The Hague Convention on Choice of Court Agreement:
Compromising the Differences in Judicial Principle between States

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Abstract

Unlike the arbitration clause which already has a broad recognition through the acceptance of New York Convention by States, the party’s choice of court agreement is still subject on the domestic law of the designated court to decide whether this court has jurisdiction or not. Moreover, judicial principles are different between States and there is no uniform law in this particular issue. This essay is aimed to discuss the possibility of the wide adoption of The Convention on Choice of Court Agreement by States.

Key Words: Choice of Court Agreement, Forum Non Conveniens, Lis Alibi Pendens.

1. Introduction

The Member States of the Hague Conference on Private International Law signed the Final Act of its Twentieth Session on June 30, 2005, which is including The Convention on Choice of Court Agreement1. Brand strongly believe that similar to the New York Convention2, this new Hague Convention will establish rules in order to enforce choice of forum agreement agreed by private party in settling disputes and rules for the recognition and enforcement the judgment of the chosen forum3.

However, the Hague Convention is not a “self executing” agreement, to enter into force it needs to be ratified by at least two States4. It recently remains as a non-binding international legal instrument. The fundamental differences in domestic judicial laws between states are the main obstacle to its broad acceptation. This essay

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4 Hague Convention, n1, Article 31.
is aimed to discuss the possibility of the wide adoption of the Hague Convention by States. It is argued that the Hague Convention can be widely accepted since it was designed to compromising the difference in jurisdictional principles between nations based on the spirit of judicial co-operation.

Part 2 of this essay will describe the burdens of choice of court clause application in an international business contract. Secondly differences in jurisdictional principles between nations in examine the parties choice of court agreement will first be discussed in part 3. A comparative study by scholars on forum non conveniences and lis pendens doctrine will be described briefly. This is followed by the scholar’s opinion on “public policy” that usually be considered by the court in enforcing foreign judgments. Part 4 will analyze several provisions of the Hague Convention to find out how it compromises the judicial principles differences as discussed in part 3. Finally, a conclusion on the acceptance of the Hague Convention by nations will be delivered.

2. The Choice of Court Clause

It is common in international business transaction that parties who enter into agreement also agree to a dispute settlement clause. This clause usually includes the choice of law and choice of forum provision. It shows the party’s strong and clear intention about what law is to be applied in interpreting the transaction as well as their intention to settle the dispute in the jurisdiction of a certain court jurisdiction. However, the intention of parties in contract might not always be accepted by the designated court. The court may refuse to hear the case on the “forum non convenience” ground, which is stated that another court would be a more convenient court because of the close connection of the parties with the court such as domicile of the party and place of the performance of the agreement\(^5\).

Therefore, the validity of the choice of forum clause in an international commercial agreement is subject to the law of the State on whether the designated court has jurisdiction or not. Baumgartner strongly agree with this principle and he further stated that “…the law applicable to transnational litigation is indeed primarily
domestic in nature\(^6\). As a result of its domestic character, Bell emphasizes that the lack of uniformity in the domestic law has encourage parties in dispute to do “forum shopping”\(^7\). This forum shopping action may occur for several reasons; firstly, a prospective plaintiff may not file a lawsuit against defendant in the chosen court as stated in the choice of court clause, because this court’s judgment on compensation will not satisfy plaintiff’s expectation. Secondly, the defendant that is being sued in a chosen court under the agreement may still have the chance to bring the same case to another court that is more desirable. Thirdly, another consideration that a party may move to another court instead of the chosen court is the fact that although the designated court agrees to hear the case, the foreign court may not recognize it, and therefore, it is unenforceable.

According to Silberman, such legal action taken by both parties to secure their interest in a dispute settlement have usually leaded to a parallel litigation, where two courts in different countries hear the same case with the same parties\(^8\). Moreover, Pring and Craig described that “…parallel proceedings are not only expensive, but they also pose complex strategic problems and present both the risk of conflicts between courts and inconsistent judgments, which can com-pound the issues in dispute even further”\(^9\). On the other hand, apart of disadvantages of the court proceedings as described above, Mo stated that the court still have advantages if compared with another means of dispute settlement such as arbitration, he firmly believes that the courts provides a “…convenient and powerful forums where disputes can be heard and where effective remedy can be sought”\(^10\). Therefore, it is obvious that although alternative dispute settlement offers many advantages and flexibilities, settlement of commercial disputes through courts will still be a significant means of dispute settlement in the business practice.

Unlike the arbitration clause which already has a broad recognition through the acceptance of New York Convention by States, the party’s choice of court clause is still subject on the domestic law of the designated court. Interestingly, as noted by


\(^9\) Mark Pring and Ryan Craig, Ibid n6.

Buxbaum that the U.S. Supreme Court in *Bremen v. Zapata Off-Shore Co.* in 1972 decided the choice of forum clause as prima facie valid and therefore, should be enforced\(^\text{11}\). Furthermore, Silberman found that although this U.S. Supreme Court judgment applied only as a standard ruling in admiralty cases, most of the state’s court in the United States have adopted this standard\(^\text{12}\). This U.S. standard is not necessarily be followed by all courts when adjudicating a choice of court clause, nevertheless it gives an example of recognition by a court on parties autonomy in contract.

The lack of standard in the U.S. Courts practice when dealing with choice of court clause has caused different judgment by many U.S. courts. Similar with the judgment in *Bremen* case as mentioned above, the U.S. Supreme Court in *Scherk v Alberto Culver Co.*\(^\text{13}\) also emphasised the importance of choice of forum clause. As cited by Buxbaum, the court noted that\(^\text{14}\):

> a contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is ... an almost indispensable preconditi

However, although in the above decision, U.S. Supreme Court signifies the importance of recognising the choice of court clause in order to achieve orderliness and predictability international business transaction, this decision was not followed by the U.S. court in another cases. There are at least two cases in the United States where courts give less emphasise to the parties’ choice of forum clause as held in *Bremen*.\(^\text{15}\)

In *Mercier v Sheraton International*\(^\text{16}\) a U.S. plaintiff filed a law suit in Massachusetts against an international hotel chain despite the forum selection clause in favour of Turkey. The First Circuit held that despite the existence of a contractually valid forum agreement, the “transaction’s link” with the United States could be used as a reason to deny the motion to dismiss on forum non conveniens ground\(^\text{17}\). Interestingly, in this case the Court suggested that “the U.S. citizenship of the parties triggered the public interest of the United States in providing a convenient forum for its citizens, and also justified imposing jury duty on U.S. citizens”\(^\text{18}\). The second case

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\(^{14}\) Hannah L. Buxbaum, above n11 at 191-192.

\(^{15}\) Hannah L. Buxbaum, above n11 at 201.

\(^{16}\) 935 F.2d 919 (1st Cir. 1991).

\(^{17}\) Hannah L. Buxbaum, above n11 at 202-203.

\(^{18}\) Hannah L. Buxbaum, Ibid.
was *Apotex Corp. v Istituto Biologico Chemioterapico S.p.a.*\(^{19}\), a U.S. plaintiff sued an Italian defendant in the District Court of Illinois despite an exclusive forum selection clause in favour of Italy. Although the court recognise the *Bremen* principle in the enforcement of choice of court clause, nevertheless the court focuses more to the connections between the disputes and the Supply Agreement between the parties in dispute. Instead of using the *Bremen* principle, the court used “most significant contact” test and held that it has jurisdiction to hear the case.\(^{20}\)

To sum up, even thought parties in international commercial contract have agreed to designate a court to settling dispute, the court may not be able to hear the case due to domestic law in adjudicating court’s jurisdiction. Judicial principles are different between States and there is no uniform law in this particular issue. Though Courts uses the same principle with the previous judgment; the decision might not necessarily be the same. Nevertheless, in practice, some parties in an international commercial contract still agreed to a choice of court clause. This practice is not without reason. Mo described that the reasons behind party’s intention to a choice of court clause is “…merely because there is no other effective supranational judicial system where a dispute can be adjudicated and a claim be enforced.”\(^{21}\)

3. **The Differences in Judicial Principle Between States**

Mo defined that there are two function of the court in international commercial dispute. First, it has to adjudicate the dispute by determining whether it has jurisdiction to hear the case, it also has to determine the relevance of the governing law of the contract and the facts related to the contract. Secondly, the court may be asked by a party in a contract to recognize and enforce the judgment of foreign court in its jurisdiction\(^{22}\). This section will describe the differences of doctrines used by court both in common law and civil law system in performing its two functions as above mentioned.

\(^{19}\) No. 02-C5345, 2003 WL 21780965 (N.D. Ill. June 30, 2003).

\(^{20}\) Hannah L. Buxbaum, above n11 at 203.


A. *Forum Non Conveniens and Lis Alibi Pendens Doctrines*

Brand explained that the doctrine of *forum non conveniens* is mostly known in a common law system and focused on the appropriateness of the court in hearing the case as compared with another court that may also have jurisdiction to hear the case. On the other hand the doctrine of *lis alibi pendens* is focus on the fact where the case is first filed and this doctrine is mostly incorporated in the domestic law of States in civil law system\(^{23}\). A comparison between the U.S. common law doctrine of *forum non conveniens* and the European Union civil law doctrine of *lis alibi pendens* may describe the differences between both doctrines.

In the United States of America, a federal or state court may exercise its jurisdiction if the defendant has a factual connection in the U.S., even if the defendant has only “minimum contact”\(^{24}\) by doing business within the U.S. territory and regardless the place of defendant’s business performance\(^{25}\). Furthermore, in applying the *forum non conveniens* doctrine, a court may grant dismissal to a litigation if the court found that there is a more convenient and adequate foreign forum\(^{26}\). The U.S. court then consider the availability of evidence, cost of the trial and other factor that make the trial easy, expeditious and inexpensive. Another factor that should be considered is the burdens that might occur in applying foreign law. This process is to ensure that the plaintiff choice of forum not oppressive to the defendant\(^{27}\). However, there is no uniform law regarding court jurisdiction and doctrine of *forum non conveniens* between states within the U.S. territory.

On the other hand, the court jurisdiction and the doctrin of *lis alibi pendens* in the E.U. is incorporated in the provisions of the Brussels Convention\(^{28}\) which is replaced by The Council Regulation\(^{29}\). Posch stated that to exercise its jurisdiction,


\(^{27}\) Buxbaum, Hannah L., *Ibid*.


courts in the European Member State must take into account the “normative contacts” of the defendant with the European Member State. He further cited article 2 (1) of the Council Regulation that “person domiciled in a Member State shall be sued, irrespective of their nationality, in the courts of the Member State”\(^{30}\). Brand explained that no provision in the Council Regulation that allowing the application of *forum non conveniens* doctrine by courts within the EU. The Council Regulation however, embraces the doctrine of *lis alibi pendens*\(^{31}\). This doctrine is stipulated in the provisions of Article 27 of the Council Regulation which is according to Eisengraeber it “provides for a strict ‘first-come, first-served’ rule”\(^{32}\). Article 27 of the Council regulation is as follows:

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Therefore, it is clear that the difference in the systems of law may also result in a difference approach by courts in applying choice of court agreement. The difference approach between doctrine of *forum non conveniens* and *lis alibi pendens* has shown the lack of uniformity in the court practices worldwide. As a result, the existence of a uniform and binding international law in this particular issue is inevitable.

**B. Recognition and Enforcement of Foreign Court Judgment**

There are many different standard used by court in different countries when it is asked to enforce foreign judgments. Silberman explained that under the U.S. Uniform Act, a court may apply non-enforcement if the foreign court has failed to

\(^{30}\) Posch, Willibald, *Ibid* n24, p368.


provide a fair trial and it has no jurisdiction to hear the case. Another principle difference is the reciprocity requirement which imposed by some countries as a mandatory condition. Furthermore, another controversial matter is the reason to refuse recognition by a court is on the ground of public policy. More over, there is also additional issue where the foreign judgments includes punitive damages. As noted by Brand, The German Bundesgerichtshof held “…it would be against German public policy to enforce the punitive damages portion of a California judgment”, a Swiss court however has give recognition for enforcement to the California judgment with punitive damages. Further, Posch emphasizes that under The Council Regulation a court of Member State must refuse to recognize foreign judgment if it violate public policy in that Member State.

In summary of this part, it is obvious that the differences in the judicial principle and in the enforcement of foreign judgment rules between States have undermined the choice of court agreement between parties in an international commercial contract. Therefore, in order to facilitate the needs of international business actors for an effective dispute settlement by courts - regardless its judicial principles - there should be cooperation between States to overcome the burdens in this respective issue. Compromise between States in the form of multilateral treaty usually is the best way to achieve a generally acceptable rule in international business practice. However, the level of acceptance by States to a treaty is depending on the level of compromise provided in the provision of the treaty.

4. Compromising Differences in Judicial Principle between States

The intention to cooperate, in fact is the very first spirit of the Hague Convention. It is stated that the State Parties to this Convention is willing “… to promote international trade and investment through enhanced judicial cooperation…” However, such a judicial cooperation between States will never be

33 Silberman, Linda J., Ibid n8, p354.
34 Posch, Willibald, Ibid n24, p380.
35 Silberman, Linda J., Ibid n8, p357.
37 Posch, Willibald, Ibid n24, p380.
38 Hague Convention, n1, preamble.
reached unless the differences in judicial principle have been compromised under the provisions of the Hague Convention itself. In order to continue the judicial differences aspects as discussed in the previous part, this part will only focus on the judicial compromises as shown in the Hague Convention provisions relating with jurisdiction as well as provisions which relating with recognition and enforcement.

A. Jurisdiction

During the negotiation of the Hague Convention, as explained by Schulz, the European Member States of the Hague Conference had put a strong concern in limiting the U.S. jurisdiction principle of long-arm jurisdiction which is based merely on the fact that defendant is doing its business in the U.S. and not considering its business place or domicile. Posch described that another concern of E.U. to the U.S. practice is that the validity of the choice of forum clause must satisfies the principles of reasonableness and fairness under the U.S. law. On the opposite, the condition is not the same under the Council Regulation provision. Compromise to this issue is stipulated in Article 5.1 and 5.2 and Article 6.a of The Hague Convention relating to Jurisdiction, as follows:

**Article 5 Jurisdiction of the chosen court**
1. The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.
2. A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.

**Article 6 Obligations of a court not chosen**
A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless:

a) the agreement is null and void under the law of the State of the chosen court;

It is obvious that under The Hague Convention rule, jurisdiction of a court is based merely on the exclusive choice of court agreement and not on the long-arm jurisdiction as happens in the U.S. practice. Moreover, it is not also based on the

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habitual residence or place of business activities of one party in a dispute as happen in the E.U. practice. Instead of using one of those practices, the Hague Convention has put party autonomy in an agreement to designate a court above the jurisdictional principles of both common law and civil law system. Another important provision of the Hague Convention is that it gives no opportunity for the court to apply forum non convenienced doctrine to dismiss a case or refuse to hear the case. However, an attempt to compromise this issue is as shown in the last sentence of Article 5 (1). The Hague Convention still gives permission to refuse to hear a case on the ground that the choice of court agreement “…null and void under the law of that State”. This is may be a compromise to the U.S. common law practice where validity of a choice of court agreement is measured by the principles of reasonableness and fairness under the U.S. law.

Article 6 clearly embraces the doctrine of *lis alibi pendens* in the civil law system. This is to avoid parallel proceedings which in practice are possible to occur under common law system. However, another evidence of compromising the differences in this matter is given by allowing the non-chosen court to hear a case if one of the conditions as stipulated in Article 6a. to e. occur. Therefore, the applicability of *lis alibi pendens* doctrine under the Hague Convention is not unlimited but limited by several conditions as generally used by courts under the common law system in examining its jurisdiction. For example, the court under common law system usually uses foreign law or the governing law of the contract to decide the validity of the contract before exercising its jurisdiction. This example is applicable to the provision that the non-chosen court may hear a case brought by a party if “…the agreement is null and void under the law of the State of the chosen court”41.

B. Recognition and Enforcement

According to Teitz, the U.S. initiative to propose negotiation of this Hague Convention was motivated by the fact that “…it has often been much more difficult to enforce U.S. judgments abroad than to enforce foreign judgments in the United

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41 Hague Convention, n1, Article 6.a.
On the other hand, as discussed in the previous part, the concern of the E.U. Member States of the Hague Conference to this choice of court treaty is that the court should be able to use public policy reason to refuse recognition and enforcement of foreign judgment. Another related concern of the E.U. Member States of the Hague Conference is the U.S. judgment which includes punitive damages which is generally not known under the civil law system. As a result, a compromise to the above issue is as shown in Article 8.1, 8.2, Article 9.e and Article 11.1 of the Hague Convention, as follows:

**Article 8 Recognition and enforcement**
1. 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 in accordance with this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.
2. Without prejudice to such review as is necessary for the application of the provisions of this Chapter, there shall be no review of the merits of the judgment given by the court of origin. The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.

**Article 9 Refusal of recognition or enforcement**
Recognition or enforcement may be refused if -
e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State;

**Article 11 Damages**
1. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.

As stipulated in the above provisions, as long as the exclusive choice of court agreement is valid, then judgment of the designated court arising out from that agreement shall be recognized and enforced by any courts within the contracting States of this Hague Convention. Moreover, a court where recognition and enforcement is sought shall not make any review to the merits given by the designated court. This provision seems to facilitate the needs of efficiency and certainty by the U.S. litigants who seek recognition and enforcement of U.S. court in another country. On the other side, in order to facilitate the interest of the E.U. Member States, The

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Hague Convention includes a provision on the use of public policy standard of the requested contracting State as a ground to refuse recognition or enforcement. Furthermore, the Hague Convention also facilitate the concern of E.U. Member States regarding punitive damages, this convention stipulates that to refusal by a court to recognize or enforce foreign judgments is allowed if that foreign judgment award damages that exceed the actual loss or harm suffered by an injured party.

Finally, the most significant compromise shown by the provisions of the Hague Convention is as stipulated in both Article 9 and Article 11. Instead of using the word “Recognition or enforcement shall be refused” or “Recognition or enforcement must be refused”, it uses the word “Recognition or enforcement may be refused”, therefore, refusal to recognize or to enforce a judgment based on a public policy and punitive damages reasons is not an obligatory provision but it is more likely as an open provision in order to enhance judicial cooperation between States. Therefore, it is obvious that the Hague Convention is a product of consensus and compromise between the Member States of the Hague Conference.

5. Conclusion

The Court has a role as a supranational judicial body that can hardly be replaced by other means of dispute settlement body and tribunals. This special characteristic of court is highly needed in the international commercial transaction especially which involve business actors from two or more different legal system. Therefore, in order to fulfill the needs of business actors to an efficient and effective dispute settlement by courts, there should be an international treaty in dispute settlement by court that compromising the differences in judicial principles between States. Compromising differences in legal system and interest of the States is an important aspect of an international treaty to be widely accepted by States and become source of international law. The Hague Convention - Like many other international treaties in commercial practice - was designed to compromise differences in jurisdictional principles between States based on the spirit of judicial cooperation. The writer believes that this Convention has successfully compromised the differences in jurisdiction principles as well as the recognition and enforcement of foreign judgment principles between Members of the Hague Conference, especially between United States of America. and European Union, which are the major trading state and region
in international commercial activities. Therefore, the writer believes that the Hague Convention can be widely accepted and is ready for ratification by States.

**Bibliography**


