Ius Comparatum – Global Studies in Comparative Law

Volume 37

As globalization proceeds, the significance of the comparative approach in legal scholarship increases. The IACL / AIDC with almost 800 members is the major universal organization promoting comparative research in law and organizing congresses with hundreds of participants in all parts of the world. The results of those congresses should be disseminated and be available for legal scholars in a single book series which would make both the Academy and its contribution to comparative law more visible. The series aims to publish the scholarship emerging from the congresses of IACL / AIDC, including: 1. of the General Congresses of Comparative Law, which take place every 4 years (Brisbane 2002; Utrecht 2006, Washington 2010, Vienna 2014, Fukuoka 2018 etc.) and which generate (a) one volume of General Reports edited by the local organizers of the Congress; (b) up to 30 volumes of selected thematic reports dealing with the topics of the single sections of the congress and containing the General Report as well as the National Reports of that section; these volumes would be edited by the General Reporters of the respective sections; 2. the volumes containing selected contributions to the smaller (2-3 days) thematic congresses which take place between the International Congresses (Mexico 2008; Taipei 2012; Montevideo 2016 etc.); these congresses have a general theme such as "Codification" or "The Enforcement of Law" and will be edited by the local organizers of the respective Congress. All publications may contain contributions in English and French, the official languages of the Academy.

More information about this series at http://www.springer.com/series/11943

Académie Internationale de Droit Comparé
International Academy of Comparative Law

Mary Keyes
Editor

Optional Choice of Court Agreements in Private International Law

Springer

Editor
Mary Keyes
Griffith Law School
Griffith University
Brisbane, Australia

ISSN 2214-6881 ISSN 2214-689X (electronic)
Ius Comparatum – Global Studies in Comparative Law
ISBN 978-3-030-23913-8 ISBN 978-3-030-23914-5 (eBook)
https://doi.org/10.1007/978-3-030-23914-5

This Springer imprint is published by the registered company Springer Nature Switzerland AG.
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

Foreword

In the era of globalization, the frequent movement of people, goods, services, and capitals across borders challenges the conventional legal framework. The sovereignty of nation-states is gradually eroded by alienating its decision-making power to other bodies, entities, or non-state actors. The divide between "private" and "public" is blurring, giving priority to private ordering. This paradigm shift accords with the tendency in private international law to accentuate and extend the role of party autonomy. This is not only the case with the freedom of choice of law but also the freedom of selecting the forum.

Today, it is generally established that choice of court agreements ought to be respected, subject to limited exceptions. It is a remarkable development, considering that granting the validity and effects of choice of court agreements is a relatively recent development in quite a few countries, particularly in the USA (1972), in the Netherlands (1985), in China (1991), and in Italy (1995). This is because it required overcoming the idea of sovereignty that individuals could not confer or oust the adjudicatory jurisdiction of a court that inheres in the power of the sovereign state. It reflects a shift of the concept of international jurisdiction from "concerns of international law and interstate power" to "concerns of fairness to individual defendants," with an emphasis on the interests of private parties.[1] Designating the forum for future litigation entails notable advantages of ensuring legal certainty and predictability of the parties, allowing an effective risk calculation.

The discussions among academics and practitioners have so far concentrated on the treatment of exclusive choice of court agreements. It is presumably attributable to the growing use of exclusive forum selection clauses in practice, as well as the new legal framework established by the 2005 Hague Choice of Court Convention and the 2012 Recast of the EU Brussels I Regulation adjusting to it. These tendencies of academic and practical interests in exclusive choice of court agreements are understandable, given that the exclusivity of the available courts considerably affects the

[1] Mills, A (2018) Party Autonomy in Private International Law, Cambridge, pp. 34 ff.

interests of parties in effective dispute resolution, and requires a clear definition of the validity and effects of the agreements as well as due regard to access to justice.

Notably, unlike the ample publications on exclusive choice of court agreements, optional (or non-exclusive) choice of court agreements or asymmetric (or unilateral) choice of court agreements have attracted much less attention of academics and lawmakers so far, despite their increasing importance in practice. An optional choice of court agreement means a permissive agreement to allow parties to bring a suit to the court nominated in their contract, in addition to legally competent courts. An asymmetric choice of court agreement means a one-sided agreement on jurisdiction that is exclusive for one party and optional for the other party. These types of choice of court agreements entail a series of important questions that were largely left unresolved.

The underlying fascinating book fills these lacunae in the academia. Professor Mary Keyes, the general reporter and authority of private international law from Australia, is an expert in this area, having extensively published excellent articles and book chapters on forum selection clauses. Professor Keyes and other highly qualified national reporters from 19 jurisdictions, encompassing both civil law and common law jurisdictions, have contributed to this remarkable collection. This volume chiefly addresses the following issues on optional choice of court agreements in a comparative perspective, discerning similarities to and differences from the solutions adopted for exclusive choice of court agreements.

First, this volume deals with the threshold question of how to determine the criteria of characterizing choice of court agreement as exclusive or optional. As Professor Keyes points out, this book shows divergent solutions among various jurisdictions, including the use of the presumption of exclusivity. Conflicts rules either point to the law governing the contract, the law of the chosen court, or the law of the court seized. Second, this volume deals with the positive and negative effects of choice of court agreements. As Professor Keyes analyzes, it shows a tendency of convergence among countries as to the "positive effects" to grant jurisdiction of the selected court ("prorogation") both for exclusive and optional choice of court agreements. A certain harmony can also be observed as to the "negative effects" of exclusive choice of court agreements to deprive jurisdiction of the court ("derogation"), with the caveat of judges' discretion in common law jurisdictions. However, countries largely differ as to the negative effects of optional choice of court agreements because of its permissive character, including the applicability of *forum non conveniens,* or *lis pendens* when a nominated court has first been seized. Third, this book analyzes limitations on choice of court agreements and remedies for breach of choice of court agreements. Professor Keyes comes to the result that damages or anti-suit injunctions are generally not available to support optional choice of court agreements, on the ground that instituting proceedings elsewhere does not qualify as a breach of contract. Fourth, this volume shows that countries are divided as to the validity of an asymmetric choice of court agreement. Some countries generally take an affirmative stance, some countries rely on a case-by-case analysis, and some others answer in the negative. In conclusion, Professor Keyes indicates the role and significance of forum selection clauses in contemporary cross-border business

transactions and calls for further research in view of various features and types of optional choice of court agreements.

By tackling all these crucial issues in a comparative perspective, the underlying book will highly inspire and contribute to enhance discussions among academics and practitioners, which may further influence the development of case law and law-making in different countries. Viewing its broad scope of comparative research and the highest caliber of its thorough study, the underlying collection is a fantastic achievement.

The practical relevance of optional choice of court agreements will presumably continue to rise. The Judgments Project of the Hague Conference on Private International Law was completed and adopted as a new convention on the recognition and enforcement of foreign judgments at the 22nd Diplomatic Session in June 2019. Under the Draft Convention of May 2018, Article 5 (1) (m) provides an indirect jurisdiction ground based on a choice of court agreement "other than an exclusive choice of court agreement". If this provision is included in the future convention, it will give rise to various questions on how to delineate its scope from the exclusive choice of court agreements falling under the 2005 Choice of Court Convention, how to deal with asymmetric choice of court agreements, and how to solve international parallel proceedings. This will particularly be important, now that the 2005 Choice of Court Convention has entered into force in all EU Member States including Denmark and the U.K., Montenegro, Singapore and Mexico, has been signed by the U.S., China and Ukraine, and is envisaged to be joined by Australia.

To find accurate information and effective answer to various questions surrounding optional choice of court agreements, academics and practitioners from various countries and international business communities will primarily refer to this book, which yields an invaluable insight in different legal systems, clear analyses and convincing results. This collection will provide a new perspective on the treatment of optional choice of court agreements and certainly serve as an important and useful guide for academics, attorneys and judges, and hopefully also for lawmakers in the future. I sincerely congratulate the contributors on the completion of this wonderful book, which is an enrichment for the series of *Ius Comparatum* founded by the International Academy of Comparative Law.

Kyoto University, Kyoto, Japan Yuko Nishitani

Preface

This collection comprises 19 national reports addressing the issue of the legal effects of optional choice of court agreements, by which we mean choice of court agreements that are other than purely exclusive. Whereas exclusive choice of court agreements have attracted a great deal of attention in private international law, optional choice of court agreements have been neglected by lawmakers and commentators alike, although optional choice of court agreements are quite often found in both commercial and non-commercial contracts. This collection therefore makes a significant contribution to the literature on choice of court agreements.

This project was undertaken under the auspices of the International Academy of Comparative Law, and I thank Professor Diego P. Fernández Arroyo and Professor Katharina Boele-Woelki for the invitation to me to act as General Reporter for this topic, and for the invitation to include this volume in the important Ius Comparatum series. Eleven national reporters presented their draft reports at the Congress of the International Academy of Comparative Law which was held in Fukuoka, Japan, in July 2018. Professor Yuko Nishitani graciously chaired that session of the Congress, and also agreed to write the Foreword to this volume, and I thank her for her generosity and collegiality.

I also thank Anja Trautmann and Anitha Chellamuthu at Springer for their editorial and production help with this volume. But above all I would like to record my profound thanks to the national reporters who participated in this project. They have been without exception not only brilliant in their written work but also truly delightful to work with, and I have learned a great deal from each one of them. I thank them, in particular, for their helpful comments on an earlier draft of the General Report.

Brisbane, Australia — Mary Keyes
April 2019

Contents