, the presumed exclusivity of that choice, in essence, typically represents the intention of the parties, and recognition of such an intention is not only a mandate of party autonomy but also a desire under the freedom of contract.

The Choice of Court Convention is a product of harmonization of "civil and common law traditions,"[500] and is driven by the need to help "facilitate global transactions."[501] The Convention serves to bring "the international community closer than it has ever been to a reliable system" for effective enforcement of CCAs and for mutual recognition and enforcement of judgments entered thereby.[502] The rules set forth in the Convention, though not perfect, have established a legal framework well received in the international community that governs CCAs.[503]

As an initiator of the Choice of Court Convention,[504] the U.S. still seems to stay far away from joining the Convention. The U.S. is

500. Teitz, *supra* note 401, at 550.

501. *Id.* at 556.

502. William Woodward, Jr., *Saving the Hague Choice of Court Convention*, 29 U. PA. J. INT'L L. 657, 718 (2008).

503. *See* Born, *Hague Convention on Choice of Court Agreements*, *supra* note 139, at 2126.

504. *See* Teitz, *supra* note 401, at 544–45.

also not a party to any bilateral or multilateral agreements on the recognition and enforcement of foreign civil judgments.[505] However, that does not necessarily mean that nothing can be done in the U.S. to get existing laws adapted to the Choice of Court Convention. As discussed, the presumption of exclusivity of CCAs is not only a basic rule of the Convention, but also a well-accepted practice internationally.[506] Given the belief in the U.S. that the Choice of Court Convention is as a lasting document to the "vision of 'law and justice in a multi-state world,'"[507] joining the world trend is necessary and worth trying in the U.S.

505. Draft Uniform Act, *supra* note 224, at art. 1.

506. Draft Uniform Act, *supra* note 224, at art. 3.

507. Teitz, *supra* note 401, at 558.