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OPPOSIBILITY OF CHOICE-OF-COURT AGREEMENTS AGAINST THIRD PARTIES UNDER THE HAGUE CHOICE-OF-COURT CONVENTION AND BRUSSELS IBIS REGULATION

INTRODUCTION

A choice-of-court agreement usually incorporated in a contract has an effect limited to the relations between the contractual parties.

The rights and/or obligations under the contract and even the contract as a whole may be transferred to third parties. This could happen for example as a result of universal transfer of assets (successions, mergers and acquisitions of companies) or specific transfer of assets (assignment of receivables or debts, subrogation, stipulation in favour of a third party, transfer of contract); or, in case of multiple parties (e.g. articles of association).

May the third parties find themselves involved in a choice-of-court agreement, or even in a proceeding which is already under way?

This paper aims at answering this question using the Hague Convention of 30 June 2005 on Choice of Court Agreements (hereinafter the “Hague Convention”) entering into force on the 1st of October 2015 and the Regulation Brussels Ibis applicable since 10th of January 2015.

Unfortunately neither the Hague Convention, nor Regulation Brussels Ibis give a comprehensive regulation of the choice-of-court agreement. In these two instruments the jurisdiction agreement is divided in several substantive issues governed differently. The issues may be classified as follows: 1) consent, 2) form, 3) subject, 4) substantive grounds for invalidity and 5) other contractual aspects. The extension of the choice-of-court agreement to third parties is not expressly regulated. This requires an issue-by-issue analysis for determining the applicable law to the opposability of the jurisdiction agreement towards the third party.

Having said this, it may be concluded at the beginning that the choice-of-court agreement is not a typical contract governed usually

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by one system of law; instead - dépeçage takes place whereas the contract is governed by multiple systems of law. This is particularly clear when having to determine the opposability of the jurisdiction agreement against third party.

I. The consent

The choice of court agreement requires consent. Whether there is consent is assessed differently under the Hague Convention and the Regulation Brussels Ibis.

1. Hague Convention

Under the Hague Convention the consent has to be determined by the **law of the State of the chosen court (lex fori prorogati), including its rules of choice of law** (Art. 5(1), 6 a) and 9 a) Hague Convention)¹. For example: if a German company and an American company choose the court in New York, and if the PIL of New York leads to the New York substantive law, the consent has to be determined pursuant to this law including the consideration requirement.

The Explanatory Report amends the Hague Convention by stating that the chosen court has to prove *that the basic factual requirements of consent exist*. The court has to use *any normal standards* without having to consider the applicable foreign law. The following example illustrates this notion:

X, who is resident in Panama, sends an unsolicited e-mail to Y, who is resident in Mexico, making an offer on terms that are extremely unfavorable to Y. The offer contains a choice of court clause in favour of the courts of Ruritania (an imaginary State), and concludes: "If you have not replied within seven days, you will be deemed to have accepted this offer." The e-mail is deleted by Y's anti-spam software and he never reads it. After seven days, X claims that there is a contract with a choice of court agreement, and brings proceedings in the courts of Ruritania. If, unlike the law of every other State in the world, the law of Ruritania considered that a contract existed and the choice of court "agreement" was valid, other States, including Mexico, would nevertheless be entitled to treat the choice of court agreement as non-existent².

1) See Hartley, T., Dogauchi, M., Convention of 30 June 2005 on Choice of Court Agreements, Explanatory Report, p. 38, Wagner, R. Das Haager Übereinkommen vom 30.06.2005 über Gerichtsstandsvereinbarungen, in: RabelsZ (73), 2009, p. 117-118.

2) See Hartley, T. Dogauchi, M., op.cit., p. 38.

According to the Explanatory Report the consent issue covers the possibility of binding third parties who did not expressly consented to the choice-of-court agreement. This may happen if: 1) the original parties have consented to the jurisdiction agreement, and 2) the third parties take over the rights and obligations of one of the original parties under the national law. Which is this national law is not subject to further clarifications. One may argue that this could be: 1) *lex causae* (usually *lex contractus*) as this law determining the taking over of rights and obligations, 2) *lex fori prorogati* – as the law determining the consent and 3) *lex fori* – as the law determining the procedure.

2. Regulation Brussels Ibis

The consensus between the parties to the contract has to be determined in a **uniform way** under the Brussels Convention, Regulation Brussels I and Regulation Brussels Ibis. In case 25/76 *Galerias Segouira Sprl vs. Firma Rahim Bonakdarian* (p. 6) ECJ stated that *Article 17 imposes upon the court before which the matter is brought the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated. The purpose of the formal requirements imposed by Article 17 is to ensure that the consensus between the parties is in fact established. Thus, the consensus is established only on the basis of Article 17*³. According to the prevailing doctrine the conclusion of the choice of court agreement requires only consensus between the parties⁴. In this way all additional elements for contract conclusion are excluded (e.g. the consideration under the Common Law). At the same time, by keeping the formal requirements listed

3) See ECJ, C – 288/92 *Custom Made Commercial Ltd /Stawa Metallbau GmbH (Custom Made)*, C – 269/95 *Francesco Benincasa/Dentalkit Srl (Benincasa)*, C-159/97 *Trasporti Castelletti Spedizioni Internazionali SpA/Hugo Trumpy SpA (Castelletti)*, C-116/02 *Erich Gasser GmbH / MISAT Srl (Gasser)* and C-214/89 *Powell Duffryn Plc/Wolfgang Petereit (Powell)*, T. 13.

4) See ECJ, C-24/76 *Estasis Salotti ai Colzani Aimo u Gianmario Colzani S.N.C./ Ruewa Polstereimaschinen GmbH (Salotti)*, p. 7, Hess, B. Th. Pfeiffer, P. Schlosser. Report on the Application of Brussels I Regulation in the Member States, (www.ec.europa.eu/civiljustice/news/docs/study_application_brussels_1.en.pdf), p. 159, Mangus, U. In: Choice of Court Agreements in the Review Proposal for the Brussels I Regulation. - In: The Brussels I review proposal uncovered, Camberley: BIICL, 2012, p. 87, including the cited opposite view, Quirolo, I. M. De Maestri. The effects of the Proposal for a recast of the Brussels I Regulation on rules concerning prorogation of jurisdiction.- European Legal Forum. 2011, № 2, p. 66, Jenard, P. Bericht zu dem Übereinkommen über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen, OJ, C 59/35, p. 37, Cheshire, North & Fawcett. Private International Law. 14th ed. Oxford: Oxford University Press, 2008, p. 287.

by the Convention/Regulation is ensured that the parties have really agreed to the chosen court. This quasi presumption makes in principle the otherwise prove impossible⁵.

An example: if a Bulgarian company and an English company choose the English court no PIL rules come into play and it is not allowed to look for *consideration*. The compliance with the form requirements suffices the establishment of the consensus.

Turning to the extension of the choice of court agreement to third parties ECJ shares the view that as far as the consensus issues is concerned *in order for a third party to rely on such a clause it is, in principle, necessary that the third party has given his consent to that effect*⁶. This conclusion is more than clear and does not deserve further explanations. However, it confirms that the opposability of the jurisdiction clause against third parties without their consent is not subject to the autonomous consensus issue.

II. The form

The choice of court agreement has to comply with the formal requirements imposed by the Hague Convention and Regulation Brussels Ibis. Both instruments determine the form of the jurisdiction agreement in a uniform/autonomous way leaving no room for national private international and substantive law. The used uniform approach ensures that jurisdictional issues in courts of Contracting/Member States will be treated with the same standards. The formal validity of the choice of court agreement does not regulate the opposability of the jurisdiction clause against third parties. The detailed analysis of the formal requirements is outside to scope of this paper. It is only worth to mention that the jurisdiction agreement has to satisfy different formal requirements under the different instruments.

1. Hague Convention

Article 3(c) of the Convention sets out in clear terms the formal requirements. Pursuant to it an exclusive choice of court agreement must be concluded or documented i) in writing; or ii) by any other means of

5) See CEC 24/76 *Salotti*, т. 9, 784/ 79 *Porta-Leasing GmbH/Prestige International SA (Ports Leasing)*, p. 5, 221/84 *F. Berghoefer GmbH & Co. KG/ASA SA (Berghoefer)*, p. 13.

6) See ECJ, C-543/09, *Refcomp SpA/Axa Corporate Solutions Assurance SA, Axa France IARD, Emerson Network Power, Climaveneta SpA (Refcomp)*, p. 29 and C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA ('CDC')/Akzo Nobel NV, Solvay SA/NV, Kemira Oyj and FMC Foret SA (CDC)*, p.64.

communication which renders information accessible so as to be usable for subsequent reference. No further requirements of a formal nature may be imposed under national law (being *lex fori*, *lex for prorogati* or *lex contractus*)⁷.

2. Regulation Brussels Ibis

Pursuant to Article 25, par. 1 Regulation Brussels Ibis the agreement conferring jurisdiction shall be either: (a) in writing or evidenced in writing; (b) in a form which accords with practices established between the parties; or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned. In any case no further condition stemming from the national law may be imposed. The provision's aim as stated above is to ensure that there was real consent of the persons concerned so avoiding jurisdiction clauses, incorporated in a contract by one party, going unnoticed by the other⁸.

III. The subject

The jurisdiction agreement has pursuant both instruments (the Hague Convention and Regulation Brussels Ibis) as subject matter procedural issues. The parties to the agreement have to choose court/courts of a Contracting State (Article 3, a) Hague Convention) or of a Member State (Article 25, par.1). This designation has to be made for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship (Article 3, a) Hague Convention and Article 25, par.1 Regulation Brussels Ibis). Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The regulation in both instruments is completely identical. A uniform/autonomous approach is used containing rules directly applicable to the choice of court agreement.

The extension of the choice of court agreement to third parties leads to extension of this already agreed subject matter to the third parties. However, the content of the agreement itself stays the same if the extension takes place. The uniform/autonomous regulation of the subject matter of the jurisdiction agreement does not cover the way of opposing the choice of court agreement against third parties.

7) See Hartley, T. Dogauchi, M., op.cit., p. 40-41.

8) See ECJ, C-106/95 *MSG v Gravières Rhénanes*, p. 16, C-159/97 *Castelletti*, p.19.

IV. Substantive grounds for invalidity

Both the Hague Convention and Regulation Brussels Ibis provide conflict of law rules regulating the substantive validity/invalidity of the jurisdiction agreement. The contents of the conflict-of-law rules are identical. Pursuant to Article 5, par. 1 Hague Convention *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*. Article 25, par. 1 Regulation Brussels Ibis provides for *.....that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State*. The envisaged Member State is the Member State of the chosen court. The law of the chosen court includes the conflict-of-law rules of that State⁹.

The substantive validity of the choice of court agreement was regulated neither in the Brussels convention, nor in the Regulation Brussels I. The provision is absent in the currently applicable Lugano convention. It was introduced in Regulation Brussels Ibis due to the divergences in the Member States constituting a permanent source of difficulties for choice-of-forum agreements. Some Member States used to apply *lex fori* (considering the forum agreement as procedural contract)¹⁰, whereas others referred to *lex causae* (considering the jurisdiction agreement as a clause closely connected with the main contract)¹¹. In doing so some Member States applied their national law even to the consent issue¹². The need of uniform rule was more than obvious. The solution was found in the Hague Convention¹³. Article 5, par.1 Hague Convention was transferred with some slight amendment in Article 25, par.1 Regulation Brussels Ibis. As the provisions of the Hague Convention and Regulation Brussels Ibis are similar they will be analyzed simultaneously.

9) For HAGUE CONVENTION see Hartley, T. Dogauchi, M., op.cit., p. 43, for Regulation Brussels Ibis see recital 20.

10) See Magnus, U., Op.cit., p. 87, Quirolo, I. M. De Maestri. op.cit, p. 66.

11) See Cheshire, North & Fawcett. op.cit. p. 287, Dicey, Morris& Collins, Conflic of Laws, 14th ed. London: Sweet&Maxwell, 2006, p. 604, Layton, A. A. Mercer. European Civil Practice. London: Sweet&Maxwell, 2004, p. 721, Mohs, F. Drittwirkung von Schieds- und Gerichtsstandsvereinbarung. München: Sellier, 2006, p. 30, German Case Law – OLG Düsseldorf, RIW, 1990, p. 577 and Frenche Case Law – Cour de Cassation, ILPr., 1995, p. 191.

12) See Hess, B. Th. Pfeiffer, P. Schlosser., Op.cit., p. 158-159.

13) See Hess, B. Th. Pfeiffer, P. Schlosser . Op.cit., p. 159.

The main advantage of the rule dealing with the substantive validity of the jurisdiction agreement is that it shall be applied either by the chosen court or by any court confronted with the forum-selection agreement. This result will provide uniformity and increase the legal certainty, the foreseeability and the confidence in the choice-of-court agreements.

1. Material scope

Lex fori prorogati shall determine whether the forum-selection agreement is *null and void (Hague Convention)* as to its substantive validity (Regulation Brussels Ibis).

This conflict-of-laws rule does **not cover the formal validity** of the jurisdiction agreement. These requirements are defined directly in Article 3 c) Hague Convention and in Article 25, par. 1 and 2 Regulation Brussels Ibis and do not leave room for any conflict-of-laws rules and/or national law¹⁴.

As far as the **consent** is concerned, the Hague Convention uses the same conflict-of-laws rule, but, as described above, with some amendments stemming from the Explanatory report. Regulation Brussels Ibis regulates the consensus in autonomous way, thus, **limiting the scope of application of *lex fori prorogati***.

The wording of Article 5, par. 1 Hague Convention give rise to the conclusion that *lex fori prorogati* covers **only the grounds for invalidity making the choice-of-court agreement “null and void” (English) or “nul” (French)**. Article 25, par. 1 Regulation Brussels Ibis uses the same phrases: *null and void* (English), *nullité* (French), *nichtig* (German). The Bulgarian linguistic version differs from the English, French and German one. It envisages **all grounds for invalidity** (...освен ако споразумението е недействително по отношение на материалната си действителност...). In any case, the Bulgarian phrase includes the grounds making the choice of court agreement null and void, voidable, total or partial invalidity, relative or pending invalidity and so on. In my view both the Hague Convention and Regulation Brussels Ibis intended to designate law to all substantive validity issues in order to achieve uniform and simple application of the rule in all Contracting/member States. The partial regulation may give raise to qualification problems and to additional dépeçage to the existing dépeçage.

14) See. Hartley, T. Doguchi, M., op.cit., p. 43.

Turning to the specific grounds for invalidity *lex fori prorogati* refers to **grounds like fraud, mistake, misrepresentation, duress, stringent necessity, lack of cause, lack of object, violation of law or good practice/morals and so on.**

The **lack of capacity** under the Hague Convention is subject to *lex fori prorogati* only if the court seized is the chosen court. If the court seized is different court (e.g. the derogated court or the court seized with recognition and enforcement claim) **the lack of capacity is subject to two cumulatively applicable law systems:** the law of the court seized and the law of the chosen court (Article 6 b) and 9 b)). The effectiveness of this solution is doubtful. It is not clear why *lex fori* has to limit *lex fori prorogati* leading to additional dépeçage and endangering the Hague-and EU-wide existence of the forum-selection clause.

The substantive validity/invalidity **does not include any further substantive issues** of the choice-of-court agreement: for example time-frame of the contract, terms and conditions, universal or specific transfer. In particular, *lex fori prorogati* does not cover the effects of the jurisdiction agreement towards third parties. This conclusion stems from wording of Article 5, par.1) Hague Convention and Article 25, par. 1 Regulation Brussels Ibis envisaging conflict-of-laws rule only for the substantial invalidity of the jurisdiction clause. In addition, in case of Regulation Brussels Ibis the notion for strict construction of the choice-of-court agreement¹⁵ does not allow broad interpretation.

2. Applicable Law

As stated above, the substantive grounds for invalidity have to be determined by *lex fori prorogati*, including the private international law of the selected forum. Thus, the classical institute of *renvoi* is invoked.

This solution may confuse the private international law theoreticians. Being aware that the choice of court is not identical with the choice of law, it is worth pointing out that both selections are stemming from the parties will. The need to respect for the will of the parties is secured in case of party autonomy, in principle, by the exclusion of *renvoi* (see Article 20 Rome I regulation, 24 Rome II Regulation, 11 Rome III Regulation, 12 Hague Maintenance Protocol, 34, par. 2 Regulation 650/2012). Considering this different approach, keeping the *renvoi* alive is not justified from the parties' point of view.

15) See ECJ 24/76 *Salotti*, p. 7.

In addition, the invocation of *renvoi* will create additional effort for the judge (for the selected judge but even more for the deselected one), who will face the problem of determining the applicable law to the choice of court agreements. This is not an easy task even in the EU Member States as Article 1, par. 2, e) Rome I Regulation excludes expressly the jurisdiction agreement from its scope of application. Despite of this rule, some Member States extend the application of Rome I Regulation to all contractual issues, including the jurisdiction agreement (Spain). In other Member States some authors suggest an analogous application of this EU instrument but the opposite view is also shared. The issue is also controversial in Bulgaria. If the Bulgarian court is the chosen one, two possibilities exist: 1) to apply Rome I Regulation and 2) to apply the Bulgarian Code on Private International Law. In applying Rome I Regulation, the court has to look first for *lex voluntatis* (Article 3). It is unlikely that the parties will have selected applicable law to the jurisdiction clause. The jurisdiction agreement is not enlisted in Article 4, par. 1. It is not easy task ether to determine the party required to effect the characteristic performance of the choice of court agreement (Article 4, par.2). Most probably, Article 4, par. 4 will apply: the forum selection agreement shall be governed by the law of the country with which it is most closely connected. In the given case, a special account should be taken of whether the jurisdiction agreement has a very close relationship with another contract or contracts. Without any doubt the “another contract” is the main contract containing the jurisdiction agreement. Thus, the law applicable to the main contract will become the law regulating the choice of court agreement. The same result will be achieved pursuant to the Bulgarian Code on Private International Law, which is following the provisions of the Rome Convention.

The determination of *lex fori prorogati* by the presented way will be more difficult for the judge, who may be faced with not know law of Contracting State.

V. Other substantive issues

As demonstrated in the above explanations, the opposability of choice of court agreement against third parties being a substantive issue is not subject to express rule in the Hague Convention/ Regulation Brussels Ibis and/or to *lex fori prorogati*.

The Explanatory report to Hague Convention conditions the extension of the forum selection clause to third parties on the taking over the

rights and obligations of one of the original parties. It states that *whether this is the case will depend on national law*.

Which is this national law is not subject to further clarifications. One may argue that this could be: 1) *lex causae* (usually *lex contractus*) as this law determining the taking over of rights and obligations under the main contract, 2) *lex fori prorogati* – as the law determining the consent and 3) *lex fori* – as the law determining the procedure.

Regulation Brussels Ibis does not clarify who may become a party to choice of court agreement. The linguistic construction of Article 25 Regulation Brussels Ibis/Article 23 Regulation Brussels I/Article 17 Brussels Convention sets out the party quality to the contracting parties as well as to the party to the dispute at stake (claimant or defendant)¹⁶.

The European Parliament tried to include an express provision in Regulation Brussels Ibis devoted to the opposability against third parties¹⁷. This instrument had in mind third parties not assented but bound by choice of court agreements (for instance in a bill of lading) considered as adversely affecting their access to justice and being manifestly unfair. Therefore a special provision was proposed:

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13. Considers that the Regulation should contain a new provision dealing with the opposability of choice-of-court agreements against third parties; takes the view that such provision could provide that a person who is not a party to the contract will be bound by an exclusive choice-of-court agreement concluded in accordance with the Regulation only if: (a) that agreement is contained in a written document or electronic record; (b) that person is given timely and adequate notice of the court where the action is to be brought; (c) in contracts for carriage of goods, the chosen court is (i) the domicile of the carrier; (ii) the place of receipt agreed in the contract of carriage; (iii) the place of delivery agreed in the contract of carriage, or (iv) the port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; considers that it should further be provided that, in all other cases, the third party may bring an action before the court otherwise competent under the Regulation if it appears that holding that party to the chosen forum would be blatantly unfair;

16) *Opinion of the Advocate General in case C-543/09, Refcomp SpA/Axa Corporate Solutions Assurance SA, Axa France IARD, Emerson Network Power, Climaveneta SpA (Refcomp)*, т. 39

17) European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/2140(INI))

This provision is not to be found in Regulation Brussels Ibis. It seems that the need for compliance with the Hague Convention and the ECJ case law prevailed over the need of protection the third parties.

ECJ had the opportunity to rule several times on the possibility the choice of court agreement to bind third parties.

- 201/82 Gerling Konzern Speziale Kreditversicherung A. G. v. Amministrazione del tesoro dello Stato

The case concerned the question whether under a contract of insurance **a person in whose favour** the contract is made but who is not a party to the contract and is separate from the insured, is entitled to rely on a clause extending jurisdiction inserted for his benefit although he has not himself signed it, albeit the insurer and insured have duly done so (p.10). ECJ motivated that the Convention in Article 12 has expressly provided for the possibility of stipulating clause conferring jurisdiction in favour of third parties (insured and the beneficiary) whose identity may even be unknown when the contract is signed.

Logically, ECJ ruled that *in a contract of insurance a clause conferring jurisdiction is inserted for the benefit of the insured who is not a party to the contract but a person distinct from the policy-holder , it must be regarded as valid within the meaning of Article 17 of the convention provided that, as between the insurer and the policy-holder, the condition as to writing laid down therein has been satisfied and provided that the consent of the insurer in that respect has been clearly and precisely manifested.*

- C-112/03 Société financière et industrielle du Peloux v. Axa Belgium u. A

Much later – in 2005 – ECJ ruled that a jurisdiction clause **decrementing the third party** cannot be relied on. This conclusion is stemming from Article 12(3) providing special protection of the economically weakest party.

- 71/83 Partenreederei Ms. Tilly Russ и Ernest Russ срещу N.V. Haven en Vervoerbedrijf Nova Und N.V. Goeminne Hout

The case concerned the formal validity of jurisdiction clause contained in a bill of lading. On the reverse side of it was written that *any dispute arising under this bill of lading shall be decided by the Hamburg courts*. The carrier was a German company, the shipper – American and the holder of the bill of lading – Belgian. The Belgian *Hof van*

Cassatie submitted the following question for a preliminary ruling:

Can the bill of lading issued by the carrier to the shipper be considered, having regard to the relevant generally accepted practices, to be an 'agreement in writing' or an 'agreement evidenced by writing' between the parties within the meaning of article 17 of the convention of 27 September 1968 on jurisdiction and the enforcement of judgment in civil and commercial matters and, if so, does that also apply in relation to a third party holding the bill of lading?

According to ECJ the mere printing of a jurisdiction clause on the reverse of the bill of lading does not satisfy the requirements of Article 17 of the convention, since such a procedure gives no guarantee that the other party has actually consented to the clause derogating from the ordinary jurisdiction rules of the convention (p. 16). Further, the *acquisition of the bill of lading could not confer upon the third party more rights than those attaching to the shipper under it. The third party holding the bill of lading thus becomes vested with all the rights, and at the same time becomes subject to all the obligations, mentioned in the bill of lading, including those relating to the agreement on jurisdiction (p.25).*

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Consequently, ECJ ruled the jurisdiction clause contained in a bill of lading may be invoked against third party, 1) provided that the clause has been adjudged valid as between the carrier and the shipper and 2) provided that, by virtue of the **relevant national law**, the third party, upon acquiring the bill of lading, succeeded to the shipper's rights and obligations.

- C-159/97 *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpp SpA*

This ECJ judgment refers to *Tilly Russ* with regard to the invocation of jurisdiction clause against third parties (p. 41). The added value concerns the formal validity based on the usage of which the parties are or ought to have been aware. As per ECJ the awareness of the usage must be assessed with respect to the original parties to the agreement conferring jurisdiction and not the third parties acquiring the bill of lading.

- C-387/98 *Coreck Maritime GmbH v. Handelsveem BV u. a.*

The case is also connected with jurisdiction clause contained in a bill of lading. The plaintiffs were the holder of the bill of lading and the insurer from China, the respondents: the ship owner – a Russian company

and the carrier – a German company. The bill of lading, issued by the carrier and holding the carriers logo, stipulated that any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business. It was further specified that the ship owner only shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage. The claim was lodged with the court of Rotterdam. Coreck, relying on the jurisdiction clause in the bills of lading, claimed that that court did not have jurisdiction. *Hoge Raad* referred several questions for preliminary ruling whereas the most important for the current topic are:

Does the fact that the jurisdiction clause contained in the bill of lading must be regarded as valid as between the carrier and the shipper mean that it is also binding on any third party holding the bill of lading, or is that the position only as regards a third party who, upon acquiring the bill of lading, succeeds by virtue of the applicable national law to the shipper's rights and obligations?

And

..... which national law governs the decision as to whether the third party, upon acquiring the bill of lading, succeeded to the shipper's rights and obligations,....

Unsurprisingly ECJ referred to its previous *Tilly Russ* and *Castelletti* judgments and ruled that a jurisdiction clause agreed between a carrier and a shipper which appears in a bill of lading is enforceable against a third party bearer of the bill of lading if he succeeded to the rights and obligations of the shipper under the applicable national law when he acquired the bill of lading. If he did not, it must be ascertained whether he accepted that clause having regard to the requirements laid down in the first paragraph of Article 17 of the Convention. The second question did not receive an answer as falling outside of the Convention.

- C- 214/89 *Powell Duffryn Plc cpeuy Wolfgang Petereit*.

This is a case related to forum selected in a clause contained in the statute of a company limited by shares. The statute of IBH-Holding – a German company limited by shares – provided for that by subscribing for or acquiring shares or interim certificates the shareholder submits, with regard to all disputes between himself and the company or its organs, to the jurisdiction of the courts ordinarily competent to enter-

tain suits concerning the company. The English company Powell Duffryn subscribed subsequently for shares on successive increases in the capital of IBH-Holding and also received dividends. Several months later IBH-Holding was put into liquidation. The appointed liquidator brought an action before the Landgericht Mainz claiming that Powell Duffryn had not fulfilled its obligations to IBH-Holding to make the cash payments due in respect of the increases in capital. He also sought to recover dividends which he maintained had been wrongly paid to Powell Duffryn. The question referred was

Does the rule contained in the statutes of a company limited by shares on the basis of which the shareholder by subscribing for or acquiring shares submits, with regard to all disputes with the company or its organs, to the jurisdiction of the courts ordinarily competent to entertain suits concerning the company constitute an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention which is concluded between the shareholder and the company?

In this judgment ECJ expressly states that the concept of “agreement conferring jurisdiction” in Article 17 of the Convention must be regarded as an independent concept. The most important characteristic is the existence of a community of interests in the pursuit of a common objective. From this point of view the company’s statutes must be regarded as a contract covering both the relations between the shareholders and also the relations between them and the company they set up and constituting an agreement conferring jurisdiction. This agreement binds all shareholders even in case their shareholder capacity arises consequently. As far as the form is concerned the formal requirements laid down in Article 17 of the Convention must be considered to be complied with in regard to any shareholder, irrespective of how the shares were acquired, if the clause conferring jurisdiction is contained in the statutes of the company and those statutes are lodged in a place to which the shareholder may have access or are contained in a public register.

- *C-543/2010 Refcomp SpA v. Axa Corporate Solutions Assurance SA, Axa France IARD, Emerson Network, Climaveneta SpA.*

The case is devoted *inter alia* to answering the question whether a clause conferring jurisdiction which has been agreed, in a chain of contracts under Community law, between a manufacturer of goods and a buyer in accordance with Article 23 of RBI is effective as against

the sub-buyer. The sub-buyer is a third party who at the end of chain of contracts acquires the goods. *Refcomp SpA* is an Italian company, manufacturing compressors. *Climaveneta*, another Italian company, purchases compressors and manufactures air-conditioning units. In the contract between *Refcomp SpA* and *Climaveneta* a jurisdiction clause in favour of the Italian courts was incorporated. Consequently, *Climaveneta* sold air-conditions to the French company *Emerson* and the latter resold them to *Doumer* – another French company. Later, some irregularities in the air-conditioning system occurred. The insurer of *Doumer* *Axa Corporate* sued the manufacturer *Recomp*, the fitter *Climaveneta* and the seller *Emerson* in France seeking an order that they pay *in solidum* compensation for the damage suffered. *Refcomp* challenged the jurisdiction of the French court, relying on a jurisdiction clause in favour of the Italian courts incorporated in the contract between it and *Climaveneta*.

Under the French law there is an exception to that principle of privity of contract in case of transfer of ownership. The ownership of the goods sold being transferred to all the subsequent purchasers together with all elements appurtenant to it. Among the ancillary elements is the right of the sub-buyer of the goods to claim compensation for harm resulting from the non-conformity of those goods from the direct seller and any of the intermediaries who have sold the goods or manufactured it (p. 16). ECJ starts with pointing out that the wording of Article 23 does not indicate whether a jurisdiction clause may be transmitted, beyond the circle of the parties to a contract, to a third party, a party to a subsequent contract and successor, in whole or in part, to the rights and obligations of one of the parties to the initial contract (p. 25). Having said this, ECJ stresses the need for establishing the consensus between the parties to the jurisdiction agreement. In order for a third party to rely on the clause it is, in principle, necessary that the third party has given his consent to that effect (p. 29). In doing so a full effect to the principle of freedom of choice on which Article 23(1) of the Regulation is based will be given. ECJ considers the reference to the national law when determining whether sub-buyer may rely on a jurisdiction clause incorporated in the initial contract between the manufacturer and the first buyer as inappropriate. This solution may compromise the aim of unifying the rules of jurisdiction pursued by the Regulation and be an element of uncertainty incompatible with the concern to ensure the predictability of jurisdiction (p. 39). On the described grounds ECJ ruled:

Article 23 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that a jurisdiction clause agreed in the contract concluded between the manufacturer of goods and the buyer thereof cannot be relied on against a sub-buyer who, in the course of a succession of contracts transferring ownership concluded between parties established in different Member States, purchased the goods and wishes to bring an action for damages against the manufacturer, unless it is established that that third party has actually consented to that clause under the conditions laid down in that article.

- C-352/13 Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel NV, Solvay SA/NV, Kemira Oyj and FMC Foret SA

The most recent case dealing with opposability of choice of court agreement against third parties concerns a claim for damages which were directly or indirectly transferred to the applicant CDC by 71 undertakings having allegedly suffered loss as a result of an infringement of Article 81 EC and Article 53 of the Agreement on the European Economic Area. From 1994 to 2006 those undertakings (the assignors) purchased substantial quantities of hydrogen peroxide in various EU and EEA Member States. Some of the contracts of sale included agreements on arbitration and jurisdiction. In 2006 the European Commission found out that, in connection with hydrogen peroxide and sodium perborate, the defendants and other undertakings participated in a single and continuous infringement of the prohibition of cartel agreements (exchanging important and confidential market and/or company-relevant information, limiting and/or controlling production, allocating markets and customers and fixing and monitoring prices).

The claim for damages was brought by CDC (the assignee) before Landgericht Dortmund (Germany) that could have international jurisdiction by virtue of Articles 5(3) and 6(1) of Regulation No 44/2001. The defendants relied on the contracts on jurisdiction provided for in some of the sales contracts by which they were bound to the undertakings and contended that the referring court had no jurisdiction to hear and determine the case.

In those circumstances the referring court asked *inter alia* whether Article 23(1) of Regulation No 44/2001 and the requirement of effective

enforcement of the prohibition of cartel agreements in EU law must, in the case of actions for damages for an infringement of competition law, be interpreted as allowing account to be taken of jurisdiction clauses contained in contracts for supply of goods where this has the effect of excluding the jurisdiction of a court with international jurisdiction under Article 5(3) and/or Article 6(1) of that regulation (p. 57).

ECJ easily asked the part devoted to the correlation between the jurisdiction agreement and the special jurisdiction under Article 5(3) and/or Article 6(1). The Court referred to its previous judgment stating expressly that, by concluding an agreement on the choice of court under Article 17 of the Brussels Convention, the parties may derogate, not only from the general jurisdiction under Article 2 thereof, but also from the special jurisdiction laid down in Articles 5 and 6 of that convention (see judgment in *Estasis Saloti di Colzani*, 24/76, EU:C:1976:177, paragraph 7). Having said this, ECJ concluded that the requirement of effective enforcement of the prohibition of cartel agreements cannot undermine the choice of court agreement as being independent from the substantive validity of the main issue (*Castelletti*, C-159/97, EU:C:1999:142, paragraph 51).

As far as the assignment issue was at stake, ECJ found that the *court before which the action is brought must, nevertheless, ensure that the clauses at issue actually bind the applicant in the main proceedings before examining the requirements of form laid down in Article 23 of Regulation No 44/2001*. The Court repeated the conclusion from *Ref-comp*, C-543/10, p. 29 stating that a jurisdiction clause incorporated in a contract may, in principle, produce effects only in the relations between the parties who have given their agreement to the conclusion of that contract. In order for a third party to rely on such a clause it is, in principle, necessary that the third party has given his consent to that effect. ECJ rightly added an exception to this principle:

Only where a party not privy to the original contract had succeeded to an original contracting party's rights and obligations in accordance with national substantive law as established by the application of the rules of private international law of the court seised of the matter could that third party nevertheless be bound by a jurisdiction clause to which it had not agreed.

As you may see, this exception is not new. It is to be found in *Coreck*, C-387/98, EU:C:2000:606, paragraphs 24, 25 and 30). It was only put

into question by *Refcomp*. Luckily the doubts lasted not very long.

The added value of *CDC* is connected also with the reasoning that it is for the applicant to the main proceedings to prove to be bound by the clauses at issue (p.66). This rule may be interpreted as meaning that: 1) the applicant bears the burden of proof and/or 2) that he has to establish the national substantive law.

Finally, the *CDC* case provides valuable interpretation as to the particular relationship underling the disputes subject to forum selection clause in case of cartel liability. For ECJ a clause which abstractly refers to all disputes arising from contractual relationships as not extending to a dispute relating to the tortious liability that one party allegedly incurred as a result of the other's participation in an unlawful cartel (p. 69). By contrast, where a clause refers to disputes in connection with liability incurred as a result of an infringement of competition law and designates the courts of a Member State other than the Member State of the referring court, the latter ought to decline its own jurisdiction (p.71)

VI. The represented ECJ case-law gives rise to **three different approaches** of the opposability of the choice of court agreement towards third parties:

1. Restrictive approach (Refcomp.) – a jurisdiction clause incorporated in a contract may, in principle, produce effects only in the relations between the parties **who have given their agreement** to the conclusion of that contract;

2. Accessorial approach (Tilly Russ, Castalletti, Coreck and CDC) - Only where a party not privy to the original contract **had succeeded to an original contracting party's rights and obligations** in accordance with national substantive law as established by the application of the rules of private international law of the court seized of the matter, may be bound by the forum selection clause;

3. Substantive approach (Powell Duffryn and Gerling) – the **third party in the given case is bound by** the forum selection clause **without giving its agreement and without referring to the national substantive law** established by the rules of the PIL of the court seized.

We may check these three different approaches to assignment cases

being the most economically important tool for transfer of rights.

By using the restrictive approach the assignors will have to agree to the concluded forum selection agreement. If forum selection clause is used against those persons they will never agree and the clause will become futile. The assignment will lead to change (and even to termination) of the forum selection agreement. The third parties will acquire rights with a content differing from the original one. The other party to the forum selection clause will be deprived rights.

The accessorial approach ties the opposability of the choice of court agreement towards third parties with the substantive national law determined by the private international law of the court seized. Under this law the third party has to step into the shoes of the initial party, i.e. to succeed the rights and obligations thereof.

In order to go into details an example may be use. Let's imagine that a construction agreement between Bulgarian constructor and a German contractor is concluded. The parties have chosen the Bulgarian court. The constructor assigns part of its remuneration to a Greek bank. The German company does not pay. The Greek company seizes the German court, which has to apply Article 14, par. 2 Rome I Regulation. According to it the law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged. The assigned claim is governed by the Bulgarian law (as per Article 4, par. 1, b) Rome I Regulation). Under the Bulgarian law in case of assignment only rights and no obligations are transferred. The same notion is to be found in many states. If the German court has to follow strictly the accessorial approach of ECJ requiring simultaneous succession of rights and obligations, it has to consider that the assignee is not bound by the forum selection clause and may seize the German court as the court having general jurisdiction under Article 4 Regulation Brussels Ibis.

This result is not convincing. By assigning the claim the assignor will deprive the debtor from the forum selection clause. The assignees will acquire rights protected by different forum than before the assignment. The identity of the transferred right will vanish. Finally, this result is not very easy to be achieved as the court seized may has to establish foreign law and may differ depending on the national substantive law.

This solution may compromise the aim of unifying the rules of jurisdiction pursued by the Regulation Brussels Ibis and be an element of uncertainty incompatible with the concern to ensure the predictability of jurisdiction (p. 39 *Refcomp*).

The large number of industries relying on the assignment will not be very happy with the described result and created uncertainty.

The substantive approach used by the ECJ in case of insurance contract in favour of third party and in case of statutes of a company introducing an independent rule for including a third party into the scope of the forum selection clause has to expand and to cover at least the assignment cases.

The provision may simply state that in case of assignment the assignee is bound by the forum selection clause. This solution keeps the link between the transferred right and its way of protection created by the initial contracting parties. The identity of the right is preserved. The debtor is not deprived of the right of the agreed forum and the assignee does not acquire rights deferring from the original one. This solution will save efforts for the court seized in establishing foreign law if necessary and provide stability and foreseeability.

If the substantive solution is not accepted the accessorial approach may be amended in two possible ways:

A) Amendment of the current version by exchanging the need to succession of the original contracting party's rights **and** obligation with the succession either of the rights or obligation of the initial contracting party (rights **or** obligations).

B. Conditioning the opposability of the forum selection clause towards third parties by the substantive law applicable to the contract, containing the forum selection clause, as far as under this law the third party acquires contractual rights and/or obligations. *In there is no contract, the lex cause for which choice of court is made has to be considered.*

In both cases the national substantive law and the line of the actual ECJ case law will be considered. At the same time it will be clear that the forum selection clause is either right or obligation by itself but a modality to the right/obligation envisaged for. Unfortunately those solutions are not easy to be applied by the court and seem to be time

consuming and to some extent unpredictable.

The assignment issue will for sure be subject to further clarifications and legislative and case law developments. We may only hope that this institute will deserve its proper treatment in case of choice of forum situations.

ABSTRACT

A choice-of-court agreement usually incorporated in a contract has an effect limited to the relations between the contractual parties. The rights and/or obligations under the contract and even the contract as a whole may be transferred to third parties. This could happen for example as a result of universal transfer of assets (successions, mergers and acquisitions of companies) or specific transfer of assets (assignment of receivables or debts, subrogation, stipulation in favour of a third party, transfer of contract); or, in case of multiple parties (e.g. articles of association). May the third parties find themselves involved in a choice-of-court agreement, or even in a proceeding which is already under way? This paper aims at answering this question using the Hague Convention of 30 June 2005 on Choice of Court Agreements (hereinafter the “Hague Convention”) entering into force on the 1st of October 2015 and the Regulation Brussels Ibis applicable since 10th of January 2015.

Keywords: Choice-of-court agreement; Hague Convention on Choice of Court Agreements; Brussels Ibis Regulation.

MOGUĆNOST ZAKLJUČIVANJA PROROGACIONIH SPORAZUMA PROTIV TREĆIH LICA PREMA HAŠKOJ KONVENCIJI O PROROGACIONIM SPORAZUMIMA I UREDBI BRISEL I bis

SAŽETAK

Prorogacioni sporazum koji je u pravilu inkorporisan u osnovni ugovor ima dejstvo ograničeno na odnose između ugovornih strana. Prava i/ili obaveze iz ugovora, pa čak i sam ugovor u cjelini, mogu biti preneseni na treća lica. Ovo se može desiti npr. U slučaju univerzalnog prenosa imovine (nasljeđivanja, spajanja ili akvizicije kompanija) ili specifičnog prenosa imovine (ustupanje potraživanja ili prenos duga, subrogacija, ugovaranje u korist trećeg lica, prenos ugovora) ili u slučaju više ugovornih strana (e.g. statutom). Mogu li se treća lica naći uključena u prorogacioni sporazum, ili čak u postupku koji je već započet? Ovaj članak pruža odgovore na postavljeno pitanje koristeći Hašku konvenciju od 30. juna 2005. godine o prorogacionim sporazumima koja je stupila na snagu 01. oktobra 2015. i Uredba Brisel I bis primjenjiva od 10. januara 2015. godine.

Ključne riječi: Prorogacioni sporazum; Haška konvencija o prorogacionim sporazumima; Uredba Brisel Ibis.