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Doctoral Thesis

Regulatory Framework for the International Choice of Court Agreements in Thailand:

Revisiting the Validity and Jurisdictional Protection of Weak Parties

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Abstract

Nowadays, Thailand is deeply connected with international trade and cross-border activities. Simultaneously, the risk of international litigation has been increasingly exposed to individuals and businesses in Thailand, as a result of the internationalization of economic activities. At the international level, the choice of court agreements has been widely used to increase legal certainty, as well as reduce litigation and enforcement risks often associated with international litigation, such as undesirable fora, parallel proceedings, and jurisdictional challenges. However, Thailand still lacks an explicit statutory provision and a clear legal framework for the international choice of court agreements, thus leading to confusion and uncertainty as to the validity, effects, formality, and other requirements of such agreements in the country. One of the main reasons for the hesitancy in recognizing the choice of court agreements is the concern over weak parties.

This dissertation aims to propose a new regulatory framework and a statutory model for international choice of court agreements in civil and commercial matters in Thailand, which would balance the benefits of party autonomy in choice of court and the need to protect weak parties in international litigation. To achieve this objective, the dissertation investigates the existing jurisdictional rules, related legislation, case law, and regulatory policies to address crucial problems concerning the recognition of the international choice of court agreements in Thailand. It also examines the theoretical foundations and justifications for the choice of court agreements. Key developments in international civil procedures and arbitration laws in major jurisdictions, such as Japan, the European Union, the United States, and the Hague Convention on the Choice of Court Agreements, are considered to suggest a legislative framework for the international choice of court agreements. The validity of the asymmetric choice of court agreements is also discussed. Furthermore, this dissertation utilizes behavioral economics and comparative legal methodology to scrutinize the need for providing jurisdictional protection to weak parties and to design regulatory tools that would provide optimal protection for weak parties in the context of the choice of court agreements.

Based on the results of the studies, this dissertation argues that Thailand should establish a new legislative framework for the international choice of court agreements in the form of statutory provisions. It also proposes a statutory model consisting of the amendments to the Civil Procedure Code, the Consumer Case Procedure Act, B.E. 2551 (2008), and the Act for the Establishment of and Procedure for Labor Court, B.E. 2522 (1979). In particular, the Civil Procedure Code should be amended to provide clear rules on the obligations of the Thai courts regarding the choice of court agreements, formal and substantive validity requirements, the specificity requirement, the presumption in favor of exclusivity, and the public policy exception. Moreover, protective jurisdictional rules in favor of consumers and employees should be established in the Consumer Case Procedure Act, B.E. 2551 (2008) and the Act for the Establishment of and Procedure for Labor Court, B.E. 2522 (1979), respectively.

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Chapter I: Introduction

This dissertation attempts to analyze party autonomy in choice of court and develop a new regulatory framework for the international choice of court agreements in Thailand. The choice of court agreements are frequently used in international business transactions and are widely recognized in many jurisdictions around the world. However, Thailand lacks an explicit statutory provision and a clear legal framework for an international choice of court agreements, thus leading to confusion and uncertainty as to the validity, effects, formality, and other requirements of such agreements in the country. One of the reasons for the hesitancy in recognizing the choice of court agreements is the concern over weak parties, such as consumers and employees. Hence, this dissertation carefully considers the impacts of the choice of court agreement on the weak parties by using a behavioral economic analysis, which could accurately explain the creation of individuals' preferences and human decision-making processes in a real-world situation. In addition, this dissertation analyzes how the jurisdictional rules of Thailand should be revised to balance the benefits of party autonomy in choice of court with the need to protect weak parties in the choice of court agreements. It also provides a statutory model for the reform of Thai law in relation to the international choice of court agreements in civil and commercial matters.

1.1 Background of the Research

The main engines of Thailand's economy are exports, foreign direct investment (FDI), and tourism. Thailand also relies extensively on international production, trade, and investment in global value chains.[1] Moreover, Thai society has become rapidly exposed to international contacts and cross-border activities due to the establishment of the ASEAN Economic Community (AEC), various free

[1] *See* OECD, *OECD Investment Policy Reviews: Thailand 2020*, OECD Investment Policy Reviews (Paris: OECD Publishing, 2021), 54.

trade agreements (FTAs), and the most recent technological innovations. Furthermore, the globalization of economic activities and the cross-border exchange of people and goods has inevitably led to an increasing volume of international litigation in Thailand and also exposed every individual and business in Thailand to the risk of international litigation. Simultaneously, jurisdictional disputes have become more significant issues in cross-border litigation, and judicial decisions on such disputes could have a decisive effect on the overall trial.

In general, party autonomy, a widely recognized principle in private international law, has been extensively used as a tool to increase legal certainty in international transactions, satisfy the needs of the litigants, and mitigate the risk of multi-forum litigation. It also enables litigation risk management for the parties. As a result, dispute resolution agreements, such as the choice of court agreements, which reflect the principle of party autonomy, has become more common business practices in cross-border transactions.

Recently, many jurisdictions have introduced new legislation on international civil procedures and private international law to recognize or give greater effect to the international choice of court agreements. For example, the European Union newly enacted Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on the jurisdiction and recognition and enforcement of judgments in civil and commercial matters (recast) (hereafter referred to as the "Brussels I Regulation (Recast)") to replace Council Regulation (EC) No 44/2001 of 22 December 2000 on the jurisdiction and recognition and enforcement of judgments in civil and commercial matters (hereafter referred to as the "Brussels I Regulation") and provide more clarity and precise rules on international jurisdiction as well as the choice of court agreements.[2] In addition, Japan amended its Code of Civil Procedure to introduce new statutory provisions on international jurisdiction and the international choice

[2] *See* Recitals 1-10 of the Brussels I Regulation (Recast).

of court agreements.[3] Furthermore, the Convention of 30 June 2005 on Choice of Court Agreements (hereafter referred to as the "Hague Convention on Choice of Court Agreements"), which entered into force in 2015 in more than 30 jurisdictions, has shown an international attempt to create a multilateral framework of rules concerning the exclusive choice of court agreements in civil and commercial matters.[4]

On the other hand, although an international choice of court agreement is generally one of the contractual terms negotiated by business lawyers in Thailand in their everyday practices during the process of drafting contracts, the Civil Procedure Code of Thailand (hereafter referred to as the "CPC") and the Act on Conflict of Laws B.E. 2481 (1938) are silent on the choice of court agreements.[5] Prior to the amendment of the CPC in 1991, the parties had the freedom to select the Thai courts where they wished to submit their disputes. The former Section 7 (4) of the CPC provided that the parties could agree in writing to submit any disputes which had arisen or could arise to the courts for the place of the cause of action, the place of domiciles of either party, or the place of the subject matter of the claim. However, the 1991 amendment repealed this provision because of the criticism concerning the abuse of the choice of court agreements by the parties with superior bargaining powers, such as banks, insurance companies, hire-purchase companies, and other large corporations. They tended to choose the courts close to their head offices in Bangkok, which were often detrimental to consumers and rendered undue

[3] *See generally*, Dai Yokomizo, "The New Act on International Jurisdiction in Japan: Significance and Remaining Problems," *Zeitschrift Fuer Japanisches Recht [Journal of Japanese Law]* 34 (2012): 95–113.
[4] *See* "Status Table," Convention of 30 June 2005 on Choice of Court Agreements, HCCH, accessed May 25, 2022, https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.
[5] Kittiwat Chunchaemsai, "Legal Considerations and Challenges Involved in Bringing the 2005 Hague Convention on Choice of Court Agreements into Force Within an Internal Legal System: A Case Study of Thailand," *Journal of Private International Law* 17, no. 1 (2021): 152–53.

advantage over the weak parties.[6] As a result, the validity of the international choice of court agreements in Thailand after the revision of the CPC in 1991 has become uncertain.[7]

Recent Thai Supreme Court decisions have also appeared to confirm the validity of a non-exclusive choice of court agreements in international trade and business transactions. The Supreme Court held that the international choice of court agreements was permitted under the international general principle of law.[8] Some leading commentators in Thailand also opined that the choice of court agreement in cross-border transactions should be valid under Thai law because it has been internationally accepted. They also argued that the deleted provision on the choice of court agreements was concerned only with domestic cases without any foreign elements.[9] Nonetheless, the lack of clear statutory provisions and the limited volume of the court decisions has led to confusion and uncertainty regarding the validity, effects, formality, and other requirements of the international choice of court agreements in Thailand. The types of choice of court agreements that are permissible under the current law; namely, exclusive, non-exclusive, and asymmetric, are also unclear.[10]

In addition, the insufficient recognition of party autonomy and the lack of a clear and precise set of rules on the international choice of court agreements could lead to problems concerning the attractiveness of conducting trade and commerce in Thailand, the international reputation of Thai courts, and the nonrecognition of Thai judgments. In recognizing these problems, the Thai government is now making an effort to improve the international litigation system to suit the era of globalization. The government announced the National Reform Plan on Justice Administration in April 2018. The Plan sets

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[6] Vichai Ariyanuntaka, "Problems Respecting Jurisdiction and Recognition and Enforcement of Foreign Judgments and Arbitral Awards: A Thai Perspective," *Law Journal of the Thai Bar* 52, no. 3 (1996): 44.
[7] Prasit Pivavatnapanich, *Commentary on Private International Law [Kam Athibai Khodmai Rawangprathed Panaek Khadeebukkon],* 8th ed. (Bangkok: Thammasat University Press, 2018), 98.
[8] *See e.g.* Supreme Court Dika no. 3281/2562 (2019), Supreme Court Dika no. 3537/2546 (2003).
[9] *See* Pivavatnapanich, *Commentary on Private International Law [Kam Athibai Khodmai Rawangprathed Panaek Khadeebukkon],* 97.
[10] Chunchaemsai, "Legal Considerations and Challenges Involved in Bringing the 2005 Hague Convention on Choice of Court Agreements into Force Within an Internal Legal System: A Case Study of Thailand," 153.

goals for the government to achieve in order to reform the international jurisdiction of Thai courts, establish clear mechanisms for the recognition and enforcement of foreign judgments, and modernize the rules on the conflict of laws. The Plan also suggests that the rules regarding international jurisdiction in civil and commercial matters, including the choice of court agreements under the CPC, should be reviewed to increase legal certainty and predictability as well as reflect the current international business practices.[11] However, the National Reform Plan has not provided any concrete guidelines concerning how jurisdictional rules in international disputes should be developed. This issue is thus left to the legislature and relevant government agencies to decide during the subsequent implementation stage.

Accordingly, the existing framework for the international choice of court agreements under Thai law needs to be reformed to accommodate party autonomy in choice of court and better facilitate international business transactions. Furthermore, in designing a new regulatory framework for the international choice of the court agreements, it is essential to strike a balance between the benefits of party autonomy and the need to protect the weak parties who are vulnerable to abuse by parties with superior bargaining powers. In particular, the concern over weak parties was the main reason for restricting party autonomy in choice of court in Thailand, and it has been a severe hurdle for promoting party autonomy in the aspect of international litigation. Therefore, to avoid market inefficiency and behavioral market failure, the lawmakers should ensure that granting party autonomy in choice of court would not conversely impair the economic welfare of the weak parties and expose them to the risks of being exploited.

[11] The National Reform Plan for Justice Administration is available at https://www.nesdc.go.th/download/document/ SAC/RF_Plan04.pdf. *See also,* Apipong Sarntikasem, "Rethinking the International Jurisdiction of Thai Courts in Civil and Commercial Matters through Comparative Analysis," *Dullapaha* [Thai Court of Justice Law Journal] 65, no. 3 (September – December 2018): 3.

1.2 Research Objectives, Research Questions, and Scope of the Research

The purposes of this research were to examine the concept of party autonomy and the anatomy of the international choice of the court agreements in civil and commercial matters, as well as to design a statutory model for the reform of Thai law to promote party autonomy in choice of court based on the Thai legal, social, and economic circumstances. The ultimate main goal of this research project was to design the most appropriate regulatory framework for the international choice of court agreements in Thailand which would maximize the benefits of party autonomy while protecting the weak parties who truly deserve special jurisdictional protection. Moreover, since many developing countries are confronting the same challenges as Thailand in finding a suitable approach toward the international choice of court agreements, the outcomes of this research could provide crucial recommendations on how to balance the benefits of party autonomy and the protection of weak parties in cross-border litigation. To achieve such goals, this research aimed to address the following questions:

(i) What are the theoretical foundations of party autonomy in choice of court in international litigation?

(ii) Why and to what extent should party autonomy in choice of court be limited for the protection of weak parties?

(iii) Is the transplantation of the legislative models used in Japan, the European Union, the United States, and the Hague Convention on Choice of Court Agreements into Thailand feasible?

(iv) How can Thailand develop a suitable statutory model for the international choice of court agreements that would appropriately enhance party autonomy in international litigation while effectively protecting weak parties?

In addition, the main focus of this research was on the validity of the choice of court agreements in civil and commercial matters in international settings and jurisdictional protection for the weak parties since these issues were given priority in the National Reform Plan on Justice Administration. Additionally, the use of such agreements would be consistent with contemporary business practices and the current case law of Thailand. Furthermore, it should be noted that there are other issues related to the introduction of the international choice of court agreements in Thailand. These include the exclusive

jurisdiction of Thai courts and the recognition and enforcement of foreign judgments based on the choice of the court agreements. However, because of the broad nature of these topics and the lack of clear mechanisms concerning these two areas under Thailand's existing civil procedural rules, which would require further in-depth research, these two issues were not covered in this study.

1.3 Research Methodology

The research methodology adopted for this study was an interdisciplinary approach comprising doctrinal legal research, comparative legal scholarship, and behavioral economic analysis of the law. The originality of this research was based on the combination of these research methods and behavioral insights to examine the appropriate framework for the international choice of court agreements and jurisdictional protection of the weak parties in Thailand. This dissertation principally employed qualitative research techniques to collect and analyze both the primary and secondary sources of law. In particular, this research involved a review of the textual analysis of the legislative provisions, a body of case law, and underlying policy rationales. It also considered several key aspects of international treaties and agreements on the choice of the court agreements. In addition to the primary sources, secondary sources were also utilized, such as legislative histories, reports, statistics, journal articles, and commentaries on the legislation and case law.

In order to address the first research question, this study reviewed the existing jurisdictional rules and key legislation of Thailand, including the CPC, the Consumer Case Procedure Act B.E. 2551 (2008), the Act for the Establishment of and Procedure for Labor Court B.E. 2522 (1979), the Arbitration Act B.E. 2545 (2002), the Multimodal Transport Act B.E. 2548 (2005), the Act on Conflict of Laws B.E. 2481 (1938), and relevant case law to determine the adequacy, problems, and limitations concerning the choice of court agreements. It also explored the normative foundations of party autonomy

in private international law through the review of the literature, international documents, and practices to justify the need for a new framework for the international choice of court agreements in Thailand.

In addressing the second research question, this study utilized behavioral economic analysis to examine the need for protecting weak parties in the choice of court agreements. Behavioral economics could accurately explain the creation of individuals' preferences and human decision-making processes in a real-world situation, as well as identify the cognitive biases that could constrain human judgment and induce a behavioral market failure. This dissertation also analyzed several regulatory techniques from the behavioral economic perspective to determine the most appropriate framework for the jurisdictional protection of the weak parties in the international choice of court agreements.

For the third and fourth research questions, this study conducted a comparative legal analysis to examine the key aspects of legislation concerning the international choice of court agreements in major jurisdictions, including Japan, the European Union, the United States, and the Hague Convention on Choice of Court Agreements. In particular, the Japanese Code of Civil Procedure, the Brussels I Regulation (Recast), and the above-mentioned Hague Convention were analyzed in detail. Japan was selected as the primary target for the purpose of the comparison because Thailand and Japan share certain legal traditions, especially civil law traditions with strong common law influences. In addition, Japan has recently experienced significant reforms of its international jurisdiction system in civil, commercial, and family matters. It has adopted comprehensive and detailed rules on international adjudicatory jurisdiction to achieve a high degree of legal certainty and predictability. The Brussels I Regulation (Recast) and the Hague Convention on Choice of Court Agreements provided crucial frameworks and precise rules on the choice of court agreements, thus influencing legal reforms in several jurisdictions. The United States was also chosen for a comparative purpose with respect to the policy toward weak party protection because its courts, including both federal and state courts, have developed a large body of case law concerning the use of public policy exceptions to protect weak parties in the choice of court agreements. Moreover, several national arbitration laws were

comparatively examined to analyze the suitable framework for the international choice of court agreements. Finally, this dissertation utilized the results of doctrinal research, comparative legal studies, and behavioral insights to propose a new statutory model for the international choice of court agreements in Thailand.

1.4 Structure of the Dissertation

This dissertation consists of six chapters. Chapter I introduces the research background and explains the research objectives, the research questions, the scope of the research, and research methodologies. Chapter II begins with the introduction of the Thai legal system and examines the development and existing rules for international jurisdiction and the choice of court agreements in Thailand. It also discusses party autonomy in choice of forum under Thai law, including the choice of court agreements, jurisdiction based on submission, and arbitration. Moreover, it analyzes the theoretical and practical problems caused by the lack of party autonomy in choice of court in Thailand. Chapter III presents the foundations and normative justifications of party autonomy in choice of court. It then further examines the anatomy, legal nature and effects, as well as varieties of the choice of court agreements in cross-border transactions.

Chapter IV discusses the formal and substantive validity of the choice of court agreements in various jurisdictions, especially Japan, the European Union, and the Hague Convention on Choice of Court Agreements. It also examines the principle of severability in the context of the choice of court agreements, as well as analyzes the conflict of laws issues and approaches for ascertaining the law applicable to the choice of court agreements to determine their substantive validity. Furthermore, the validity of asymmetric choice of court agreements, which are controversial in many jurisdictions, is also discussed. Chapter V examines the need for the protection of weak parties in the choice of court agreements based on behavioral economics. It also comparatively surveys the state practices in

regulating the choice of court and arbitration agreements in relation to the weak parties and utilizes behavioral economics analysis to evaluate the regulatory techniques for providing jurisdictional protection to the weak parties. Then, it develops the legal models, including protective jurisdictional rules and public policy control for the protection of consumers, employees, and other weak parties in the choice of court agreements. Finally, Chapter VI proposes a new legal framework for the international choice of court agreements and develops a legal reform proposal on the jurisdictional rules of Thailand to accommodate party autonomy in choice of court.

Chapter II: Legal System and Party Autonomy in Choice of Forum in Thailand

Thailand has successfully transformed its economy and made an outstanding social development over the last few decades. It moved from a lower-middle-income country to an upper-middle-income country within a generation, according to the World Bank.[1] With a population of approximately 67 million, Thailand is the eighth largest economy in Asia and the second-largest economy in Southeast Asia, after Indonesia.[2] Thailand's economy is highly dependent on international trade and exports, accounting for approximately two-thirds of its gross domestic product (GDP). Its top trading partners are the United States, China, Japan, Vietnam, Hong Kong, Malaysia, Australia, Indonesia, Singapore, and India. Thailand's main exports include machinery, electrical machinery, vehicles, and agricultural products.[3]

Thailand is also an attractive destination for foreign direct investment (hereafter referred to as "FDI") in the region. FDI constitutes a significant element of Thailand's economy. Japan is the largest investor in the country, followed by Singapore. The two countries account for half of the FDI inflows in Thailand. Hong Kong, the United States, the Netherlands, and China are also ranked in the top list of foreign investors in Thailand.[4] Furthermore, Thailand particularly depends on the tourism industry, which accounts for approximately twenty percent of its GDP.[5] Thailand received over two trillion Thai baht from the spending of international tourists in 2018 and the number of international travelers reached almost forty million people in 2019.[6] In addition, as of November

[1] *See* "Overview," The World Bank in Thailand, The World Bank, accessed January 18, 2021, https://www.worldbank.org/en/country/thailand/overview.
[2] "GDP Ranking," The World Bank, accessed January 18, 2021, https://datacatalog.worldbank.org/dataset/gdp-ranking.
[3] Daniel Workman, "Thailand's Top Trading Partners," World's Top Exports, accessed January 18, 2021, http://www.worldstopexports.com/thailands-top-import-partners/.
[4] *See* "Thailand: Foreign Investment," Santandertrade, accessed January 18, 2021, https://santandertrade.com/en/portal/establish-overseas/thailand/foreign-investment. *See also*, "World Investment Report 2020: International Production beyond the Pandemic" (New York: United Nations Conference on Trade and Development (UNCTAD), 2020).
[5] AFM Editorial Office, "Thailand Economy – Former Success Crushed by Coronavirus," *AsiaFundManagers.Com* (blog), August 5, 2020, https://www.asiafundmanagers.com/int/thailand-economy/.
[6] "Thailand's Tourism Industry Outlook 2019," AEC+ BUSINESS ADVISORY, accessed January 18, 2021, https://kasikornbank.com/international-business/en/Thailand/IndustryBusiness/ Pages / 201901_ Thailand_TourismOutlook19.aspx.

2020, there are 2,183,615 foreign workers legally working in Thailand, which is mostly comprised of those from Myanmar, Laos, Cambodia, and Vietnam.[7] The actual number of foreign workers is expected to be much higher.

Nowadays, Thailand is deeply connected with international trade and cross-border activities. The modernization of logistical infrastructure and technological innovation also dramatically increase the volume and Thailand's ability to engage in transnational commercial activities. Moreover, the Association of Southeast Asian Nations (ASEAN), in which Thailand is a founding member, has established the ASEAN Economic Community (AEC), in order to create a single market and facilitate free movements of goods, services, capital, investment, and skilled labor. This development further accelerates the globalization of Thai society and economy. Meanwhile, the risk of international litigation is increasingly exposed to individuals and businesses in Thailand, thanks to the internationalization of economic activities. As the number of international litigation rises, several important issues arise before Thai courts, such as which court should have jurisdiction to adjudicate a dispute and which law should the court apply to the case. The former question is mainly regulated by the Civil Procedure Code (hereafter referred to as "CPC"), and the latter is governed by the Act on Conflict of Laws B.E. 2481 (1938). However, the CPC does not always give a clear answer on the international jurisdiction of Thai courts, especially issues related to a choice of court agreement, which is frequently used in international business transactions, and is one of the core pillars of international commercial litigation today.

This chapter aims to examine the current international jurisdiction of Thai courts and analyze its shortcomings resulting from the lack of party autonomy in choice of court. Section 2.1 will first introduce an overview of the Thai legal system and scrutinize the jurisdictional rules of Thai courts in civil and commercial matters. Special rules for the protection of weak parties such as consumers and employees will also be discussed. Then, Section 2.2 will comparatively examine party autonomy in choice of forum under Thai laws, including a choice of court agreement, jurisdiction based on

[7] "Statistics on Foreign Workers in Thailand," Foreign Workers Administration Office, accessed January 18, 2021, https://www.doe.go.th/prd/alien/statistic/param/site/152/cat/82/sub/0/pull/category/view/list-label.

submission, and arbitration. Subsequently, Section 2.3 will analyze theoretical and practical problems caused by the lack of party autonomy in choice of court in Thailand. Finally, Section 2.4 will offer a brief conclusion with some remarks.

2.1 Overview of the Thai Legal System

Thailand is a civil law country with strong influences from common law traditions. The primary sources of Thai law are statutes passed by the parliament.[8] Although case law is not regarded as a binding legal source in Thailand, legal precedents established by the Thai Supreme Court have persuasive authority upon lower courts. A code law system is a major fruit of the legal modernization of Thailand, which started during the reign of King Chulalongkorn (1868-1910). The major code laws consist of the Civil and Commercial Code, the Criminal Code, the Civil Procedure Code, and the Criminal Procedure Code. These laws mainly adopted the European and British legal systems with minor borrowings from Japan, India, China, and the United States.[9] In particular, the Thai code laws were highly influenced by the French legal system because of the leading roles played by French legal advisors during the time of drafting the first modern laws. For example, Riviére and Charles L' Evésque, two French legal advisors, were appointed to be principal drafters of the first Civil Procedure Code between 1911 and 1935.[10]

The CPC provides various grounds of territorial jurisdiction for Thai courts in civil, commercial, and family matters.[11] It determines local venues by allocating the proper territorial district in Thailand where the action should be brought. In principle, general jurisdiction of Thai courts is based on the *actor sequitur forum rei* principle, and special jurisdiction is based on the place of the cause of action.[12] However, there is no specific provision prescribing international

[8] For an overview of the Thai legal system, s*ee* Joe Leeds, "UPDATE: A Summary of the Thailand Law and Legal System," GlobaLex, March/April 2020, accessed April 1, 2022, https://www.nyulawglobal.org/globalex/Thailand1.html.
[9] Frank C. Darling, "The Evolution of Law in Thailand," *The Review of Politics* 32, no. 2 (1970): 208.
[10] *See* Chanchai Sawaengsak and Wannachai Boonbumrung, *Codifications of Laws in Foreign Countries and Thailand* [Sara naru kieokap kanchattham pramuan kotmai khong tangprathet lae khong Thai] (Bangkok: Nithidham, 2000), 164–65.
[11] *See* the CPC Sections 3–5.
[12] The CPC Section 4:

jurisdiction in the CPC. The Act on Conflict of Laws B.E. 2481 (1938), which lays down conflict of laws rules in a dispute involving foreign elements, is also silent on jurisdictional issues.[13] It has been widely accepted that the jurisdiction provisions under the CPC also apply to questions of international jurisdiction of Thai courts when the action involves foreign elements such as foreign parties, international contracts, and multi-jurisdiction torts.[14] Accordingly, international jurisdiction of Thai courts is presumed to exist when there are grounds in the case to establish territorial jurisdiction as provided in the CPC. These grounds include the defendant's domicile[15], the place where the cause of action occurred[16], the situs of the property or estate[17], and the plaintiff's nationality and domicile.[18] Jurisdiction rules under the CPC are discussed below in detail.

2.1.1 International Jurisdiction of Thai courts

(i) General jurisdiction

General jurisdiction permits a court to hear any claims against the defendant. General jurisdiction of Thai courts over the defendant follows the traditional principle of *actor sequitur forum rei*, which means "the plaintiff follows the matter forum." The canon of this principle is that a plaintiff should seek remedies before a competent court having jurisdiction at the domicile or place of business of the defendant.[19] This principle is based on the presupposition that defendants, the

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"Except otherwise provided by law:
(1) the complaint shall be submitted to the Court in which the defendant is domiciled within its territorial jurisdiction, or to the Court in which the cause of action occurs within its territorial jurisdiction, whether the defendant would have a domicile in the Kingdom or not."

[13] The English translation of the Act on Conflict of Laws, B.E. 2481 (1938) is available at http://web.krisdika.go.th/ data//document/ext809/809769_0001.pdf. For a detailed discussion of the Thai conflict of law rules, *see generally*, Chin Kim, "The Thai Choice-of-Law Rules," *International Lawyer* (ABA) 5, no. 4 (October 1971): 709-721; Kanung Luchai, *Commentary on Conflict of Law Rules [Kam Athibai Waduay Karn Kudkun Haeng Khodmai]*, 8th ed. (Bangkok: Vinyuchon, 2019).

[14] *See* Prasit Pivavatnapanich, *Commentary on Private International Law [Kam Athibai Khodmai Rawangprathed Panaek Khadeebukkon]*, 8th ed. (Bangkok: Thammasat University Press, 2018), 96. *See also*, Kittiwat Chunchaemsai, "Legal Considerations and Challenges Involved in Bringing the 2005 Hague Convention on Choice of Court Agreements into Force Within an Internal Legal System: A Case Study of Thailand," *Journal of Private International Law* 17, no. 1 (2021): 157–58.

[15] *See* the CPC Section 4 (1).

[16] Ibid.

[17] *See* the CPC Section 4 *sex*.

[18] *See* the CPC Section 4 *ter*.

[19] Aaron X. Fellmeth and Maurice Horwitz, "Actor Sequitur Forum Rei," in *Guide to Latin in International Law* (Oxford University Press, 2009), https://www.oxfordreference.com/view/10.1093/acref/ 9780195369380.001.0001/acref-9780195369380-e-76.

parties who cannot choose the venue for litigation, should be allowed to fight the plaintiffs at their domiciles where they can most easily defend themselves.[20] Section 4 (1) first sentence of the CPC stipulates that "the complaint shall be submitted to the Court in which the defendant is domiciled within its territorial jurisdiction." The CPC uses the domicile of the defendant as a primary connecting factor for establishing general jurisdiction.

The CPC provides three alternative bases for the determination of the defendant's domicile. Firstly, in Section 4 (1), the first sentence provides a default rule that the complaint must be submitted to the court in which the defendant is domiciled within its territorial jurisdiction (the first alternative domicile). Section 37 of the Civil and Commercial Code of Thailand further defines a domicile of a natural person as the place where such person has a principal residence.[21] Secondly, in the case where the defendant is not presently domiciled in Thailand, the place where the defendant had a principal residence at any place in Thailand within the period of two years before the date of the submission of the complaint can be deemed as the defendant's domicile (the second alternative domicile).[22] Thirdly, in the absence of the above domiciles, if the defendant carries out business or used to carry out business, in whole or in part, by itself or through an agent or a liaison, in Thailand within the period of two years prior to the date of the submission of the complaint, it can be deemed that the place where is used for carrying out business, or a residence of an agent or liaison is a domicile of the defendant for the purpose of filing an action (the third alternative domicile).[23]

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[20] Alan Reed, "Optimal Rule-Selection Principles in Anglo-American Contractual Jurisdiction," *Touro International Law Review* 11 (2008): 26.

[21] For detailed rules of a domicile of a natural person, *See* the Civil and Commercial Code Sections 37-47.

[22] Section 3 (2)(a) of the CPC:

> "(2) in the case where the defendant is not domiciled within the Kingdom;
> (a) if the defendant has ever been domiciled at any place in the Kingdom within the period of two years before the date of submitting the complaint, such place shall be regarded as a domicile of defendant."

[23] Section 3 (2)(b) of the CPC:

> "(2) in the case where the defendant is not domiciled within the Kingdom;
> (b) if the defendant operates or has ever operated either a whole or part of transaction within Thailand, irrespective of by himself or by an agent or by having any contacting person operating such transaction within the Kingdom, it shall be regarded that the place, where is used or has ever used for operating or contacting transaction, or the place, where is a residence of an agent or contacting person on the date of submitting the complaint or prior to the period of two years, is a domicile of the defendant."

The above rules are also applicable to a legal-person defendant. However, a domicile of a legal person points to the place where such legal person has its principal office or establishment, or which has been selected as a special domicile in its regulation or constitutive.[24] In the case where a legal person has several establishments or branch offices, the place of its establishment or branch office may also be considered its domicile as to acts there performed.[25]

(ii) Special jurisdiction

The rules of special jurisdiction broaden general jurisdiction by providing extra options for the plaintiff to sue the defendant in another court other than that of the defendant's domicile. In general, special jurisdiction requires a substantial link or close connecting factor between the dispute and the forum court. In Section 4 (1), the second sentence provides general rules for special jurisdiction, especially in contractual and tort claims. It stipulates that "the complaint shall be submitted … to the Court in which the cause of action occurs within its territorial jurisdiction, whether the defendant would have a domicile in the Kingdom or not." The CPC uses the place of the cause of action as a basic connecting factor for establishing special jurisdiction of Thai courts. Jurisdiction rules in contractual and tort claims are further discussed below.

(a) Contractual claims

Section 4 (1) of the CPC does not contain detailed jurisdictional rules for a claim relating to a contract. This provision has been interpreted as a general principle for jurisdiction in contractual and tortious matters, which confers special jurisdiction to Thai courts in which the cause of action arises. This rule aims to ensure that jurisdiction over a party may be exercised only when there is a strong connection between the court and the dispute by using a "cause of action" as a point of contact. In addition, Section 3 (1) of the CPC exceptionally confers special jurisdiction on the Civil Court, located in Bangkok, if the cause of action in the dispute occurs in a Thai vessel or airplane outside the Thai territory, irrespective of the defendant's domicile.[26]

[24] *See* the Civil and Commercial Code Section 68.
[25] *See* the Civil and Commercial Code Section 69.
[26] The CPC Section 3:
"For the purpose of filing the complaint:

However, there is no further explanation on the determination of jurisdiction over contractual claims at the statutory level. This issue is mostly left to the judiciary to decide on a case-by-case basis through the interpretation of the cause of action and the place where it occurs. According to Thai case law, the place where a cause of action occurs in relation to contractual claims generally points to the place where the contract is made.[27] Under Thai contract law, the contract is made where the offeror receives the acceptance.[28] Where the contract is made through instantaneous or near-instantaneous means of communication such as telephone and fax, either the place where the offer is made or the place where the acceptance is made can be considered the place where the cause of action occurs.[29] Furthermore, several decisions of the Thai Supreme Court have expanded the scope of the place of the cause of action to include the place of performance of the obligation where the breach of which gives rise to the claim.[30] Therefore, it can be inferred from the current case law that Thai courts appear to have international jurisdiction over a contractual dispute if the contract is made within Thailand or the place for the performance of a contractual obligation in question is within Thailand.

(b) Tort claims

Jurisdiction in tort claims is determined in accordance with Section 4 (1) of the CPC. Analogous to contractual claims, the courts where the cause of action arose have jurisdiction over tortious matters. Under the present case law, the place of a cause of action in relation to tort generally points to the place where the tort occurred.[31] Furthermore, the Thai Supreme Court has interpreted the place of tort to comprise both the place where the damage occurred and the place

(1) in the case where the cause of action occurs in Thai vessel or airplane outside the Kingdom, the Civil Court shall be the Court of the territorial jurisdiction;"

[27] *See* e.g., Supreme Court Dika no. 8947/2547 (2004), Supreme Court Dika no. 4687/2553 (2010).
[28] *See* the Civil and Commercial Code Sections 356 and 361.
[29] *See* Supreme Court Dika no. 269/2543 (2000).
[30] *See* Supreme Court Decision no. 2916/2548 (2005); *see also*, Pairoj Wayupap, *Civil Procedure Division I General Provisions [Kodmhai Withi Picharana Kwampaeng Phak 1 Bot Thuapai]*, 5th ed. (Bangkok: Krungsiam Publishing, 2017), 44.
[31] *See* e.g., Supreme Court Dika no. 2786/2540 (1997).

where the wrongful act was committed.[32] Consequently, tort claims can be brought in Thai courts if the tort occurred within Thailand.

(iii) Immovable property

Section 4 *bis* (Section 4/2) of the CPC uses the situs of immovable property and the defendant's domicile as grounds of jurisdiction over disputes relating to immovable property. It provides that "the complaint concerning any immovable property, right or interest regarding an immovable property shall be submitted to the Court in which such immovable property is located within its jurisdiction whether the defendant would have a domicile in Kingdom or not, or to the Court in which the defendant has a domicile within its jurisdiction." Therefore, the plaintiff can file an action relating to immovable property with Thai courts if such property is located within Thailand or if the defendant has a domicile in Thailand.

(iv) Jurisdiction based on the nationality and domicile of the plaintiff, and the situs of the defendant's property

Section 4 *ter* (Section 4/3) of the CPC provides:

> The other complaint as provided other than that in Section 4 *bis* [immovable property related-claims], in which the defendant is not domiciled within the Kingdom and the cause of action did not occur in the Kingdom, if the plaintiff is a Thai nationality or is domiciled within the Kingdom, it shall be submitted to the Civil Court or to the Court where the plaintiff is domiciled within its territorial jurisdiction.
>
> In case of the complaint according to the first paragraph, if the defendant has a property in the Kingdom, which may be executed, whether temporarily or permanently, the plaintiff shall submit the complaint to the Court in which such property is located within its territorial jurisdiction.

This Section was added in 1991 by Section 4 of the Amendment Act on the CPC (Vol. 12) B.E. 2534 (1991). It has extended jurisdiction of Thai courts beyond the scope of general jurisdiction based on the defendant's domicile and established a new jurisdictional ground based on the plaintiff's nationality and domicile, as well as the situs of the defendant's property.[33] This Section

[32] Wayupap, *Civil Procedure Division I General Provisions*, 48.
[33] Jurisdiction based on the plaintiff's nationality is seen in Art. 14 of the French Civil Code, and jurisdiction based on the presence of the defendant's assets can be found in Section 23 of the German Code of Civil Procedure and Section 99 of the Austrian Court Jurisdiction Act.

enables the plaintiff to sue the defendant domiciled abroad if the plaintiff has Thai nationality or domicile in Thailand, except for immovable property related-claims.[34] The policy objective of this amendment is to provide better protection and easier access to justice for Thai residents.

According to Section 4 *ter*, a Thai plaintiff or a person who has a domicile in Thailand can bring a lawsuit against a foreign defendant before Thai courts either at (1) the Civil Court, (2) the court for the plaintiff's domicile, or at (3) the court for the situs of the defendant's seizable property. The defendant's property includes both immovable and movable property.[35] However, if the claim is related to immovable property or the right or interest regarding immovable property, the plaintiff must file an action according to Section 4 *bis*.

Although Section 4 *ter* aims to enhance judicial protection for Thai residents by providing an opportunity to litigate at home, many commentators argue that jurisdiction based on nationality or domicile of the plaintiff is exorbitant and unjustified due to the insufficient connection between the dispute and the court.[36] It also disregards the interests and hardship of the defendant who resides abroad as well as the effectiveness of enforcement when the defendant has neither property nor domicile in the Thai territory.

(v) Non-contentious cases

Section 4 (2) of the CPC provides jurisdiction rules in non-contentious cases such as a request for declarations of ownership due to an acquisitive prescription[37], a request to commence a guardianship in respect of a person who constantly lacks the capacity[38], and a request for declarations of disappearance[39]. This provision stipulates that "the request shall be submitted to the

[34] Vichai Ariyanuntaka, "Problems Respecting Jurisdiction and Recognition and Enforcement of Foreign Judgments and Arbitral Awards: A Thai Perspective," *Law Journal of the Thai Bar* 52, no. 3 (1996): 43.
[35] Wayupap, *Civil Procedure Division I General Provisions*, 63.
[36] *See* Chumphorn Pachusanond, "Observations on Conflicts of Jurisdiction in Thailand from Private International Law Perspective [Khokid Bangprakarn Kiawkub Karnkhudkun Haeng Khed Amnajsarn Khong Prathedthai Nai Thassana Khong Kodmhai Rawang Prathed Phanak Khadee Bhukkhon]," *Chulalongkorn Law Journal* 17, no. 1 (January 1997): 52–58; *see also*, Ralf Michaels, "Jurisdiction, Foundations," in *Encyclopedia of Private International Law*, ed. Jürgen Basedow et al (Cheltenham, UK: Edward Elgar Publishing, 2017), 1043–51.
[37] *See* the Civil and Commercial Code Section 1382; Supreme Court Dika no. 1665/2548 (2005).
[38] *See* the Civil and Commercial Code Section 29; Supreme Court Dika no. 4513/2542 (1999).
[39] *See* the Civil and Commercial Code Section 61; Supreme Court Dika no. 2038/2514 (1971).

Court in which the cause of action occurs within its territorial jurisdiction, or to the Court in which the applicant is domiciled within its territorial jurisdiction." Therefore, an applicant in a non-contentious case can file an action either before the court for the place of the cause of action or the court for the applicant's domicile.

The cause of action in a non-contentious case means the matter which causes a person to pursue a legal action before a court.[40] However, as noted in the context of Section 4 (1), there is no direct provision on the determination of the place of the cause of action in the CPC. Consequently, this issue is left to the judiciary to decide on a case-by-case basis. For example, in a request for declarations of ownership due to an acquisitive prescription, the cause of action is deemed to occur in the place where the property is located. Also, the Thai Supreme Court determined that the place of the cause of action in the commencement of guardianship was the place for the domicile of a person subject to a decision for the commencement of guardianship.[41]

On the other hand, the domicile of an applicant is determined by the Civil and Commercial Code Sections 37–47 and Sections 68–69 in the case of a natural person and a legal person, respectively.[42] In addition, special rules under Section 3 (2) of the CPC are inapplicable to non-contentious cases since they intend to apply to the defendant's domicile in contentious matters.[43] Furthermore, the CPC provides specific jurisdiction rules in some particular non-contentious cases, which are discussed further below.

(vi) Appointment of an administrator of an estate

Section 4 *quarter*[44] (Section 4/4) of the CPC provides specific jurisdiction rules for a request to appoint an administrator of an estate pursuant to Section 1713 of the Civil and Commercial Code. A request to appoint an administrator of an estate including both immovable

[40] Wayupap, *Civil Procedure Division I General Provisions*, 65.
[41] *See* Supreme Court Dika no. 4513/2543 (2000).
[42] *See* Section 2.1.1 (i).
[43] *See* Wayupap, *Civil Procedure Division I General Provisions*, 66.
[44] The CPC Section 4 *quarter*:

> "The request appointing an administrator of an estate shall be submitted to the Court in which the *de cujus* is domiciled within its territorial jurisdiction at the time of his death.
> In case that the *de cujus* is not domiciled within the Kingdom, the request shall be submitted to the Court where the estate is located within its territorial jurisdiction."

and movable property, irrespective of a will, must be submitted to the court in which the *de cujus* (the deceased whose succession is open) is domiciled within its territorial jurisdiction at the time of his or her death. In case that the *de cujus* is not domiciled within Thailand, such request must be submitted to the court where the estate is located within its territorial jurisdiction.

(vii) Requests concerning legal persons

Section 4 *quinque*[45] (Section 4/5) of the CPC provides jurisdiction rules for a request related to an operation of a legal person, such as revocation of the resolution of the general meeting of a legal person, dissolution of a legal person, appointment or removal of a liquidator of a legal person, or any other requests concerning a legal person. Such request must be submitted to court where the principal office of the legal person is located within its territorial jurisdiction.

(viii) Requests concerning the estate located in Thailand

Section 4 *sex*[46] (Section 4/6) of the CPC provides special rules for a request concerning the estate located in Thailand when an applicant does not have a domiciled in Thailand, and the cause of action did not occur in Thailand. Such request must be submitted to the court where the estate is located. This estate includes both immovable and movable property.[47] Furthermore, requests prescribed by Section 4 *sex* include the request concerning the estate located in Thailand and the request that if the court issues an order, it will result in the disposal or discontinuance to dispose of the estate located in Thailand. This provision aims to provide access to Thai courts for Thai

[45] The CPC Section 4 *quinque*:

> "The request revoking the resolution of the meeting or the general meeting of the juristic person, the request dissolving the juristic person, the request appointing or removing of a liquidator of the juristic person, or other requests concerning the juristic person, shall be submitted to the Court where the principal office is located within its territorial jurisdiction."

[46] The CPC Section 4 *sex*:

> "The request concerning the estate located in the Kingdom, or the request that if the Court issues his order, it will result in the disposal or discontinuance to dispose of the estate located in the Kingdom of which the cause of action did not occur in the Kingdom and the applicant is not domiciled within the Kingdom, shall be submitted to the Court where the estate is located within its territorial jurisdiction."

[47] *See* Wayupap, *Civil Procedure Division I General Provisions*, 69–70.

nationals who move their domiciles to foreign countries but still retain some properties in Thailand and non-resident foreigners who have properties in Thailand.[48]

(ix) Multiple parties and multiple claims

Section 5 of the CPC provides:

> In a case where a complaint or request may be submitted to two Courts or more, whether it is because of a domicile of a person, a location of the estate, a place where the cause of action occurred or having several claims, and if subject matters of a case are connected, the plaintiff or the applicant shall submit the complaint or request to any of such Courts.

This provision permits closely related proceedings to be joined so that the court can simultaneously hear and determine multiple claims which are closely connected in order to expedite the proceedings and avoid the risk of irreconcilable judgments.[49] There are two basic requirements for joining claims under this provision. Firstly, the claims or subject matters of a case must be closely related. Secondly, the court must have jurisdiction over each defendant based on grounds provided in the CPC Sections 3–4 *sex*, including the domicile of a person, the location of the estate, and the place where the cause of action occurred. If the court does not have jurisdiction over one of a number of defendants, then separate claims, though closely connected, cannot be joined. For example, in the case where the first defendant is a debtor and the second defendant is a guarantor, if the first defendant is not domiciled in Thailand and the cause of action did not occur in Thailand, the foreign plaintiff who is a non-Thailand resident cannot sue the first defendant before a Thai court due to the lack of international jurisdiction.[50] Even if the second defendant is domiciled in Thailand, the plaintiff cannot join these claims together and file a lawsuit against both defendants before the court in which the second defendant is domiciled.[51] When the two

[48] Udom Fuengfung, *Commentary on Civil Procedure Code Division 1 Chapter 1 [Kam Athibai Pramuan Kodmai Withipijarana Kwam Paeng Phak 1 Torn 1],* 6th ed. (Bangkok: Institute of Legal Education Thai Bar Association, 2009), 92.
[49] *See* Supreme Court Dika no. 695/2524 (1981), 6753/2540 (1997).
[50] Thai courts cannot assert jurisdiction based on Section 4 *ter* of the CPC because it requires that the plaintiff have a Thai nationality or domicile within Thailand.
[51] *See* Wayupap, *Civil Procedure Division I General Provisions*, 74.

requirements are satisfied, the plaintiff can bring an action before any competent court having jurisdiction over one of a number of defendants.[52]

(xi) Exclusive jurisdiction

The CPC and the Act on Conflict of Laws B.E. 2481 (1938) do not contain a specific provision for the exclusive jurisdiction of Thai courts. Also, the Thai Supreme Court has not yet clarified what kind of disputes Thai courts have the power to adjudicate to the exclusion of other foreign courts. It remains to be seen how Thai courts Court will rule on this issue.[53]

2.1.2 Weak-Party Protection

Thailand has long recognized the importance of protecting parties in weak bargaining positions from being exploited by stronger counterparts to the detriment of such parties. In particular, consumers and employees are typical examples of weak parties that merchants and employers, who have superior bargaining powers, can easily take advantage of their weakness. Therefore, the Thai legislature enacted special procedural and substantive laws to protect the interests of weak parties in consumer and labor relations.[54] This Section examines protective

[52] This approach is contrary to the Japanese Code of Civil Procedure Art. 3-6 first sentence and the Brussels I Regulation (recast) Art. 8 (1) which permit closely connected proceedings to be joined even if a court may not have connection with one of the defendants. On the other hand, the United States courts deny derived jurisdiction on this basis under the minimum contacts doctrine. *See* Trevor C. Hartley, *Civil Jurisdiction and Judgments in Europe: The Brussels I Regulation, the Lugano Convention, and the Hague Choice of Court Convention*, First edition, Oxford Private International Law Series (New York, NY: Oxford University Press, 2017), 152; *see also*, Yuko Nishitani, "International Jurisdiction of Japanese Courts in a Comparative Perspective," *Netherlands International Law Review* 60, no. 02 (January 2013): 269–70.

[53] *See* Rungnapa Adisornmongkon, "Jurisdiction on the Brussels Regulation," *Payap University Journal* 29, no. 1 (2019): 12–19, 26. *See also*, "Report on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters in ASEAN Countries [Krongkarn Youmrub Lae Karn Bungkub Kadee Tam Kumpipaksa Sarn Tangprathet Nai Kadee Paeng Lae Panich Nai Klum Prathet ASEAN]" (Bangkok: Academy of Public Enterprise Policy, Business and Regulation (APaR), University of the Thai Chamber of Commerce, March 2017), 350–52 https://www.led.go.th/articles/pdf/f-court.pdf.

[54] *See e.g.* Consumer Case Procedure Act, B.E. 2551 (2008), Consumer Protection Act, B.E.2522 (1979), Unfair Contract Terms Act, B.E. 2540 (1997), Direct Sale and Direct Marketing Act, B.E. 2545 (2002), Liability for Damage Arising from Unsafe Products Act, B.E. 2551 (2008), Act for the Establishment of and Procedure for Labor Court, B.E. 2522 (1979), Labor Protection Act, B.E. 2541 (1998), Labor Relations Act, B.E. 2518 (1975), State Enterprise Labor Relations Act, B.E. 2543 (2000), Occupational Safety, Health and Environment Act, B.E. 2554 (2011), Skill Development Promotion Act, B.E. 2545 (2002), Employment Arrangement and Jobseeker Protection Act, B.E. 2528 (1985), Home Workers Protection Act, B.E. 2553 (2010), Labor Protection in Fishing Work Act, B.E. 2562 (2019), Social

jurisdiction rules in consumer and labor disputes, as well as a general legal framework to prevent unfair terms and conditions in consumer and individual labor contracts.

(i) Protective jurisdiction Rules

The Consumer Case Procedure Act, B.E. 2551 (2008) and the Act for the Establishment of and Procedure for Labor Court, B.E. 2522 (1979) provide, among others, jurisdictional protection to consumers and employees in order to prevent abusive exploitation of their weakness by stronger parties. Similar to the CPC, these laws do not limit their application to purely domestic disputes. The special jurisdiction rules in favor of such weak parties are also equally applicable to legal disputes with foreign elements.[55] Protective jurisdiction rules in consumer and labor disputes are discussed below.

(a) Consumer disputes

The Consumer Case Procedure Act, B.E. 2551 (2008) provides protective jurisdiction rules for consumers in consumer cases.[56] Section 17 provides that in a case where a business operator is going to take a legal action against a consumer in a consumer case, it must submit a complaint only to a court in which a consumer is domiciled.[57] On the other hand, where a consumer is a claimant in a consumer case, the proceeding may be brought to the courts for the business operator's domicile, the court for the place of cause of action, or other competent courts having jurisdiction pursuant to jurisdiction rules in the CPC. An important feature of this protective rule is that when the weak parties are the defendants, they may be sued only in the courts where they are domiciled.

Welfare Promotion Act, B.E. 2546 (2003), Foreigner's Working Management Emergency Decree, B.E. 2560 (2017).

[55] *See* Chunchaemsai, "Legal Considerations and Challenges Involved in Bringing the 2005 Hague Convention on Choice of Court Agreements into Force Within an Internal Legal System: A Case Study of Thailand," 157–58. *See also*, Luchai, *Commentary on Conflict of Law Rules [Kam Athibai Waduay Karn Kudkun Haeng Khodmai]*, 23–25.

[56] The English translation of the Consumer Case Procedure Act, B.E. 2551 (2008) is available at http://web.krisdika.go.th/data//document/ ext809/809788_0001.pdf.

[57] The Consumer Case Procedure Act, B.E. 2551 (2008) Section 17:

> "In the case where a business operator is going to take a legal action against a consumer as a consumer case, and the former is entitled to submit a case to the court within the territorial jurisdiction of which the consumer is domiciled or to other court as well, the business operator shall submit the case only to the court within the territorial jurisdiction of which the consumer is domiciled."

A consumer is defined in Section 3, which refers to the definition of a consumer under the Consumer Protection Act, B.E.2522 (1979).[58] According to this act, a consumer means "a person who purchases or receives a service from a business operator or a person who receives an offer or a solicitation from a business operator for purchasing goods or receiving a service and includes a person who duly uses goods or receives a service from a business operator despite no payment of remuneration on his part."[59] In order to receive jurisdictional benefits under the Consumer Case Procedure Act, B.E. 2551 (2008), a consumer must act primarily for personal, family, or household purposes outside its trade or profession. In other words, a consumer must be an end-user of goods or services provided by a business operator.[60] If persons purchase goods or services for the purpose of resale, then they do not count as consumers.[61] Furthermore, the definition of a consumer does not limit to a natural person.[62] Therefore a legal person, a corporation, or a government entity may be considered as a consumer if it is not acting in the course of business.[63]

On the other hand, a business operator is defined in Section 3, which also refers to the definition of a business operator under the Consumer Protection Act, B.E.2522 (1979).[64] Under

[58] The Consumer Case Procedure Act, B.E. 2551 (2008) Section 3:

> "'Consumer' means a consumer under the law on consumer protection, and shall also include an injured person under the law relating to liability for damage arising from unsafe goods;"

[59] *See* the Consumer Protection Act, B.E. 2522 (1979) Section 2.

[60] Channarong Praneejitt, *Commentary on the Consumer Case Procedure Act, B.E. 2551 [Kham Athibai Phraratchabanyat Withi Phicharana Khadi Phuboriphok Pho. So. 2551* (Bangkok: Office of the Judiciary, 2009), 7.

[61] *See* Decision of the President of the Court of Appeals no. 28/2551 (2008), no. 379/2555 (2012).

[62] On the contrary, the Convention of 30 June 2005 on Choice of Court Agreements Art. 2(1)(a) limits the scope of a consumer only to a natural person. Also, special provisions concerning consumers in the Brussels I Regulation (recast) and the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention 2007) appear to be inapplicable to a corporation, even if it is not acting the course of business. *See* Hartley, *Civil Jurisdiction and Judgments in Europe: The Brussels I Regulation, the Lugano Convention, and the Hague Choice of Court Convention*, 190; Hélène Gaudemet-Tallon, *Compétence et exécution des jugements en Europe: matières civile et commerciale ; règlement 44/2001, conventions de Bruxelles (1968) et de Lugano (1988 et 2007)*, 5th ed. (Paris: L.G.D.J, 2015), 290. In addition, the Japanese Civil Procedure Code Art. 3-4 (1) defines a consumer as a natural person who does not become a party to a contract as a part of a business undertaking or for business purposes.

[63] Praneejitt, *Commentary on the Consumer Case Procedure Act, B.E. 2551*, 7; *see also*, Decision of the President of the Court of Appeals no. 50/2551 (2008), no. 59/2551 (2008).

[64] The Consumer Case Procedure Act, B.E. 2551 (2008) Section 3:

> "'Business Operator' means a Business Operator under the law on consumer protection, and shall also include operator under the law relating to liability for damage arising from unsafe goods;"

this act, a business operator points to "a seller, a producer for sale, a person ordering or importing the goods into the Kingdom for sale or a person purchasing goods for resale or a person providing a service and also includes a person operating an advertising business."[65] In general, a business operator must pursue commercial or professional activities for profit.[66] A natural person may also be counted as a business operator if the above requirement is met.

Protective jurisdiction rules in favor of a consumer apply only to a consumer case. In principle, this must be a case between a consumer and a business operator in relation to a legal right or obligation related to the consumption of goods or services. Disputes between two or more consumers or those between business operators are not covered by the Consumer Case Procedure Act, B.E. 2551 (2008). Furthermore, this act encompasses not only contractual claims but also tort and other civil claims provided in Section 3.[67] In addition, this Section does not specify the types of consumer contracts and transactions. Therefore, any transactions between a consumer and a business operator are covered by the Act.[68]

(b) Labor disputes

The Act for the Establishment of and Procedure for Labor Court, B.E. 2522 (1979) provides protective jurisdiction rules for an employee in labor disputes.[69] Section 33 requires that a complaint must be submitted to the labor court in which the cause of action arose within its

[65] *See* the Consumer Protection Act, B.E. 2522 (1979) Section 2.
[66] *See* Praneejitt, *Commentary on the Consumer Case Procedure Act, B.E. 2551*, 13-16.
[67] The Consumer Case Procedure Act, B.E. 2551 (2008) Section 3:

> "'Consumer Case' means
> (1) a case between a consumer or a person having the power to file a lawsuit on the consumer's behalf under section 19 or as per other law and an entrepreneur having a dispute in relation to a legal right or obligation related to consumption of goods or service;
> (2) a civil case under the law relating to liability for damage arising from unsafe goods;
> (3) a civil case relating to case under (1) or (2);
> (4) a civil case which a registration prescribing to apply the procedure under this Act;"

[68] The Brussels I Regulation (recast) Art. 17 (1) limits the scope of consumer contracts which are covered by protective jurisdiction rules—i.e. (a) a contract for the sale of goods on instalment credit terms; (b) a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.
[69] The English translation of the Act for the Establishment of and Procedure for Labor Court, B.E. 2522 (1979) is available at https://asean.org/wp-content/uploads/2016/08/Thailand031.pdf.

territorial jurisdiction. It further clarifies that the place where the cause of action arose means the place of work of the employees. Therefore, in principle, any claims concerning labor disputes[70] must be filed with the court for the employees' place of work. This rule applies to the cases where an employer brings an action against an employee and vice versa.[71]

However, Section 33 also provides an exception that the plaintiff, either an employer or employee, may request to file the complaint with the labor court in which the plaintiff or the defendant is domiciled if the plaintiff can prove that the trial in such court will be more convenient than litigation in the court for the employee's place of work.[72] This provision confers discretionary power to the court to assert jurisdiction based on the parties' domicile, as requested by the plaintiff, if the court considers that it will be more convenient to conduct a trial at the court for the parties' domicile. In order to permit such request, the court may consider all relevant circumstances, such as the fact that an employee is no longer providing labor, the domicile of each party, the location of evidence, and the burdens upon the parties.[73]

(ii) Unfair contract terms

In addition to jurisdictional protection, several consumer and labor protection laws provide substantive protection to weak parties. The most noteworthy legislation is the Unfair Contract Terms Act, B.E. 2540 (1997), which aims to protect weak parties in general against unfair contract terms imposed by stronger parties.[74] It applies primarily to consumer contracts, standard-form contracts,

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[70] *See* the Act for the Establishment of and Procedure for Labor Court, B.E. 2522 (1979) Section 8.

[71] This approach is different from the Brussels I Regulation (recast) and Japanese Code of Civil Procedure which restrict the available forum to the court for the employee's domicile when an employer brings an action against an employee. *See* Nishitani, "International Jurisdiction of Japanese Courts in a Comparative Perspective," 267–68.

[72] The Act for the Establishment of and Procedure for Labor Court, B.E. 2522 (1979) Section 33:

> "A labor plaint shall be filed with the labor court within the territorial jurisdiction of which the cause of action arose. If the plaintiff intends to file the plaint with the labor court within the territorial jurisdiction of which the plaintiff or the defendant has domicile, the labor court may, when the plaintiff has proved that the trial in such labor court will be convenient, allow the plaintiff to file such plaint as requested.
>
> For the purpose of this Section, the place of work of the employees shall be deemed as the place where the cause of action arose."

[73] *See e.g.* Supreme Court Dika no. 297/2551 (2008).

[74] This act was drafted based on the British Unfair Contract Terms Act 1977. *See* Pichai Na Nakhon, "Law on Unfair Contract Terms: The New Comparative Analysis [Khodmai Wadauy Korsunya Ti Maipendham: Naewwikrow Mai Cherngpreabteab]," *Thammasat Law Journal* 30, no. 4 (December

non-compete clauses in employment contracts, contracts under which a deposit is given, and limitation of liability clauses. In general, this act confers the court a supervisory power over contractual parties in which it can unilaterally alter unfair contractual terms to preserve fairness and reasonableness in transactions between parties with unequal bargaining powers.

In the context of consumer protection, Section 4 provides that unfair contract terms mean the contractual terms between a consumer and a trader or in a standard-form contract which render the trader or the proferen of a standard-form contract to have an unreasonably excessive advantage over the other party. Furthermore, it lays down a rebuttable presumption that a term which possesses the character or produces the effect of requiring the other party to render a performance or assume a burden greater than usually expected by a reasonable person is regarded as a term giving an advantage over the other party. Such terms are illustrated in Section 4 paragraph 3, including a term excluding liability for breach of contract, a term imposing a burden greater than that imposed by the law, and a term allowing a contract to be terminated without justifiable reasons.[75]

2000): 547. The English translation of the Act is available at http://web.krisdika.go.th/data//document/ext810/810062_0001.pdf.

[75] The Unfair Contract Terms Act, B.E. 2540 (1997) Section 4:

> "A term in a contract as between a consumer and a trader or a professional or in a standard-form contract or in a sale with the right of redemption which renders the trader or professional or the proferens of the standard form contract or the buyer to have an unreasonably excessive advantage over the other party is an unfair contract term and shall be enforceable only insofar as it is fair and reasonable in a particular case.
>
> In case of doubt, a standard-form contract shall be interpreted in favour of the party not formulating such standard-form contract.
>
> A term which possesses the character or produces the effect of requiring the other party to render a performance or assume a burden greater than usually expected by a reasonable person may be regarded as a term giving an advantage over the other party, such as:
> (1) a term excluding or restricting liability for breach of contract;
> (2) a term imposing liability or a burden greater than that imposed by the law;
> (3) a term allowing a contract to be terminated without justifiable reason or entitling termination of the contract without material breach by the other party;
> (4) a term entitling non-performance of any of the terms of the contract or a delayed performance without justifiable reason;
> (5) a term entitling one party to demand or require the other party to bear more burdens than those at the time of the contract;
> (6) a term, in a sale with the right of redemption, under which the buyer fixes the price of redemption at a sum in excess of the price of the sale plus the interest at the rate of fifteen percent per annum;
> (7) a term, in a hire-purchase, fixing an excessively high hire-purchase price or imposing on the hirer an excessively high burden;

If the terms are deemed unfair contract terms, the consequence is that they will be enforceable only insofar as it is fair and reasonable in a particular case.[76] Section 10 offers guidelines for the court in making the determination whether a term renders the other party an unreasonably excessive advantage[77], and as to such extent of enforceability of a term as to satisfy the requirement of fairness and reasonableness in a particular case. In brief, this Section requires the court to consider, among others, good faith, ordinary usages, bargaining power, economic status, and knowledge of the contractual parties.[78] However, it should be noted that this act does not always nullify unfair contract terms. The court may invalidate the terms or revise them to be fair and reasonable ones according to the circumstances.[79]

2.2 Party Autonomy in Choice of Forum in Thailand

Party autonomy is one of the most significant principles in private international law, which is widely recognized around the world. It encompasses both choice of forum and choice of law in

(8) a term, in a credit card contract, requiring the consumer to pay interest, penalties, expenses or any other benefits in an excessively high amount in the event of default of payment or in connection therewith;
(9) a term fixing a method for the calculation of compound interest in a manner causing the consumer to bear excessively high burdens.

In making the determination as to whether a term which gives an advantage over the other party under paragraph three renders an unreasonably excessive advantage, section 10 shall apply mutatis mutandis."

[76] *See* the Unfair Contract Terms Act, B.E. 2540 (1997) Section 4 para. 1.
[77] *See* the Unfair Contract Terms Act, B.E. 2540 (1997) Section 4 para. 4.
[78] The Unfair Contract Terms Act, B.E. 2540 (1997) Section 10:
"In making the determination as to such extent of enforceability of a term as to satisfy the requirement of fairness and reasonableness in a particular case, regard shall be had to all circumstances, including:
(1) good faith, bargaining powers, economic standing, knowledge and understanding, skills and expertise, expectation, previous practices, other alternatives and all advantages as well as disadvantages on the part of contractual parties in actual circumstances;
(2) ordinary usages applicable to that kind of contract;
(3) the time and place of the conclusion of the contract and of the performance thereunder;
(4) the assumption of far more onerous burdens on the part of one party when compared with those assumed by the other party."
[79] On the contrary, the Japanese Consumer Contract Act Section 2 nullifies unfair contract terms which unilaterally prejudice consumers' interests. Also, the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts Art. 6 requires the EU Member States to lay down that unfair terms used in a consumer contract not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

international transactions.[80] Party autonomy in choice of forum particularly reflects in the use of choice of court and arbitration agreements, as well as jurisdiction by submission. This section aims to examine party autonomy in choice of forum, which is considered the most controversial issue in international commercial litigation in Thailand. While a legal framework for a choice of court agreement and jurisdiction by submission is still underdeveloped, arbitration is relatively well-defined in Thailand, following international agreements and business practices. Section 2.2.1 discusses the development and the current status of a choice of court agreement in Thailand. Next, Section 2.2.2 explores the possibility of jurisdiction by submission under the CPC. Finally, Section 2.2.3 examines the arbitration system in Thailand for a comparative purpose.

2.2.1 Choice of Court Agreements

(i) Development of choice of court agreements in Thailand

Previously, the CPC contained a provision concerning a choice of court agreement. The former Section 7 (4) laid down jurisdiction rules for a choice of court agreement as the following:

> If the parties agree in writing to submit the disputes that already arose or the disputes that may arise out of the contract in the future to a particular Court of first instance chosen by the parties, which may or may not have jurisdiction according to the provisions of this Code governing territorial jurisdiction of the Court, such agreement shall be valid and enforceable. However, the chosen Court must be the Court in which one of the parties is domiciled, the Court in which the cause of action occurs, or the Court in which the disputed property is located.

According to this Section, the parties had the freedom to agree upon the jurisdiction of a court under two conditions. The first condition was that a choice of court agreement must have been in writing. The second condition was that the chosen court must have been the court for the domicile of one of the parties, the court in which the cause of action arose, or the court where the disputed property was located.

However, this provision was deleted from the CPC in 1991 by the Amendment Act on the Civil Procedure Code (Vol. 12), B.E. 2534 (1991). The Office of the Council of State reasoned the abolition of this provision that it was due to the concern that the parties with superior bargaining

[80] *See generally*, Alex Mills, *Party Autonomy in Private International Law* (Cambridge, United Kingdom ; New York, NY, USA: Cambridge University Press, 2018).

powers, such as banks, insurance companies, and major corporations, may abuse the use of choice of court agreement to render undue advantage over weak parties.[81] In practice, banks and hire-purchase companies often selected courts located in Bangkok as the venue for litigation because of the proximity to their head offices, which was detrimental to consumers who resided in rural areas of Thailand.[82] Another reason for the abolition was the existence of the new rules concerning special jurisdiction (the current Section 4 (1)). Previously, the former Section 4 (1) and (2) of the CPC required the plaintiff to bring an action before the court where the disputed property was located or the court where the defendant was domiciled. However, the new Section 4 (1) enabled the plaintiff, including financial institutions, to sue the defendant before the court for the place of the cause of action, which usually pointed to the plaintiff's domicile because financial institutions generally concluded contracts at their places of business.[83] As a result, the deletion of the former Section 7 (4), which allowed the financial institutions to sue the defendant at their local court, did not significantly impact their operations.[84]

The absence of a statutory provision concerning a choice of court agreement has caused uncertainty on the effect of a choice of court agreement. It is disputed in Thailand whether a choice of court agreement is enforceable under Thai laws in the absence of a clear provision. On the one hand, there is an argument that after the deletion of the former Section 7 (4), the CPC no longer allows party autonomy to agree upon the jurisdiction of a court, which is a matter of public policy.[85] As a result, a choice of court agreement that is against public policy is void under Section 150 of the Civil and Commercial Code.[86] This opinion is also supported by the plain text of Section 2 of the

[81] Pichanun Koanantachai, "Problems Surrounding the Agreement on Jurisdiction in Civil Cases" (Master's Thesis, Thammasat University, 2014) 100-01.
[82] Ariyanuntaka, "Problems Respecting Jurisdiction and Recognition and Enforcement of Foreign Judgments and Arbitral Awards: A Thai Perspective," 44.
[83] However, at the present, the Consumer Case Procedure Act, B.E. 2551 (2008) requires a business operator to bring an action against a consumer before the court in which the consumer is domiciled. *See* Section 2.1.2 (i)(a).
[84] Koanantachai, "Problems Surrounding the Agreement on Jurisdiction in Civil Cases," 101.
[85] *See* Supreme Court Dika no. 1127/2493 (1950) (The Thai Supreme Court held that the power and jurisdiction of Thai courts are matters of public policy.)
[86] Dao Praruehas, "Solving Puzzles Concerning a Choice of Court Agreement [Kae Kwam Khaojai Korranee Toklong Reung Amnajsan]," *Sukhothai Thammathirat Law Journal* 5, no. 1 (June 1993): 72–76.

CPC, which states that the complaint shall not be submitted to any Thai courts except when it appears that the courts have jurisdiction according to jurisdictional provisions provided in the CPC.[87] At present, there is no provision stipulating jurisdiction based on a choice of court agreement. Furthermore, a number of the Thai Supreme Court decisions have confirmed that a choice of court agreement in the context of a purely domestic dispute is invalid. For example, the Thai Supreme Court held in 2008 that Section 4 (1) of the CPC was a provision concerning public policy. A choice of court agreement submitting a dispute to the Civil Court, which was not a court of competent jurisdiction under Section 4 (1) was contrary to public policy and therefore void.[88]

On the other hand, Lengthaisong opines that after the abolition of the former Section 7 (4), the validity of a choice of court agreement should be determined by the general principles of law, pursuant to Section 4 paragraph 2 of the Civil and Commercial Code, which states that "[w]here no provision is applicable, the case shall be decided by analogy to the provision most nearly applicable, and, in default of such provision, by the general principles of law." Since Thai law does not clearly prohibit a choice of court agreement, and parties often choose a place of litigation or even opt for arbitration in business transactions, a choice of court agreement should be upheld by the general principles of law as long as it is not contrary to public policy.[89] Pivavatnapanich also argues that the former Section 7 (4) intended to regulate a purely domestic jurisdiction of Thai courts, which differed from international jurisdiction in the context of private international law. Therefore, the deletion of such provision did not affect the validity of a choice of court agreement involving foreign elements.[90] Furthermore, Luchai and Saisoonthorn view that since the use of a choice of court

[87] CPC Section 2:

> "The complaint shall not be submitted to any courts, except in the following cases: …
> (2) when the complaint is considered, it appears that such case is in jurisdiction of the Court according to the provisions of this Code governing venue and the provisions of the law governing territorial jurisdiction of the Court."

[88] *See* Supreme Court Dika no. 4279/2551 (2008).

[89] *See* Sathit Lengthaisong, "Agreements on Jurisdiction of Courts [Amnaj Sarn Tam Kortoklong]," *Sukhothai Thammathirat Law Journal* 4, no. 1 (1992): 161–62; Sathit Lengthaisong, "Agreements on Jurisdiction of Courts: For a Proper Understanding of Laws [Amnaj Sarn Tam Kortoklong: Pue Kwam Khaojai Tii Tooktong]," *Sukhothai Thammathirat Law Journal* 5, no. 2 (1993): 40–43.

[90] Prasit Pivavatnapanich, *Commentary on Private International Law [Kam Athibai Khodmai Rawangprathed Panaek Khadeebukkon]*, 8th ed. (Bangkok: Thammasat University Press, 2018), 97.

agreement is widely recognized by many legal systems around the world, it may be justified by Section 3 of the Act on Conflict of Laws B.E. 2481 (1938)[91], and should not be seen as against the public policy of Thailand. For the above reasons, a majority of Thai legal scholars seem to believe that a choice of court agreement in international transactions is still enforceable in Thailand even after the former Section 7 (4) has been removed.[92]

(ii) Case law

There are few occasions in which the Thai Supreme Court determined the effect of a choice of court agreement in international transactions. In 1996, the Thai Supreme Court rendered a judgment concerning the validity of a choice of court agreement in a bill of lading at the time when the former Section 7 (4) of the CPC was still effective. In a case where a choice of court agreement contained in a bill of lading between a shipper and a carrier stipulated that all disputes must be submitted to the court of London, the Thai Supreme Court held that this choice of court agreement was contrary to the former Section 4 (2) of the CPC, which was a provision concerning public policy, and such agreement did not satisfy the requirements under the former Section 7 (4) because neither parties were domiciled in London and the cause of action did not occur within the territorial jurisdiction of the court of London.[93]

After the former Section 7 (4) was deleted, the Thai Supreme Court revisited the effect of a choice of court agreement in international loan contracts in 2003 and ruled that the parties could agree to submit their disputes arising out of international commercial transactions to the court of Singapore, according to the international general principle of law. However, this choice of court agreement was a non-exclusive one because it allowed the plaintiffs (lenders) to bring an action

[91] The Act on Conflict of Laws B.E. 2481 (1938) Section 3:
"Whenever there is no provision in this Act or any other laws of Siam to govern a case of Conflict of laws, the general principles of private international law shall apply. "

[92] Kanung Luchai and Phunthip Kanchanachitra Saisoonthorn, "Analysis of the Supreme Court Dika Cases No. 951/2539 and 5809/2539: Comments on Jurisdiction Agreements Which Derogate from the Jurisdiction of Thai Courts [Dika Wikrow Anneungmajak Kampipaksa Dika Ti 951/2539 Lae 5809/2539: Korkid Kiewkub Kortoklong Leauk Sarntangprethet Pue Pen Koryokwen Khedamnaj Sarn Thai]," *Court of Justice Law Journal (Dullapaha)* 44, no. 4 (December 1997): 141–42.

[93] *See* Supreme Court Dika no. 951/2539 (1996).

before other competent courts having jurisdiction. Therefore, the Court held that the plaintiff could file an action against the defendants in the Thai court, which had jurisdiction under the CPC.[94]

Similarly, in 2005, the Thai Supreme Court affirmed the validity of a non-exclusive choice of court agreement in an international dealer agreement in which the parties agreed that a court in Germany had jurisdiction over any legal disputes except when a seller was in a plaintiff position, it could also submit disputes to the court for the dealer's domicile. The Thai Supreme Court held that such a choice of court agreement was not contrary to public policy of Thailand and it legally bound the parties. Consequently, the plaintiff could bring an action before the Thai court in which the defendant was domiciled.[95]

Recently, in 2019, the Thai Supreme Court also confirmed the validity of a non-exclusive choice of court agreement in an agency agreement between the Thai company (Agent) which was incorporated under Thai law and the German company (ATLAS) which had its headquarters in Breman, Germany. The choice of court agreement stated:

> Disputes arising from this Agreement shall be settled first in the sense of this Agreement by mutual arrangement. If such an arrangement cannot be reached, the place of jurisdiction for all possible disputes – also those resulting from legal documents, deeds, bill of exchange and cheques – is Bremen (the courts of the City of Bremen). ATLAS [the defendant] is, however, also entitled to the appropriate courts having jurisdiction over the registered office of the Agent [the plaintiff].

The Court held that a choice of court agreement in which the parties agreed to submit disputes arising out of international transactions to a German court, which was the court for the defendant's domicile, was permitted under the international general principle of law.[96]

In sum, a majority of scholarly opinions and the current trend of case law in Thailand appear to recognize a choice of court agreement in international settings. Several Supreme Court decisions have cited the international general principle of law to permit the parties' freedom to submit their disputes arising out of international commercial transactions to foreign courts.[97] However, the

[94] *See* Supreme Court Dika no. 3537/2546 (2003).
[95] *See* Supreme Court Dika no. 583/2548 (2005).
[96] *See* Supreme Court Dika no. 3281/2562 (2019).
[97] On the contrary, the Thai Supreme Court seems not to allow party autonomy in choice of court in a purely domestic case without foreign elements. *See* Supreme Court Dika no. 4279/2551 (2008).

above-mentioned decisions dealt with non-exclusive choice of court agreements which still allowed an option for the plaintiff to bring an action before Thai courts. There have been no reported decisions in which the Thai Supreme Court explicitly determined the validity of an exclusive choice of court agreement that precluded the parties from pursuing litigation in Thai courts. Furthermore, there remain questions concerning the scope, formality, and validity requirements of choice of court agreements since no statutory provisions and court precedents have clearly provided guidance.

(iii) Choice of court agreements in multimodal transport contracts

As previously noted, the absence of a statutory provision on a choice of court agreement in the CPC has caused conflicting views among scholars and practitioners in Thailand regarding the scope, effectiveness, and requirements of a choice of court agreement. However, there is a specific area in which party autonomy in choice of court is explicitly permitted at a statutory level. The Multimodal Transport Act, B.E. 2548 (2005)[98] Section 65 provides:

> The parties to the multimodal transport contract may, by providing in the multimodal transport bill of lading or contract of multimodal transport, agree that a Court in any country which, according to the law of that country, has jurisdiction over civil claims arising out of multimodal transport contract or tort shall be the competent Court having jurisdiction to try and adjudicate the case.
>
> In the case where the Court of jurisdiction is not specified for a civil action on the ground of multimodal transport contract or tort, the plaintiff, at its option, may institute an action in any of the following Courts which, according to the law of the country where the Court is situated, has jurisdiction over such case as follows:
> (1) the Court in a country in which the principal office or domicile of the defendant is situated;
> (2) the Court in the country where the multimodal transport contract was concluded, provided that the defendant has a place of business, a branch or agent in that country;
> (3) the Court in the country where the goods were taken in charge or delivery was made by the multimodal transport operator.
>
> However, the parties may agree in writing to bring an action to any Court which has jurisdiction over such case in accordance with the law of that country if such agreement is made after the claim has arisen.

This provision lays down specific requirements for a choice of court agreement in a multimodal transport contract involving carriage of goods by at least two different modes of

[98] The English translation of the Multimodal Transport Act, B.E. 2548 (2005) is available at https://www.krisdika.go.th/data//document/ext810/810030_0001.pdf.

transport from a place in one country to a place designated for delivery situated in a different country.[99] The parties in a multimodal transport contract have the freedom to select any courts, including foreign and Thai courts, they want to submit their disputes in advance. However, the agreed court must have jurisdiction, according to the law of that country, over contractual or tort claims arising out of a multimodal transport contract. As a result, the parties are not allowed to choose a court that does not have jurisdiction, pursuant to local jurisdictional rules, and a choice of court agreement made by the parties cannot confer adjudicative jurisdiction on the court having no jurisdiction. Furthermore, a choice of court agreement must be inserted in a multimodal transport bill of lading or contract of multimodal transport. In addition, after the claim has arisen, the parties may also agree in writing to select any competent court having jurisdiction in accordance with the law of the forum. In the latter case, a choice of court agreement needs not to be a part of a multimodal transport bill of lading or contract of multimodal transport.[100]

The objective of the Multimodal Transport Act, B.E. 2548 (2005) is to encourage international commercial activities, which are highly competitive, and provide legal standards for multimodal transport services in Thailand.[101] It was enacted in order to implement the ASEAN Framework Agreement on Multimodal Transport 2005, which intended to harmonize the transport environment and facilitate the movement of goods among ASEAN member states and with third-party countries.[102] Therefore, through the recognition of a choice of court agreement in multimodal

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[99] The Multimodal Transport Act, B.E. 2548 (2005) Section 4:

> "'Muitimodal transport' means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the multimodal transport operator is in charge of the goods to a place designated for delivery situated in a different country."

[100] *See* Pathaichit Eagjariyakorn, *Commentary on the Multimodal Transport Act, B.E. 2548 [Kam Athibai Prarajchabanyat Karn Khonsong Torneung Lai Roobbaeb Porsor 2548]* (Bangkok: Winyuchon, 2018), 164–65.

[101] *See* the legislative remark (legislature's intent) accompanying the Multimodal Transport Act B.E. 2548 (2005).

[102] The ASEAN Framework Agreement on Multimodal Transport 2005 is one of the core pillars to establish an AEC aiming to facilitate the free movement of goods, services, capital, investment and skilled labor in the Southeast Asian region. The Framework was drafted based on the United Nations Convention on International Multimodal Transport of Goods 1980, the UNCTAD/ICC Rules for the multimodal transport document, and the Andean Community Decision 331: International Multimodal Transport. *See* Eagjariyakorn, Commentary on the Multimodal Transport Act, B.E. 2548, 22–23. For detailed information of the ASEAN Framework Agreement on Multimodal Transport 2005, *see*

transport, this act aims to bring uniformity to cross-border business practices in this area. However, the attitude toward a choice of court agreement under this act considerably differs from the CPC and the Carriage of Goods by Sea Act, B.E. 2534 (1991), which do not contain any provisions concerning a choice of court agreement. As a result, if the carriage of goods is executed by only one mode of transport, the CPC is likely to determine the validity of a choice of court agreement in such case, and there is ambiguity about the effect of a choice of court agreement as previously discussed.[103]

2.2.2 Jurisdiction by Submission

The appearance of the defendant without contesting jurisdiction has been recognized as a basis for jurisdiction in many countries and regions.[104] In general, the defendant may submit to the jurisdiction of a court by voluntarily appearing in the proceedings. However, the court cannot assert jurisdiction based on the defendant's appearance if it was entered solely to dispute the jurisdiction of the court. As for Thailand, on the other hand, the CPC does not provide a ground for jurisdiction by submission. Furthermore, Section 2 of the CPC does not recognize jurisdictional grounds other than those provided in the CPC.[105] Some commentators argue that jurisdiction by submission may be available by invoking Section 15 (1)[106] of the CPC or general principles of law but further comment that Thai courts are unlikely to adopt this approach.[107]

"AFAMT," *ASEAN Framework Agreement on Multimodal Transport*, accessed January 5, 2021, https://afamt.asean.org/afamt/.

[103] *See* Koanantachai, "Problems Surrounding the Agreement on Jurisdiction in Civil Cases," 106–08. *See also* Eagjariyakorn, Commentary on the Multimodal Transport Act, B.E. 2548, 165.

[104] *See e.g.*, the Japanese Code of Civil Procedure Art. 3-8, the Brussels I Regulation (recast) Art. 26.

[105] *See* Dao Praruehas, "Solving Puzzles Concerning a Choice of Court Agreement [Kae Kwam Khaojai Korranee Toklong Reung Amnajsan]," 72–76.

[106] CPC Section 15:

> "The Court is barred from excercising the authority outside its territorial jurisdiction, except:
> (1) when there is no objection concerning the territorial jurisdiction of the Court raised by a person who will be examined or inspected, who is the owner of the estate or place which will be examined, the Court may examine or inspect that matter outside its territorial jurisdiction;"

[107] *See* Sathit Lengthaisong, *Commentary on Each Article of the Law for the Organization of Courts of Justice: Comparison with Foreign Laws, Recognition and Enforcement of Foreign Judgments, and the Service of Process [Kam Athibai Pra Dhammanoon Sarn Yutidham Riang Mattra Priebtieb Kub Luk Khodmai Tangprated Promduay Karn Bungkubkhadee Tam Kampipaksa Sarn Tangprated Lae Karn Song Kamkukwam Lae Ekasarn Naimeung Tangprated]* (Bangkok: Dumrongdham, 1974), 66–65.

At present, there have been no reported cases in which Thai courts asserted jurisdiction based on the appearance of the defendant. In principle, according to Section 18 paragraph 3[108] of the CPC, when the court finds that the claim is barred by the provisions of the court jurisdiction, it will reject the claim or return the claim to the plaintiff for re-submission to other competent courts having jurisdiction. If the court erroneously accepts the claim and finds out later that it lacks jurisdiction, even after the defendant has participated in the proceedings, it is empowered, as deemed appropriate, to issue an order to quash the irregular trial and reject or return the claims.[109] Therefore, it appears that Thai law does not provide room for jurisdiction by submission.[110]

2.2.3 Arbitration

The parties enjoy a wide degree of party autonomy in arbitration. Thailand has ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereafter referred to as the "New York Convention") and enacted the Arbitration Act, B.E. 2545 (2002), which was drafted based on the UNCITRAL Model Law on International Commercial Arbitration (1985).[111] The principle of party autonomy is a core pillar of the Thai Arbitration Act. This act allows the parties to agree upon an arbitration agreement and grants extensive freedom to decide on the appointment of arbitrators, the seat of the arbitration, applicable laws, the language used in arbitration, and other arbitral proceedings. As a result, the parties can submit civil disputes to arbitration and are capable of tailoring their dispute resolution mechanism to best suit their needs. It

[108] CPC Section 18 para. 3:

> "When the Court considers that the pleadings submitted as stipulated have not satisfied the conditions required by law other than those stipulated in the foregoing paragraph, and particularly when the right of the party or of the person who submitted the pleadings is barred by the provisions of the Court jurisdiction, the Court shall issue an order to reject the pleadings or an order to return the pleadings to be submitted to the Court within its territorial jurisdiction."

[109] *See e.g.,* Supreme Court Dika no. 1847/2527 (1984); *see also* Section 27 of the CPC.

[110] *Cf.* Supreme Court Dika no. 2642/2519 (1976), 3413/2524 (1981). (The Thai Supreme Court held that if the defendant knew that the court of the first instance lacked jurisdiction but still presented an argument on the merits without contesting the jurisdiction of the court and allowed the court to proceed until giving a judgment, the defendant would be deemed to ratify the irregular trial, according to Section 27 paragraph 2 of the CPC. Hence, the defendant could no longer contest the jurisdiction of the court in the appellate process.)

[111] The English translation of the Thai Arbitration Act, B.E. 2545 (2002) is available at https://www.krisdika.go.th/ data//document/ext825/825530_0001.pdf.

has been viewed that most civil and commercial disputes can be submitted to arbitration unless they are nonarbitrable or against the public policy of Thailand such as certain family matters.[112]

Unlike litigation, there are no protective rules for weak parties such as consumers and employees in the Thai arbitration regime. Consumer and employment arbitrations are permitted under Thai law. Also, several Thai Supreme Court decisions confirm the arbitrability of consumer and individual labor disputes.[113] However, this does not mean that party autonomy in arbitration concerning weak parties is absolute. The Thai Supreme Court reveals the possibility that some arbitration agreements are subject to the Unfair Contract Terms Act, B.E. 2540 (1997) and they may be unenforceable if they constitute unfair contract terms.[114]

2.3 Problems concerning Party Autonomy in Choice of Court in Thailand

As previously discussed, Thailand has adopted a restrictive approach for party autonomy in choice of court. A choice of court agreement is explicitly permitted only in a certain type of cross-border transportation contracts, while the use of which in other types of international contracts remains unsettled. Also, jurisdiction by submission is not recognized under Thai laws. The current regime has caused numerous theoretical and practical problems, which might jeopardize the international reputation of Thailand as a hub for international business and a forum for dispute settlement. The shortcomings stemming from the current legal policy toward party autonomy in choice of court in Thailand are discussed in detail below.

2.3.1 Insufficient Party Autonomy

The Thai legal system does not sufficiently recognize party autonomy in choice of court, as illustrated by the lack of statutory provision and sufficient case law concerning a choice of court agreement. As a consequence, it hinders the opportunity of the parties to benefit from a choice of

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[112] Saowanee Asawaroj, *Commentary on Commercial Dispute Settlement by Arbitration [Kam Athibai Khodmai Waduay Witikarn Rangub Korpipat Tangturakij Doykarn Anuyatotulakarn]*, 3rd ed. (Bangkok: Thammasat University Press, 2011), 64-68.
[113] *See, e.g.*, Supreme Court Case Dika no. 8335/2560 (2017), no. 8627/2550 (2007), no. 3530/2549 (2006).
[114] *See* Supreme Court Case Dika no. 3368/2552 (2009).

court agreement, which serves important functions in international transactions.[115] Party autonomy in choice of court enables the parties to design their dispute resolution mechanism to suit their specific needs such as the place of litigation, the expertise of the courts, choice of law, and other procedural matters. A choice of court agreement can offer an optimal forum for future dispute resolution, which satisfies both parties. The parties may be willing to select the court which has the authority or significant expertise concerning their business transactions. Even if one of the parties cannot achieve its preferred forum, excessively unfavorable fora can be avoided. For example, the parties may agree to submit their disputes to a neutral third state's court. Through the negotiation of a choice of court agreement, the parties can reduce the risks of litigation in undesirable fora or prevent one party from receiving excessive 'home court' advantages.

Also, a choice of court agreement can reduce the difficulties and uncertainties often associated with international litigation, such as parallel litigations of the same dispute in multiple fora and jurisdictional challenges at both the early stage of the litigation and the enforcement stage, which cause lengthy and costly litigation. In particular, the parties may receive benefits from international and regional frameworks for enforcing judgments resulting from a choice of court agreement, such as the Hague Convention on Choice of Court Agreements and the Brussels I Regulation (recast). Furthermore, a choice of court agreement help increases predictability in international transactions. When the parties know the tribunal in which their litigation may finally take place, they are in better positions to evaluate their contractual relationships and predict the outcome of the litigation since they can anticipate the forum's choice of law rules, procedural rules, as well as its interpretation and application of laws.

2.3.2 Lack of Legal Certainty

Although recent Thai Supreme Court decisions appear to confirm the validity of some nonexclusive choice of court agreements in international transactions, the Court has not clearly

[115] Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, Fourth edition (Alphen ann den Rijn, The Netherlands: Kluwer Law International, 2013), 3-4.

identified the legal requirements of a choice of court agreement.[116] At present, there are no statutory provisions and sufficient body of case law clarifying the scope, validity, and formal requirements for such an agreement. The effect of a choice of court agreement in Thailand is still far from predictability. Some Supreme Court precedents mentioned the international general principle of law as a rationale for enforcing a choice of court agreements used in international commercial transactions. Although the Hague Conference on Private International Law (here after referred to as the "HCCH") made an effort to unify the rules for a choice of court agreement and provide an international framework for enforcing judgments through the Hague Convention on Choice of Court Agreements, currently only 31 countries and one region have ratified this Convention and most of them are the European Union (EU) member states.[117] Many major countries outside the EU have not yet ratified it, such as the United States, Japan, China, Russia, Canada, India, Brazil, and Thailand. Therefore, it is still difficult to see that internationally accepted principles have emerged in the field of a choice of court agreement. The international general principle of law cannot provide a realistic standard for a choice of court agreement in Thailand. Due to the lack of legal certainty, a choice of court agreement is seldom used in Thailand, compared to an arbitration agreement.

2.3.3 Inconsistency in Policies toward Party Autonomy in Choice of Court

The Multimodal Transport Act, B.E. 2548 (2005) is the only legal instrument in Thailand that explicitly permits the use of a choice of court agreement in multimodal transport contracts. The rationale behind this policy is to encourage international trade and facilitate the cross-border movement of goods. On the other hand, other laws are silent on the use of the same agreement in a single mode of international transports such as road, rail, air, and maritime transport. Especially, maritime transport is the most important mode of international freight transport for Thailand. It

[116] *See* Supreme Court Dika no. 3537/2546 (2003), no. 583/2548 (2005), no. 3281/2562 (2019) in Section 2.2.1 (ii).
[117] *See* "Status Table," Convention of 30 June 2005 on Choice of Court Agreements, Hague Conference on Private International Law, accessed April 1, 2022, https://www.hcch.net/en/instruments/conventions/status-table/?cid=98. *But cf.*, Andreas F. Lowenfeld, *International Litigation and the Quest for Reasonableness: Essays in Private International Law* (Oxford : New York: Clarendon Press ; Oxford University Press, 1996), 208-09. ("party autonomy—both for choice of law and for choice of forum, including an arbitral forum—is now part of an international customary law of dispute settlement.")

accounted for 88.5% of the total international freight transport, followed by road, air, and rail transport.[118] The use of a choice of court agreement is also a common business practice in maritime transport around the world.[119] Nonetheless, the Carriage of Goods by Sea Act, B.E. 2534 (1991) does not contain any provisions for a choice of court agreement. Furthermore, not only international transports but also international business transactions in general, such as international sales, financial, and other commercial contracts, require a harmonized business environment and legal certainty to proceed efficiently at the global level. In this regard, a choice of court agreement can serve an important function to facilitate international transactions, as is the case in multimodal transports.

Moreover, while the CPC restricts party autonomy in choice of court due to the concerns over weak parties who generally suffer from the inequality of bargaining power and the lack of information[120], the Thai Arbitration Act allows a wide degree of party autonomy to enter into an arbitration agreement. As a result, there is a discrepancy in the range of party autonomy and weak party protection between litigation and arbitration. Thus, it is questionable whether Thailand should keep strict limitations on party autonomy in choice of court on one hand, while allowing extensive party autonomy in arbitration on the other hand, which in turn may be used to circumvent the weak party protection imposed in the context of litigation.

2.3.4 Inconsistency with International Practices

Party autonomy in choice of court has become one of the core pillars of international commercial litigation.[121] The resistance against a choice of court agreement gradually faded away in

[118] Office of the National Economic and and Social Development Council, "Thailand's Logistics Report 2019" (Bangkok, September 2019), 15, https://www.nesdc.go.th/nesdb_en/ download/article/ article_20201112144736.pdf.
[119] *See generally*, Felix Sparka, *Jurisdiction and Arbitration Clauses in Maritime Transport Documents: A Comparative Analysis*, Hamburg Studies on Maritime Affairs 19 (Heidelberg ; London: Springer, 2010).
[120] *See* Ariyanuntaka, "Problems Respecting Jurisdiction and Recognition and Enforcement of Foreign Judgments and Arbitral Awards: A Thai Perspective," 42-44.
[121] Xandra Kramer and Erlis Themeli, "The Party Autonomy Paradigm: European and Global Developments on Choice of Forum," in *Brussels Ibis Regulation. Changes and Challenges of the Renewed Procedural Scheme*, ed. Vesna Lazić and Steven Stuij (The Hague: T.M.C. Asser Press : Imprint: T.M.C. Asser Press, 2017), 27.

the course of the twentieth century. The freedom to select the competent court is now widely recognized in many countries and a choice of court agreement is utilized in commercial practice worldwide.[122] The increasing popularity of international arbitration also results in the reinforcement of party autonomy in international commercial litigation.[123] The Hague Convention on Choice of Court Agreements represents the attempt to promote party autonomy and the enforcement of choice of court agreements in international commercial contracts at a global level.

Furthermore, several empirical studies show that party autonomy is one of the most significant factors for parties in international commercial transactions. The survey of 100 European businesses jointly conducted by the Oxford Institute of European and Comparative Law and the Oxford Centre for Socio-Legal-Studies found that 97 percent of the respondents considered the ability to choose the dispute resolution forum to be important (61 percent and 36 percent of which considered it to be "very important" and "important" respectively). The results of the survey also demonstrated that 90 percent of the respondents had occasions to select a foreign forum. Almost half of which (48 percent) replied that they often opted for a foreign forum.[124] Another global empirical survey conducted by the University of Basel reveals that party autonomy is the third most desirable feature of substantive law for parties in international commercial transactions when choosing governing law of their contracts.[125] It only followed factors related to legal certainty, including "legal rules that were easy to ascertain" and "body of case law that facilitates interpretation of legal rules." This survey also shows that the lack of legal certainty and predictability, and restriction on party autonomy are among the common reasons for the avoidance of certain national laws.[126]

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[122] Major jurisdictions such as the United States, the United Kingdom, China, Japan, South Korea, India, Canada, Mexico, Singapore and EU member states enforce choice of court agreements. *See generally*, Mary Keyes, *Optional Choice of Court Agreements in Private International Law* (New York: Springer International Publishing, 2020).
[123] Kramer and Themeli, "The Party Autonomy Paradigm: European and Global Developments on Choice of Forum," 28.
[124] "Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law," The FDC (Civil Law Initiative), accessed April 1, 2022, https://www.fondation-droitcontinental.org/fr/wp-content/uploads/2013/12/oxford_civil_justice_survey_-_summary_of_results_final.pdf.
[125] Luiz Gustavo Meira Moser, "Parties' Preferences in International Sales Contracts: An Empirical Analysis of the Choice of Law," *Uniform Law Review* 20, no. 1 (2015): 43.
[126] Ibid., 45-47.

Based on the above finding, the current Thai legal system, which provides limited room for a choice of court agreement and lacks legal certainty on this issue, can be seen as inconsistent with the modern international business practices. The restriction on party autonomy in choice of court may not only affect the attractiveness of conducting trade and commerce in Thailand but also harm the international reputation of Thai courts and lead to the non-recognition of Thai judgments.[127]

2.4 Conclusion

As Thailand's economy has become increasingly dependent on international trade and exposed to international contacts, the number of transnational disputes is expected to rise rapidly. In this regard, a forum court plays a highly significant role in international commercial dispute resolution. It generally applies its own procedural law and determines conflict-of-laws rules, which decisively shapes the outcome of international litigation. For this reason, a choice of court agreement is frequently used by the parties as a tool to secure the forum for dispute settlement in advance to avoid lengthy proceedings and unnecessary disputes such as jurisdictional problems as well as increase legal predictability in international transactions.[128]

However, Thai law is still far from certainty to accommodate the use of a choice of court agreement and inadequately recognizes party autonomy in transnational disputes, which is one of the core pillars of modern international commercial litigation. Although the recent decisions of the Thai Supreme Court appear to allow more party autonomy in choice of court in international settings based on the international general principle of law, still no statutory provisions and court precedents have provided clear guidance on the scope, formality, and validity requirements of choice of court agreements. The lack of legal certainty concerning a choice of court agreement has caused numerous

[127] The Thai government's National Reform Plan on Justice Administration, published in April 2018, recognized the lack of party autonomy in international litigation and suggested to establish clear rules on choice of court agreements. The Plan is available at https://www.nesdc.go.th/download/document/SAC/RF_Plan04.pdf. *See* Apipong Sarntikasem, "Rethinking the International Jurisdiction of Thai Courts in Civil and Commercial Matters through Comparative Analysis," *Dullapaha* [Thai Court of Justice Law Journal] 65, no. 3 (September – December 2018): 3.

[128] *See* Shiho Kato, "Recent Developments in Rules on Choice of Court Agreements in Japan: New Codification and Remaining Problems," in *Preventive Instruments of Social Governance*, ed. Alexander Bruns and Masabumi Suzuki (Tübingen: Mohr Siebeck, 2017), 173.

theoretical and practical problems as it limits possible advantages of party autonomy in international transactions, and hinders international business practices.

To ensure legal certainty and predictability, the Thai rules on party autonomy in choice of court should be clear and precise enough for the parties to manage their litigation risks and strategies for dispute settlement. Foundations and theoretical justifications of party autonomy in choice of court will be thoroughly examined in the Chapter III. However, party autonomy should not be allowed without limits. Thailand used to adopt a very restrictive approach in choice of court agreement and abolished a statutory provision concerning such an agreement due to the concerns over weak parties. Therefore, the balance between the benefits of party autonomy and the protection of weak parties should be taken into consideration for establishing a new legal framework for party autonomy in Thailand. The validity of choice of court agreements and jurisdiction protection for weak parties will be analyzed in detail in Chapters IV and V, respectively.

Chapter III: Party Autonomy in Choice of Court

Since the twentieth century, the parties' right to choose the forum and applicable law has been extensively recognized in cross-border transactions.[1] This so-called party autonomy is described as "perhaps the most widely accepted private international rule of our time."[2] It is also viewed as the basic principle which belongs to "the common core of the legal systems."[3] This chapter aims to analyze the foundations and justifications of party autonomy in choice of court. It will also examine the legal nature and effects of choice of court agreements. Firstly, Section 3.1 will examine various views on the source of party autonomy and introduce a party-centric approach to analyze its foundation. Secondly, Section 3.2 will illustrate theoretical justifications for party autonomy in choice of court, which can be broadly categorized into two groups: beneficial effects on an individual level and the society as a whole. Each justification may place different limits on party autonomy. Then, Section 3.3 will examine the legal nature, effects and varieties of choice of court agreements in cross-border transactions. Finally, Section 3.4 will offer a brief conclusion on party autonomy in choice of court.

3.1 The Source of Party Autonomy

In order to understand the conditions, the limits, and the scope of the autonomy of the parties in choice of court, it is necessary to discuss the theoretical foundations of party autonomy and what gives permission for the parties to make a choice of forum in the first place. According to Nygh, there are three possible sources of party autonomy—the autonomous will of the parties, national law, and

[1] *See* Symeon Symeonides, *Codifying Choice of Law around the World: An International Comparative Analysis* (Oxford ; New York, NY: Oxford University Press, 2014), 112.
[2] Russell J Weintraub, *Functional Developments in Choice of Law for Contracts*, vol. 187, Recueil Des Cours (The Hague Academy of International Law, 1984), 239, 271.
[3] Ole Lando, "The EEC Convention on the Law Applicable to Contractual Obligations," *Common Market Law Review* 24, no. 2 (1987), 159, 169.

international law or custom.[4] However, the idea that the parties can freely designate a forum or create a contract not bounded by any law, including mandatory rules, beyond the reach of any national or international legal system does not gain much support from both theoretical perspective and practice.[5] Therefore, this section will focus on the national and international law approaches.

3.1.1 National Law Perspective

Some proponents of party autonomy place the source of party autonomy in national legal systems. As Ehrenzweig explains, "Party autonomy is, of course, not an independent source of conflicts rules, but is effective only in so far as it is recognized by such a rule."[6] Cordero-Moss also argues that "party autonomy is nothing more than a conflict rule deriving from state private international law."[7] According to this perspective, party autonomy is only effective when it is inserted in the municipal choice of law rule under a national legal system. Therefore, *lex fori* or the law of the forum provides the entry point for party autonomy and ultimately determines its scope, conditions and limits.[8] On this view, the parties' freedom of choice is conferred by the law of the forum. Party autonomy is merely a privilege created and granted by states, through which limited authority are conferred upon private parties.

This concept derives from the idea of the territorial sovereignty of the nation-state, in which the sovereign has the exclusive power to prescribe the rules for its courts to determine the jurisdiction and applicable law.[9] Individuals cannot do a legislative act by choosing a law or a forum for themselves

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[4] *See* Peter Nygh, *Autonomy in International Contracts*, Oxford Monographs in Private International Law (Oxford : New York: Clarendon Press ; Oxford University Press, 1999), 31-37.
[5] Nygh, *Autonomy in International Contracts*, 35. *Compare* F.A. Mann, "The Proper Law of the Contract—An Obituary," *Law Quarterly Review* 107 (1991), 355.
[6] Albert Armin Ehrenzweig, *Private International Law*, vol. I (Sijthoff, 1972).
[7] Giuditta Cordero-Moss, "Foundation, limits and scope of party autonomy," in Franco Ferrari and Diego P. Fernández Arroyo, eds., *Private International Law: Contemporary Challenges and Continuing Relevance*, Elgar Monographs in Private International Law (Cheltenham, UK ; Northampton, MA, USA: Edward Elgar Publishing, 2019), 72.
[8] Frank Vischer, *General Course on Private International Law*, vol. 232, Collected Courses of the Hague Academy of International Law (Dordrecht ; Boston ; London: Nijhoff, 1992), 139.
[9] Nygh, *Autonomy in International Contracts*, 35.

without authorization from the national systems of law. Thus, the parties are allowed to exercise their autonomy in choice of law and choice of forum to the extent that the law of the forum confers them such authority. The US Second Restatement of Conflict of Laws reflects this approach, stating that "[t]he law of the state chosen by the parties is applied, not because the parties themselves are legislators, but simply because this is the result demanded by the choice-of-law rule of the forum."[10]

3.1.2 Individual Sovereignty and International Perspective

On the other hand, some commentators view the source of party autonomy from an international perspective beyond a national legal system. On this view, party autonomy is considered to stem from international law, customary law, or other international consensus such as a *jus gentium* and a *lex mercatoria*.[11] For example, Lowenfeld argues that "party autonomy—both for choice of law and for choice of forum, including an arbitral forum—is now part of an international customary law of dispute settlement".[12] This supra-national approach is also endorsed by the preamble to the resolution of the Institute of International Law, adopted in 1991 in Basel, which states that "the autonomy of the parties is one of the fundamental principles of private international law" and further recognizes that "the autonomy of the parties has also been enshrined as a freedom of the individual in several conventions and various United Nations resolutions."[13]

Some proponents further perceive the source of party autonomy in private international law as a reflection of the sovereignty of individuals in international law. It is argued that private parties have inherent autonomy with regard to their personal lives and commercial affairs. Party autonomy is the product of "the natural will of the individual along with the corollary right to craft such will by virtue of

[10] The Restatement (Second) of Conflict of Laws Section 187 comment (e) (American Law Institute 1969).
[11] Nygh, *Autonomy in International Contracts*, 35.
[12] Andreas F. Lowenfeld, *International Litigation and the Quest for Reasonableness: Essays in Private International Law* (Oxford : New York: Clarendon Press ; Oxford University Press, 1996), 208-09.
[13] Institute of International Law, "The Autonomy of the Parties in International Contracts Between Private Persons or Entities," 1991, https://www.idi-iil.org/app/uploads/2017/06/1991_bal_02_en.pdf.

the individual's innate freedom"[14] or "a necessary expression of individual autonomy."[15] On this view, states are merely recognizing the reality in accepting party autonomy in choice of law and forum, rather than granting authority to private parties to choose a law or a forum.[16] Individuals themselves can be seen to be the source of normative law-making authority. This approach is consistent with the increasing recognition of private parties as subjects of international law.[17] Furthermore, Muir Watt points out that "party autonomy has evidently ceased to imply subordination of private actors to state authority, but actually reverses this relationship."[18]

The foundation and legitimacy of party autonomy under this perspective lies in the principle of freedom of individuals recognized by international human rights law such as the Universal Declaration of Human Rights and the conventions and resolutions of the United Nations concerning human rights.[19] Also, Nygh argues that "[party autonomy] is not derived from municipal law, it is supranational… . It is an axiom grounded in universal practice."[20] Indeed, the Thai Supreme Court also relied on the "international general principle of law" to allow party autonomy in choice of court, which appears to be in line with this approach.[21]

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[14] Jürgen Basedow, *The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws*, The Hague Academy of International Law Monographs 9 (Amersfoort, the Netherlands: Brill Nijhoff, 2015), 196.
[15] Matthias Lehmann, "Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws," *Vanderbilt Journal of Transnational Law* 41, no. 2 (March 2008): 417.
[16] Alex Mills, *Party Autonomy in Private International Law* (Cambridge, United Kingdom ; New York, NY, USA: Cambridge University Press, 2018), 9.
[17] *See generally*, Alex Mills, "Rethinking Jurisdiction in International Law," *British Yearbook of International Law* 84, no. 1 (September 2014): 187–239.
[18] Horatia Muir Watt, "'Party Autonomy' in International Contracts: From the Makings of a Myth to the Requirements of Global Governance," *European Review of Contract Law* 6, no. 3 (2010): 258.
[19] Erik Jayme, *Identité Culturelle et Intégration : Le Droit International Privé Postmoderne*, vol. 251, Recueil Des Cours (The Hague/Boston/London: Nijhoff, 1995)., 147-48; *See also*, Basedow, *The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws*, 148-49.
[20] Peter Nygh, *The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and in Tort*, Recueil Des Cours (Leiden, the Netherlands: Nijhoff, 1995), 295.
[21] *See* Supreme Court Dika no. 3537/2546 (2003); Supreme Court Dika no. 3281/2562 (2019). *See also* Chapter II Section 2.2.1.

3.1.3 A Shift toward a Party-Centric Approach

The notion that the will of the parties is truly self-governing and autonomous and it does not require any national legal system to give force and effect has not received much support.[22] The reality is that the state remains free to override or restrict party autonomy via its conflict of laws rules, mandatory rules, and public policy.[23] As a result, national courts may not always approve the forum selected by the parties or apply the law of their choice. In this sense, it is undeniable that party autonomy is given effect through national law. However, the national law perspective leaves open the question of why national legal orders increasingly permit party autonomy and confer such power to private parties. Furthermore, it cannot precisely explain the source of party autonomy without considering the importance and status of individuals in international law and universal practice.[24] The focus of the national system of law as the sole basis of party autonomy would be total ignorance of individuals' functions in international ordering.

On the other hand, although the parties' freedom to choose a forum and applicable law appears to be recognized in international human rights conventions and other instruments, it is still not clear whether different states accept the principle of party autonomy in their national legal systems because they consider themselves to have obligations under international customary law.[25] Nygh also admits that "[t]here is as yet an insufficient consensus to establish an international rule or *lex mercatoria* to give authority to the parties" to exercise party autonomy in choice of law and forum.[26]

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[22] Nygh, *Autonomy in International Contracts*, 32.
[23] Lehmann, "Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws." 391.
[24] *See* Nygh, *Autonomy in International Contracts*, 32 (douting whether the notion that "any freedom the parties may possess is one granted by the sovereign" is "a realistic view of today's world.").
[25] *See* Jieying Liang, *Party Autonomy in Contractual Choice of Law in China* (Cambridge: Cambridge University Press, 2018), 38-39.
[26] *See* Nygh, *Autonomy in International Contracts*, 44-45.

The widespread recognition of party autonomy suggests that individuals hold a prominent position in contemporary private international law. Individuals have become the main actors in the choice of law and forum and their wills have been seriously taken into consideration. Lehmann argues that the origin of conflicts problem lies in the private sphere. Such a problem predominantly exists between private parties and frequently arises in private situations such as litigations, arbitrations, and contractual negotiations. Therefore, it is natural and legitimate for private parties to be able to design their contractual relationships and choose the applicable law and forum that best suit their needs.[27] As Lehmann has proposed:

> Party autonomy can only be justified if one ignores the state relations that have so far been the focus of the classic theory. One needs to accept that the parties are the center of the conflicts problem. They are allowed to choose the applicable law because it is their dispute that is in question. The state renounces predicting the outcome of the choice-of-law process so as to allow the parties to design their individual relationships according to their wishes and needs.[28]

This approach does not treat the will of the parties as an autonomous source of law and does not conflict with the exclusive law-making authority of states under traditional conceptions of public international law. In this regard, party autonomy means the ability of the private parties to accommodate their wishes and needs through a conflict-of-laws process within the boundaries of states expressed through mandatory rules and public policy.[29] In this way, party autonomy can be seen in parallel with the role of the parties' intention in national contract laws, which almost all states highly respect. A party-centric approach reflects the actual functions and roles of individuals in international ordering and offers the reason why party autonomy is widely recognized by various national legal orders and is becoming global practice.

[27] Lehmann, "Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws." 413-14.
[28] Ibid, 415.
[29] Ibid, 433.

3.1.4 Interim Conclusion

As Mills and Basedow state, no single, universally accepted source of the justification for party autonomy in private international law exists and its theoretical foundations remain elusive until today.[30] This section has examined possible sources for party autonomy and pointed out that the individual sovereignty and international approach could not deny the fact that the formal source of parties' freedom in choice of law and forum stemmed from a national legal system. There is still general support that *lex fori* and its choice of law rules provide the legal basis and authorization for the parties to choose applicable law and jurisdiction of the court.[31] On the other hand, the national law approach is not able to provide a reason for the growing acceptance of the party autonomy principle and it cannot sufficiently comprehend the prominent roles of individuals in transnational conflicts problems.

A party-centric approach aims to reconcile between the two and serves as an important reminder that the universal recognition of party autonomy should be viewed not only as the evolution of national law, but also a reflection of the trend in reality and international law of recognizing the role of individuals and the protection of their rights.[32] Therefore, the source of party autonomy should be examined in the broader context of the relationship between national legal orders and the actual roles of individuals in practice and international law.[33]

[30] Mills, *Party Autonomy in Private International Law*, 67; Basedow, *The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws*, 164.
[31] Nygh, *Autonomy in International Contracts*, 44.
[32] Liang, *Party Autonomy in Contractual Choice of Law in China*, 39.
[33] For further discussion of the role of individuals and international law, *see* Mills, "Rethinking Jurisdiction in International Law."; Horatia Muir Watt and Diego P. Fernández Arroyo, eds., *Private International Law and Global Governance*, First edition, Law and Global Governance Series (Oxford, United Kingdom: Oxford University Press, 2014).

3.2 Justifications for Party Autonomy in Choice of Court

Party autonomy in choice of court is widely recognized in almost all major jurisdictions such as the United States, Canada, Mexico, Japan, China, South Korea, India, Singapore, Australia, New Zealand, Russia, the United Kingdom, Germany, France, and other European countries.[34] This principle is also endorsed in several international and regional instruments including the Hague Convention on Choice of Court Agreements[35], the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (hereafter referred to as the "Lugano Convention")[36], the Brussels I Regulation (Recast)[37], the Buenos Aires Protocol on International Jurisdiction in Contractual Matters[38], and the Minsk and Kishinev Convention on Legal Assistance and Legal Relations in Civil, Family, and Criminal Matters.[39] This section specifically explores theoretical justifications for party autonomy in choice of court and examines the reasons why parties' freedom to choose jurisdiction should be given effect. Justifications for party autonomy in choice of court range from an individual level such as beneficial effects on private parties to a public level focusing on the social welfare and the development of legal systems as a whole.[40]

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[34] *See generally*, Mary Keyes, *Optional Choice of Court Agreements in Private International Law* (New York: Springer, 2020).
[35] As of 2022, the Hague Convention on Choice of Court Agreements applies to 31 contracting states and one region such as the United Kingdom, Singapare, Mexico, and the European Union. For information on the status of this Convention, *see* "Status Table," Convention of 30 June 2005 on Choice of Court Agreements, HCCH, accessed Febuary 1, 2022 https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.
[36] The Lugano Convention applies between the European Union and Denmark, Switzerland, Norway and Iceland.
[37] The Brussels I Regulation (Recast) applies to the European Union member states.
[38] The Buenos Aires Protocol applies between Argentina, Brazil, Paraguay, and Uruguay.
[39] The Minsk and Kishinev Convention is in force as between Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Turkmenistan, Tajikistan, Ukraine, and Uzbekistan.
[40] Alex Mills categorizes justifications for party autonomy into two general groups: "party expectations and private -unilateral justifications" and "public-systemic justifications." *See* Mills, *Party Autonomy in Private International Law*, 67.

3.2.1 Legal Predictability and Party Expectations

One of the strongest justifications for party autonomy in choice of court is that it enhances legal predictability and realizes party expectations in cross-border transactions. In the present situation where there are no unified rules for jurisdiction, except the European Union, it is difficult for the parties to predict the forum where they are required to initiate or defend their legal proceedings. In the absence of an agreement on jurisdiction, two litigation risks probably arise due to the transnational nature of the dispute. The first one is the venue risk which the parties may be compelled to commence or defend their litigations in an unfavorable forum due to jurisdictional obstacles, parallel proceedings in multiple fora, or the unavailability of the optimal forum. The other one is the enforcement risk which is the risk that a judgment obtained in one court might not be enforceable in other courts. It results from jurisdictional and procedural barriers or the possibility that a judgment debtor might conceal or disperse his or her assets in various jurisdictions.[41]

In this regard, party autonomy in choice of court enables the parties to agree on the jurisdiction that provides the best solution for their particular contractual relations such as low transaction and litigation costs, and offers the most effective enforcement mechanism. In other words, party autonomy can help the parties to obtain the optimal forum which offers the most favorable procedures and suitable outcomes for each party.[42] They will be capable of tailoring their dispute resolution process to the circumstances of each case and their specific needs, which may not be available under default jurisdiction rules of the courts. Also, a choice of court agreement can substantially reduce the risks of jurisdictional challenges and parallel litigations, especially in the case of an exclusive choice of court agreement, which may lead to lengthy and costly litigations. Even if one of the parties cannot secure an optimal forum, the negotiation process of a choice of court agreement can help that party to avoid an

[41] Richard Fentiman, *International Commercial Litigation*, Second edition (Oxford, United Kingdom: Oxford University Press, 2015), 41.
[42] *See* Richard Fentiman, "Theory and Practice in International Commercial Litigation," *International Journal of Procedural Law* 2, no. 2 (2012): 243-44.

excessively unfavorable forum. Furthermore, increasing predictability in the parties' contractual relationship empowers the parties to better evaluate their rights and liabilities.[43]

As Reese explains, party autonomy "is the only practical device for bringing certainty and predictability into the multi-state contract."[44] The Second Restatement of Conflicts of Laws also states that party autonomy helps achieve the prime objectives of contract laws which are "to protect the justified expectation of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract." [45] Furthermore, the United States Supreme Court in *The Bremen v. Zapata Off-Shore Co.* recognized that party autonomy in choice of court was an indispensable element in international trade and could secure legal certainty and predictability in multistate transactions as follows:

> Manifestly, much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where the Bremen or Unterweser might happen to be found. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting."[46]

For the above reasons, party autonomy in choice of court can be justified on the basis of legal predictability and party expectations and in cross-border transactions. It permits the private parties to

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[43] *See* Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*. 4th ed. (Alphen aan den Rijn: Kluwer Law International, 2013), 3-4.

[44] Willis L.M. Reese, "Power of Parties to Choose Law Governing Their Contract," *American Society of International Law Proceedings* 54, no. Third Session (1960): 51.

[45] The Restatement (Second) of Conflicts of Laws Section 187 comment (e) (American Law Institute 1969):

> "Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and predictability of result are most likely to be secured. Giving parties this power of choice is also consistent with the fact that, in contrast to other areas of the law, persons are free within broad limits to determine the nature of their contractual obligations."

[46] *M/S Bremen and Unterweser Reederei, GmbH v. Zapata Off-Shore Co*., 407 US 1 (1972).

shape their contractual relations based on their specific needs, manage transaction and litigation costs, and minimize litigation risks in transnational disputes.

3.2.2 Human Rights

Party autonomy in choice of court could also be justified from a human rights perspective. For example, Nygh describes party autonomy for idealists as "an expression of human rights of individuals to arrange their personal and economic lives as they see fit, subject only to such constraints as are necessary to maintain public order and prevent the exploitation of the weak."[47] Therefore, one can view a choice of court agreement as "a necessary expression of individual autonomy,"[48] or the fruit of "the natural will of the individual along with the corollary right to craft such will by virtue of the individual's innate freedom."[49] In this view, party autonomy in choice of court is a default position directly arising from innate human rights and any restriction on such autonomy, not the party autonomy itself, requires justification.[50]

However, human rights alone may be difficult to justify the exercise of party autonomy in commercial matters, especially when the actors involve legal entities, such as companies and multinational corporations, which their existences derive from national legal systems and their actions are unlikely to be claimed as parts of universal human rights.[51]

3.2.3 Facilitation of International Trade and Legal Development

Not only substantial benefits to individuals but also advantageous effects on the public can be influential justifications for party autonomy in choice of court. For instance, it is suggested that party

[47] Nygh, *Autonomy in International Contracts*, 258.
[48] Lehmann, "Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws," 417.
[49] Basedow, *The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws*, 196.
[50] *See* Mills, Party Autonomy in Private International Law, 70-71.
[51] Mills, Party Autonomy in Private International Law, 72.

autonomy in choice of court is a vital element of international trade and commerce.[52] Basedow also argues that a choice of court agreement will stimulate cross-border transactions and increase economic activities by lessening litigation risks.[53] This is because the concern about litigation risks may discourage international transactions and cause substantial economic impacts.[54] The International Chamber of Commerce (ICC)'s world survey reveals that jurisdictional certainty is a crucial element in international commercial contracts. A large proportion of leading companies, 40 out of 100 companies, answered that they had been dissuaded from concluding international contracts or their important business decisions had been affected by doubts over uncertain jurisdiction of national courts.[55] Therefore, the reduction of jurisdictional uncertainty in cross-border transactions will increase overall economic activities and lead to greater public welfare.[56]

Also, the parties' freedom to select a forum creates a regulatory competition between different states and legal institutions, which leads to more efficient and favorable legal systems for economic activities.[57] As Muir Watt argues, "the principle of free choice generates a competitive market for legal products and judicial services."[58] Allowing private parties to select a jurisdiction encourages states to compete for legal business. They will revise their laws and develop new rules to attract new businesses and investors.[59] For example, in the context of arbitration, various states competed to adopt the UNCITRAL Model Law on International Commercial Arbitration and modernize their arbitration laws

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[52] *See* Nygh, *Autonomy in International Contracts*, 258. *See also M/S Bremen and Unterweser Reederei, GmbH v. Zapata Off-Shore Co*., 407 US 1 (1972).
[53] Basedow, *The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws*, 194.
[54] Fentiman, *International Commercial Litigation*, 42.
[55] "Survey on Jurisdictional Certainty (April, 2003)," International Chamber of Commerce, accessed February 1, 2022, https://iccwbo.org/media-wall/news-speeches/jurisdictional-certainty-is-essential-in-international-contracts/.
[56] Besedow, *The Law of Open Societies: Private Ordering and Public Regulation of International* Relations, 194.
[57] Mills, *Party Autonomy in Private International Law*, 83.
[58] Horatia Muir Watt, "Further Terrains for Subversive Comparison: The Field of Global Governance and the Public/Private Divide," in *Methods of Comparative Law*, Research Handbooks in Comparative Law, ed. Pier Giuseppe Monateri (Cheltenham, U.K. ; Northampton, MA: Edward Elgar Pub, 2012), 282.
[59] *See* Larry E. Ribstein, "Choosing Law by Contract," *Journal of Corporation Law* 18, no. 2 (1993): 249–50.

in order to become an international center of dispute resolution.[60] Similarly, many countries including Japan and South Korea were inspired by the highly influential Brussels I Regulation and the European private international law to revise their conflict of law rules and international jurisdiction to attract more businesses and cross-border transactions.[61]

3.2.4 Economic Efficiency

Party autonomy in choice of court can be justified through the economic perspective. It is generally viewed that granting private parties the freedom to select a forum is an efficient approach in private international law that enhances both private and social welfare. The underlying basis for this proposition is that parties are assumed to be rational maximizers of their welfare and be aware of their unique preferences unknown to others.[62] They will enter into a choice of court agreement only when it is in their interest to do so and will seek a forum that makes the highest possible return. In other words, such an agreement will not be made unless the parties have joint benefits from it. Therefore, the transactions between the parties will increase welfare and have a positive effect on states.[63] They can maximize their welfare by selecting a jurisdiction and legal regime that best suits their needs such as a forum that has favorable conflict-of-laws and procedural rules, high expertise, neutrality, or effective enforcement mechanism. In this way, they can avoid extra litigation costs associated with jurisdictional

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[60] Shunichiro Nakano (中野俊一郎), "Justification for the Principle of Party Autonomy [当事者自治原則の正当化根拠]," *Ritsumeikan Hōgaku* [立命館法学] 339–340, no. 5–6 (2011): 323.

[61] For example, Japanese and Korean legislators considered the jurisdictional rules of the Brussels I Regulation in revising their rules on international jurisdiction under the Japanese Code of Civil Procedure and the Private International Law Act of Korea. *See* Working Group on International Judicial Jurisdiction (国際裁判管轄研究会), "Report of Working Group on International Judicial Jurisdiction (1)" [国際裁判管轄研究会報告書(1)], *NBL*, no. 883 (June 2008): 38; Kwang Hyun Suk, "Introduction of Detailed Rules of International Adjudicatory Jurisdiction in Korea: Proposed Amendments of the Private International Law Act," *Japanese Yearbook of Private International Law* 19, (2017): 3.

[62] *See* Giesela Rühl, "Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency," *Comparative Research in Law & Political Economy Research Paper No. 4/2007*, Legal Research Institute Research Paper Series, 3, no. 1 (2007): 32-33.

[63] *See* Andrew T. Guzman, "Choice of Law: New Foundations," *Georgetown Law Journal* 90, no. 4 (April 2002): 913-14.

uncertainty and the costs of predicting the forum and applicable law, as well as hope for the best possible outcome of the litigation. From an economic viewpoint, as long as the choice of court agreement does not decrease the welfare of the third parties, it will lead to Pareto efficiency.[64] Furthermore, if the welfare increased by a choice of court agreement is more than the reduction of the third parties' welfare, it will lead to Kaldor-Hicks efficiency[65].[66] This justifies that parties should be permitted the freedom to choose a jurisdiction.

Furthermore, it is argued that party autonomy in choice of court, in the absence of significant inequality of bargaining powers, may realize the most efficient allocation of disputes because the parties can select the most efficient forum for their disputes based on factors such as expertise and neutrality. A choice of court agreement also limits litigation to a predictable or single forum. Consequently, it leads to greater efficiency not only in individual disputes but also in dispute resolution processes at a global level as a result of competition between forum states.[67]

3.2.5 Interim Conclusion

Party autonomy in choice of court has multiple justifications, which can be broadly categorized into two groups: beneficial effects on an individual level and the society as a whole. Such autonomy also stands firm on economic grounds. It will lead to the maximization of both private wealth and public

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[64] Pareto efficiency "occurs when resources are so allocated that it is not possible to make anyone better off without making someone else worse off. When referring to a situation as Pareto efficient, it is usually assumed that products are being produced in the most efficient (least-cost) way." Organisation for Economic Co-operation and Development and Centre for Co-operation with European Economies in Transition, eds., *Glossary of Industrial Organisation Economics and Competition Law* (Paris: Organisation for Economic Co-operation and Development, 1993), 65.

[65] Richard A. Posner explains Kaldor-Hicks efficiency as "[r]esources are allocated efficiently in a system of wealth maximization when there is no reallocation that would increase the wealth of society." Richard A Posner, "The Value of Wealth: A Comment on Dworkin and Kronman," *Journal of Legal Studies* 9 (1980): 243.

[66] *See* Rühl, "Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency," 33.

[67] Mills, *Party Autonomy in Private International Law*, 80. *See generally* Michael J Whincop, Mary Keyes, and Richard A Posner, *Policy and Pragmatism in the Conflict of Laws* (London: Routledge, 2001).

welfare. These justifications support and complement each other in the direction of allowing more party autonomy in international transactions. However, different justifications for party autonomy may offer slightly distinct answers to the questions of when and under what circumstances a choice of court agreement should be enforced or limited.[68] For example, for those who view human rights as the main justification, party autonomy in choice of court is a natural expression of basic human rights. Therefore, party autonomy is the fundamental principle and any limits on such party autonomy, not the party autonomy itself, need justification. Nonetheless, the scope and what constitutes human rights will be a significant boundary for the exercise of such autonomy. On the other hand, for the supporters of legal predictability and facilitation of international trade as principal justifications for party autonomy, a choice of court agreement ought to be given effect as long as it brings benefits to the parties involved and the society. Finally, from the economic viewpoint, the third-party effects and market failure caused by externalities, information asymmetry, and inequality in bargaining power should be taken into consideration to delineate the scope and effects of a choice of court agreement.

However, it should be noted that no matter what the justification for party autonomy in choice of court is, it may not give a complete answer for every detail of the actual application of the party autonomy principle and its specific limits. The interpretation and application of such principle should be individually examined depending on the circumstances of each case and based on a legal policy with a careful balance between various interests.[69] Still, the discussion of justifications for party autonomy in choice of court remains significant because it contributes to the construction of theoretical frameworks for legal policy and enriches the practice of international dispute resolution.

[68] Mills, *Party Autonomy in Private International Law*, 84.
[69] Nakano, "Justification for the Principle of Party Autonomy [当事者自治原則の正当化根拠]," 327.

3.3 Choice of Court Agreements

Party autonomy in choice of court can be exercised through the use of a choice of court agreement and voluntary submission to jurisdiction by the party. A choice of court agreement is the most widely used form of this party autonomy in international transactions because it provides ex-ante predictability to contractual relations and reduces the risks of litigations in multiple fora and conflicting judgments. Especially, some business sectors such as financial services often use a choice of court agreement in their contracts and tend to prefer litigation over arbitration.[70] Therefore, a choice of court agreement is accepted and enforced in almost all mature legal systems.[71] This section examines the nature and anatomy of choice of court agreements.

3.3.1 Nature and General Characteristics of Choice of Court Agreements

A choice of court agreement is an agreement or a contract between two or more parties, under which the parties agree that a particular court or multiple courts may have jurisdiction to hear a dispute.[72] This agreement seeks to provide a national court located in a specific location with the power to adjudicate the agreed disputes and exercise authority over the parties. It is often inserted as a boilerplate clause in standard form contracts in commercial transactions such as "the parties agree to submit any disputes arising out of this contract to the exclusive jurisdiction of the courts of Japan" or simply as a declaration such as "Jurisdiction: Courts of Tokyo."[73] A choice of court agreement can also be extremely complex and comprehensive as follows:

> Except as may be required under the foreclosure provision contained within the Security Deed, each of Lender, Borrower, and Guarantor, to the fullest extent permitted by law, hereby knowingly, intentionally, and voluntarily, with and upon the advice of competent counsel, (i)

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[70] *See* Queen Mary University of London and PricewaterhouseCoopers, "Corporate Choices in International Arbitration: Industry Perspectives," 2013 International Arbitration Survey, 2013, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/pwc-international-arbitration-study2013.pdf.
[71] Adrian Briggs, "Choice of Forum and Submission to Jurisdiction," in *Encyclopedia of Private International Law*, ed. Jürgen Basedow et al (Cheltenham, UK: Edward Elgar Publishing, 2017), 304.
[72] Also known as a forum selection clause, a choice of forum agreement, or a jurisdiction agreement.
[73] *See* Mills, *Party Autonomy in Private International Law*, 91.

> submits to personal, nonexclusive jurisdiction in the State of Georgia with respect to any suit, action or proceeding by any person arising from, relating to, or in connection with such Loan Document or the Loan, (ii) agrees that any such suit, action or proceeding may be brought in any state or federal court of competent jurisdiction sitting in Lowndes County, Georgia, and (iii) submits to the jurisdiction of such courts. Each of Borrower and Guarantor, to the fullest extent permitted by law, hereby knowingly, intentionally and voluntarily, with and upon the advice of competent counsel, further agrees that it will not bring any action, suit, or proceeding in any forum other than Lowndes County, Georgia (but nothing herein shall affect the right of Lender to bring any action, suit, or proceeding in any other forum), and irrevocably agrees not to assert any objection which it may ever have to the laying of venue of any such suit, action, or proceeding in any federal or state court located in Georgia and any claim that any such action, suit, or proceeding brought in any such court has been brought in an inconvenient forum.[74]

A choice of court agreement has two significant aspects. On the one hand, it is a contract concluded by private parties. As a result, it falls under the realm of private contract law.[75] On the other hand, it seeks to establish a procedural relationship between the parties and aims to have jurisdictional consequences.[76] Therefore, it also subjects to the law of procedure or public law. This concept is confirmed by the Rome I Regulation, which explicitly excludes a choice of court agreement from its scope due to a procedural character.[77] The dual nature of a choice of court agreement leads to different

[74] A forum selection clause in loan documents between the Park Avenue Bank, Steamboat City Development Company, and the guarantors in *Park Ave. Bank v. Steamboat City Dev. Co., L.P*., et al., 728 S.E.2d 925 (Ga. Ct. App. 2012).

[75] A majority of British commentators and English common law view a choice of court agreement as entailing enforceable substantive rights and obligations. A failure to comply with it is considered as a breach of contract. *See* Mukarrum Ahmed, *The Nature and Enforcement of Choice of Court Agreements: A Comparative Study*, Studies in Private International Law, volume 19 (Oxford, UK ; Portland, Oregon: Hart Publishing, 2017), 56. *See also Donohue v Armco Inc* [2001] UKHL 64.

[76] The prevailing view in Germany interprets a choice of court agreement as a merely "procedural" contract involving no substantive rights and obligations. *See* Jonas Steinle and Evan Vasiliades, "The Enforcement of Jurisdiction Agreements under the Brussels I Regulation: Reconsidering the Principle of Party Autonomy," *Journal of Private International Law* 6, no. 3 (December 2010): 576. ("In Germany, this perspective is derived from the jurisprudence of the German Federal Court (Bundesgerichtshof), which classifies a jurisdiction agreement as a contract about the procedural relationship between the parties. Consequently, the effects of a jurisdiction clause are limited to its effect on prorogation or derogation of certain courts (prozessuale Verfügungswirkung), meaning that a jurisdiction clause may add or remove certain courts from the competent courts which are available to the parties, depending on the negative or positive effect of a jurisdiction agreement.")

[77] Article 1(2)(e) of the Regulation No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations: OJL/2008/177/6.

approaches in the choice-of-law process depending on the aspect in question.[78] For example, procedural issues concerning the exercise of judicial power and the administration of justice are generally governed by the *lex fori* following the principle of *forum regit processum* (the law of the forum governs procedure).[79] The issue of whether a choice of court agreement confers jurisdiction on the chosen court or deprives jurisdiction of other courts may be categorized as a procedural issue. Also, the validity of a choice of court agreement as to form is likely to be governed by the *lex fori* or the relevant instrument such as the Hague Convention on Choice of Court Agreements or the Brussels I regulation (Recast).[80] On the other hand, the validity as to substance such as consent and the effects of duress, fraud, or incapacity is commonly classified as substantive and accordingly subjects to the forum's conflict of laws rules or general choice-of-law process.[81]

In addition, a choice of court agreement consists of four basic elements.[82] First, there must be an agreement. This element leads to the issues of the formality requirements as well as the substantive and formal validity of a choice of court agreement. Secondly, there must be parties who make such an agreement. However, not only the parties to a choice of court agreement but also persons who did not originally consent to it may be bound by the agreement. Thirdly, the agreement must specify litigation as a form of dispute resolution. This element distinguishes a choice of court agreement from arbitration, mediation, or other means of dispute resolution. Finally, the agreement must confer jurisdiction on a national court, or oust the jurisdiction of competent courts, or combine the two aspects in the same agreement. The content of a choice of court agreement will determine the duties of the parties and

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[78] *See* Trevor C. Hartley, *Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*, Oxford Private International Law Series (Oxford, United Kingdom: Oxford University Press, 2013), 4.
[79] Koji Takahashi, "Cases and Issues in Japanese Private International Law: Law Applicable to Choice-of-Court Agreements," *Japanese Yearbook of International Law* 58 (2015): 392.
[80] Hartley, *Choice-of-Court Agreements under the European and International Instruments*, 4.
[81] Koji Takahashi, "Damages for Breach of a Choice-of-Court Agreement," *Yearbook of Private International Law* 10 (2008): 67.
[82] *See* Hartley, *Choice-of-Court Agreements under the European and International Instruments*, 4-6.

relevant courts as well as the positive effects (prorogation) and the negative effects (derogation) of a choice of court agreement.

3.3.2 Anatomy of Choice of Court Agreements

Choice of court agreements can take various forms with different effects on the court designated in the agreements and the non-chosen courts. At the simplest form, they may merely confer jurisdiction on the chosen court, in addition to the existing competent courts having jurisdiction. Therefore, parties can initiate legal proceedings in both the chosen court and other competent courts. Furthermore, choice of court agreements may confer jurisdiction on the designated court meanwhile depriving the jurisdiction of the court that would otherwise have had been competent. This subsection seeks to analyze the anatomy of choice of court agreements by examining the legal effects of choice of court agreements and explore the variety of such agreements.

(i) Effects of choice of court agreements

In general, a choice of court agreement may have two significant effects on national courts. On the one hand, it may confer jurisdiction on a court, which would not otherwise have been competent, to hear and determine the dispute. This effect is conventionally referred to as the "positive," or "jurisdiction-granting" effect, or "prorogation." On the other hand, a choice of court agreement may oust the jurisdiction of the court that would otherwise have had been competent. This is commonly referred to as the "negative," or "jurisdiction-depriving" effect, or "derogation."[83]

[83] Hartley, *Choice-of-Court Agreements under the European and International Instruments*, 5.

(a) Positive effects

A choice of court agreement allows the parties to establish the jurisdiction of the court chosen by them, even though the chosen court may not have had jurisdiction from the beginning. This so-called positive effect depends on the *lex fori* or the procedural law of the forum court and whether it accepts party autonomy in choice of court as a basis of jurisdiction.[84] At present, most countries recognize the positive effect of this agreement in a cross-border dispute. For example, the Japanese Code of Civil Procedure provides in Article 3-7 (1) that "Parties may establish, by agreement, the country in which they are permitted to file an action with the courts." This Article was added in 2011 at the time of the major revision of the Japanese Code of Civil Procedure to establish clear and precise rules for international jurisdiction.[85] It came into force on April 1, 2012. The primary purpose of the new jurisdiction rules on a choice of court agreement was to enhance legal predictability and certainty as well as better facilitate cross-border business activities.[86]

Similarly, the Brussels I Regulation (Recast) Article 25 (1) provides that:

> If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State.

As a result, the chosen court of a Member State is required to hear the dispute regardless of the domicile of the parties. Recital 4 to the Brussels I Regulation (Recast) suggests that the general justification for party autonomy in choice of court lies in the beneficial effects on the public such as the facilitation of

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[84] Mary Keyes, "Optional Choice of Court Agreements in Private International Law: General Report," in *Optional Choice of Court Agreements in Private International Law*, ed. Mary Keyes (New York: Springer International Publishing, 2020), 14.
[85] *See generally*, Dai Yokomizo, "The New Act on International Jurisdiction in Japan: Significance and Remaining Problems," *Zeitschrift Fuer Japanisches Recht [Journal of Japanese Law]* 34 (2012): 95–113.
[86] See Hideyuki Kobayashi (小林秀之) and Masako Murakami (村上正子), *International Civil Procedure [国際民事訴訟法]*, 1st ed. (Tokyo: Kobundo, 2020), 64–65.

regional trade within the European Union and the sound operation of the internal market provided by legal certainty.[87] In the words of Recital 4:

> Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters, and to ensure rapid and simple recognition and enforcement of judgments given in a Member State, are essential.[88]

Also, the Hague Convention on Choice of Court Agreements 2005 explicitly stipulates the positive effect of a choice of court agreement in Article 5 (1), providing that "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." The general principle is that the designated court of a Contracting State in an exclusive choice of court agreement must hear the dispute. It cannot decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State under the doctrines of *lis pendens* or *forum non conveniens*.[89] As stated in the Preamble to the Hague Convention, the primary justification for party autonomy in choice of court is the promotion of "international trade and investment through enhanced judicial co-operation." It also affirms that "such enhanced co-operation requires in particular an international legal regime that provides certainty and ensures the effectiveness of exclusive choice of court agreements between parties to commercial transactions and that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements."

In the United States, on the other hand, the positive effect of a choice of court agreement is generally analyzed as a contractual form of consent to jurisdiction. Through a choice of court agreement,

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[87] Mills, *Party Autonomy in Private International Law*, 129.
[88] Recital 4 of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
(recast).
[89] Article 5 (2). *See* Trevor Hartley and Masato Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements. Explanatory Report.* (Mortsel: Intersentia Uitgevers NV, 2013), 57 para 132-34.

a contracting party waives any rights to raise objections to the personal jurisdiction or venue if a lawsuit is initiated in the chosen court.[90] For example, the US Supreme Court in *Atlantic Marine Construction Co., Inc. v. United States District Court for the Western District of Texas* stated that "When parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witness, or for their pursuit of the litigation."[91] US courts have repeatedly confirmed that personal jurisdiction can be waived by a defendant because the objective of the requirement for personal jurisdiction is the recognition and protection of "an individual liberty interest."[92] Therefore, consent and waiver such as entering an appearance without contesting jurisdiction have long been recognized as a valid basis for asserting personal jurisdiction. Over time, it has led to the recognition of a contractual waiver in the form of *ex ante* choice of court agreements.[93] The US Supreme Court in *National Equipment Rental, Ltd. V. Szukhent* ruled that "parties to a contract may agree in advance to submit to the jurisdiction of a given court."[94]

It is also notable that procedural laws of many legal systems do not require any objective or factual connection between the dispute or the parties and the chosen court in order to exercise jurisdiction on the basis of a choice of court agreement.[95] The Court of Justice of the European Union (CJEU) confirmed that Article 25 of the Brussels I Regulation (Recast) does not require such objective connection.[96] Also, US courts generally enforce a choice of court agreement even when the

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[90] Hannah L. Buxbaum, "The Interpretation and Effect of Permissive Forum Selection Clauses under U.S. Law Reports," *American Journal of Comparative Law* 66 (2018): 127–52.
[91] *Atlantic Marine Construction Co., Inc. v. United States District Court for the Western District of Texas*, 134 S.Ct. 568, 581 (2013).
[92] Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.").
[93] Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315-16 (1964) ("[I]t is settled ... that parties to a contract may agree in advance to submit to the jurisdiction of a given court ....").
[94] *National Equipment Rental, Ltd. V. Szukhent*, 375 U.S. 311, 316 (1964). *See also* The Restatement (Fourth) of Foreign Relations Law Section 422 Comment b (American Law Institute 2018) ("Parties may also agree, subject to applicable law, to submit to the jurisdiction of a particular court.").
[95] *See e.g.* Japanese Code of Civil Procedure Art. 3-7.
[96] Case 56/79 *Zelger v. Salinitri* [1980] ECR 89.

chosen forum is unconnected with the dispute and conclude that it does not violate the due process requirement.[97]

On the other hand, some countries may impose a factual connection requirement in a choice of court agreement. For example, the Chinese Civil Procedure Law Article 34 provides:

> Parties to a dispute over a contract or any other right or interest in a property may, without violating rules concerning jurisdiction by forum level and exclusive jurisdiction, choose the court for the place where the defendant is domiciled, or where the contract is performed or signed, or where the plaintiff is domiciled, or where the subject matter is located or any other place that has actual connection with the dispute as the court having jurisdiction over their dispute by a written agreement.[98]

A similar factual connection requirement can also be found in Section 65 of Thailand's Multimodal Transport Act, B.E. 2548 (2005).[99] The requirement of a factual connection may support the legitimacy of the positive effects of a choice of court agreement since it can help maintain consistency with other rules establishing jurisdictional grounds of the court and manage the burden of the forum court. However, a lack of such requirement might be desirable for the parties as it enhances more party autonomy to manage their litigation risks and strategies, as well as allows them to choose a forum based on neutrality.[100]

In addition, the recognition of the positive effects of a choice of court agreement may be relatively easy in many jurisdictions, compared to that of the negative effects. As Nygh argued, "For the prorogated forum the choice of the parties presents no challenge to State Authority. Concepts of

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[97] *See* RSR Corp. v. Sigmund, 309 S.W.3d 686, 704 (Tex. Ct. App. 2010) ("To the extent a party has consented to jurisdiction in a particular forum, the trial court's exercise of personal jurisdiction over it does not violate due process even in the absence of contacts with Texas.").
[98] Art. 34 of the Civil Procedure Law of the People's Republic of China (as amended in June 2017). *See* Keyes, "Optional Choice of Court Agreements in Private International Law: General Report," 27-28.
[99] *See* Chapter II Section 2.2.1 (iii).
[100] Keyes, "Optional Choice of Court Agreements in Private International Law: General Report," 15.

territorial sovereignty and control are not offended, but rather flattered, when foreigners submit to the jurisdiction."[101]

(b) Negative effects

The negative effect of a choice of court agreement is more controversial in many legal systems because it ousts the jurisdiction of a court that would otherwise have had it. The non-chosen court or the court that is deprived of its jurisdiction by a choice of court agreement may hesitate to decline jurisdiction because the notion of territorial sovereignty is offended.[102] This is one of the reasons why a choice of court agreement in favor of a foreign court was treated as ineffective in several jurisdictions until recently.[103]

The negative effects of a choice of court agreement are generally viewed as procedural matters and therefore subject to *lex fori* or the forum law.[104] For example, the Brussels I Regulation (Recast) provides in Article 31 that:

> (2) Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.
> (3) Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.

Article 31 requires the non-chosen court not to hear the dispute where the parties agree to the exclusive jurisdiction of a court in another Member State. There are no exceptions for the obligation to decline

[101] Nygh, *Autonomy in International Contracts*, 15.
[102] Ibid, 15, 19.
[103] *See e.g. Prince Steam-Shipping Co. v. Lehman*, 39 F. 704 (S.D.N.Y. 1889); *Nute v. Hamilton Mutual Insurance Co.*, 6 Gray 174, 184 (Mass. 1856).
[104] Keyes, "Optional Choice of Court Agreements in Private International Law: General Report," 16.

jurisdiction if other requirements under the Brussels I Regulation (Recast) are met. Furthermore, the non-chosen court cannot exercise jurisdiction on the ground of *forum conveniens*.[105]

The Hague Convention on Choice of Court Agreements also provides an explicit provision concerning the negative effects of a choice of court agreement and lays down an exhaustive list of exceptions to the obligation to decline jurisdiction. Article 6 provides that:

> A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless –
> a) the agreement is null and void under the law of the State of the chosen court;
> b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;
> c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;
> d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or
> e) the chosen court has decided not to hear the case

The general principle under the Hague Convention is that the non-chosen court must decline jurisdiction, either through suspension or dismissal of the proceedings, even if it has jurisdiction under its own national law, unless one of the five specific exceptions under Article 6 paragraphs *a)* to *e)* applies.[106] However, this obligation applies only if the chosen court is located in the contracting State and the choice of court agreement is exclusive.[107]

In the United States, a choice of court agreement in favor of a foreign court with the negative effect to take away the jurisdiction of American courts was historically viewed as unenforceable due to the infringement of sovereignty. Jurisdiction to adjudicate was regarded as a matter for the sovereign to decide, not for private parties to regulate by themselves.[108] However, since the middle of the twentieth

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[105] *See* Hartley, *Choice-of-Court Agreements under the European and International Instruments*, 182.
[106] Hartley and Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements. Explanatory Report*, 819-21 para. 145-46.
[107] Article 1 of the Hague Convention on Choice of Court Agreements.
[108] Michael Mousa Karayanni, "The Public Policy Exception to the Enforcement of Forum Selection Clauses," *Duquesne Law Review* 34, no. 4 (Summer 1996): 1010.

century, American courts have shifted from this perspective towards the growing recognition of party autonomy and broadly allowed parties to select their forum.[109] Nowadays, most American courts generally analyze a choice of court agreement through the framework of the *forum non conveniens* doctrine and consider it as a "persuasive reason for the courts to exercise their *own* power to decline to exercise their jurisdiction over a dispute."[110] The Restatement (Fourth) of Foreign Relations Law noted that a choice of court agreement altered "the *forum non conveniens* analysis by eliminating the presumption in favor of the plaintiff's choice of forum, by putting the burden on the plaintiff to show why the clause should not be enforced, and by precluding the district court from considering arguments about the parties' private interests."[111]

The leading case in the recognition of a choice of court agreement in a cross-border dispute was the US Supreme Court decision in *M/S Bremen v. Zapata Off-Shore Co.* The Court upheld the validity of a choice of court agreement in favor of the courts of England which were chosen as a neutral forum. Despite the precedent, the Court ruled that "in the light of present-day commercial realities ... we conclude that [a] forum clause should control absent a strong showing that it should be set aside." In order to justify party autonomy in choice of court, the Court reasoned that "the expansion of the American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts."[112] The decision in *M/S Bremen* established strong policy considerations for the validity and enforcement of a choice of court agreement and had a significant impact on the subsequent cases in both federal and state courts.

[109] Kevin M. Clermont, "Governing Law on Forum-Selection Agreements," *Hastings Law Journal* 66, no. 3 (2015): 647–48.
[110] Mills, *Party Autonomy in Private International Law*, 118.
[111] The Restatement (Fourth) of Foreign Relations Law Section 424 Reporter's Notes 6 (American Law Institute 2018).
[112] *M/S Bremen and Unterweser Reederei, GmbH v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

Moreover, in *Carnival Cruise Lines, Inc. v. Shute*, the US Supreme Court emphasized the benefits of a choice of court agreement on individuals including consumers in justifying the recognition of such agreement, finding that "a clause establishing *ex ante* the dispute resolution forum has the salutary effect of dispelling confusion as to where suits may be brought and defended, thereby sparing litigants time and expense and conserving judicial resources. Furthermore, it is likely that passengers purchasing tickets containing a forum clause like the one here at issue benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued."[113] From these decisions, it appears that American courts view the beneficial effects of party autonomy on individuals and the public such as the American society and international trade as justifications for the recognition of a choice of court agreement. However, the negative effect of a choice of court agreement may be denied if the parties resisting the enforcement can show that "enforcement would contravene a strong public policy of the forum," that "enforcement would be unreasonable and unjust," or that "the [agreement] was invalid for such reasons as fraud or overreaching."[114]

As for Japan, the Japanese courts have an obligation not to hear the dispute where another foreign court is chosen by the parties and such court has jurisdiction according to an exclusive choice of court agreement.[115] However, the negative effects of a choice of court agreement may be denied if the chosen court is legally or factually unable to exercise jurisdiction.[116] Furthermore, a choice of court agreement in favor of a foreign court may also be rejected if such agreement is "extremely unreasonable

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[113] *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

[114] The Restatement (Fourth) of Foreign Relations Law Section 424 Reporter's Notes 6 (American Law Institute 2018). *See also M/S Bremen and Unterweser Reederei, GmbH v. Zapata Off-Shore Co*., 407 U.S. 1, 15 (1972).

[115] *See* Japanese Code of Civil Procedure Art. 3-7 (1):

> "Parties may establish, by agreement, the country in which they are permitted to file an action with the courts."

[116] Japanese Code of Civil Procedure Art. 3-7 (4):

> "An agreement that an action may be filed only with the courts of a foreign country may not be invoked if those courts are unable to exercise jurisdiction by law or in fact."

and contrary to the law of public policy."[117] This so-called "public policy test" is established by the Japanese Supreme Court decision in *Chisadane* case and is still operative as case law to safeguard public policy of Japan in the context of a choice of court agreement.[118]

(ii) Category of choice of court agreements

Choice of court agreements can take numerous different forms. In general, they can be categorized into exclusive and non-exclusive ones. This characterization is highly important because they differ basically as to the positive and negative effects on the parties and relevant courts.[119] Also, a choice of court agreement can be one-sided, or unilateral (generally known as an "asymmetric" choice of court agreement), which allows one party to enjoy greater freedom to select a forum than the other. Furthermore, a choice of court agreement sometimes combines litigation with other alternative dispute resolution systems such as arbitration and mediation. This form of agreement is generally called a "hybrid" agreement.

(a) Exclusive choice of court agreements

An exclusive choice of court agreement has both positive and negative effects. It intends to confer jurisdiction on the chosen court and also preclude the possibility that any other court may exercise jurisdiction over the dispute covered by such agreement. Most legal systems require their courts to exercise jurisdiction based on a choice of court agreement and oblige the non-designated court to stay or dismiss proceedings that are brought against such agreement.[120] Also, each party is contractually required to litigate in the nominated forum and not to sue elsewhere.[121] In principle, a court nominated in

[117] *Chisadane* case, Supreme Court, Judgment, November 28, 1975, 29 Minshu (10) 1554 [1975].
[118] Shunichiro Nakano, "Agreement on Jurisdiction," *Japanese Yearbook of International Law* 54 (2011): 291–93.
[119] Mary Keyes and Brooke Adele Marshall, "Jurisdiction Agreements: Exclusive, Optional and Asymmetrical," *Journal of Private International Law* 11, no. 3 (2015): 349.
[120] Mills, *Party Autonomy in Private International Law*, 93.
[121] Fentiman, *International Commercial Litigation*, para. 2.09.

an exclusive choice of court agreement must hear the case when a dispute is brought before it whereas a court other than the chosen court is required to suspend or dismiss the same proceeding.

An exclusive choice of court agreement significantly enhances legal certainty in a cross-border dispute because it normally limits disputes to a single forum. Parties can predict the place of litigation in advance and avoid litigating the same dispute in multiple courts. For this reason, they can considerably minimize the time and costs of litigation. In general, parties in multinational transactions tend to prefer certainty to flexibility.[122] Therefore, many international instruments and courts in various jurisdictions often presume that parties intend a choice of court agreement to be exclusive unless the parties have agreed otherwise.[123]

(b) Non-exclusive choice of court agreements

A non-exclusive choice of court agreement is an agreement in which the parties intend to submit their disputes to a particular court or more than one court, without seeking to exclude the possible jurisdiction of the non-designated courts.[124] In other words, under this agreement, the parties do not designate a single court to have exclusive jurisdiction for their disputes. A non-exclusive choice of court agreement can also be defined in a negative way which is any choice of court agreement that is not exclusive.[125] Adrian Briggs states that "'non-exclusive' means only that the jurisdiction agreement is not of the 'fully, bilaterally, and immediately exclusive' type."[126] In general, a non-exclusive choice of court agreement does not require the parties to litigate in the designated forum. The parties can still bring a

[122] Keyes and Marshall, "Jurisdiction Agreements: Exclusive, Optional and Asymmetrical," 350-51.
[123] *See e.g.* The Hague Convention on Choice of Court Agreements Art. 3 (b), The Brussels I Regulation (Recast) Art. 25. *See also*, Koji Takahashi, "Japan: Quests for Equilibrium and Certainty," in *Optional Choice of Court Agreements in Private International Law*, ed. Mary Keyes (New York: Springer International Publishing, 2020), 268 ("The tendency of the Japanese courts is to characterize a choice of court agreement as exclusive unless otherwise indicated.").
[124] Mills, *Party Autonomy in Private International Law*, 23.
[125] Keyes and Marshall, "Jurisdiction Agreements: Exclusive, Optional and Asymmetrical," 362.
[126] Adrian Briggs, *Agreements on Jurisdiction and Choice of Law*, Oxford Private International Law Series (Oxford ; New York: Oxford University Press, 2008), 116 para. 4.19.

lawsuit before a competent court having jurisdiction even it is not nominated in their choice of court agreement.[127] A non-exclusive choice of court agreement can be further divided into a "simple" non-exclusive choice of court agreement and a "multiple" non-exclusive choice of court agreement. The former is the agreement in which the parties nominate only one court that can assert non-exclusive jurisdiction while the latter is the agreement where the parties designate multiple courts for adjudicating their disputes.[128]

Similar to an exclusive choice of court agreement, a non-exclusive choice of court agreement has positive effects to confer jurisdiction on the designated court. However, the negative effects of a non-exclusive choice of court agreement considerably differ from those of an exclusive one, pursuant to *lex fori* in accordance with the doctrine of *forum regit processum*. For example, although the Brussels I Regulation (Recast) does not provide a specific provision for the negative effects of a non-exclusive choice of court agreement, it is generally understood that the allocation of jurisdiction based on a non-exclusive choice of court agreement is subject to the *lis pendens* rules under Article 29[129], which is determined by which court is first seised.[130] On the other hand, in common law jurisdictions such as the United States and England, a non-exclusive choice of court agreement is considered as one factor in the *forum non conveniens* analysis, and its effect is that the parties are deemed to have waived their rights to

[127] Keyes and Marshall, "Jurisdiction Agreements: Exclusive, Optional and Asymmetrical," 363.
[128] Elena-Alina Oprea, "Romania: Interpretation and Effects of Optional Jurisdiction Agreements in International Disputes" in *Optional Choice of Court Agreements in Private International Law*, ed. Mary Keyes (New York: Springer International Publishing, 2020), 294.
[129] The Brussels I Regulation (Recast) Art. 29:

> "1. Without prejudice to Article 31 (2), 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. In cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised in accordance with Article 32.
> 3. 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."

[130] Keyes, "Optional Choice of Court Agreements in Private International Law: General Report," 20.

contest the jurisdiction of the nominated court.[131] As a result, it prevents the parties from challenging the appropriateness or convenience of the agreed forum as inconvenient for themselves or their witnesses to pursue litigation.[132] The English Court of Appeal well described the effect of a non-exclusive choice of court agreement in *Highland Crusador Offshore Partners v. Deutsche Bank* as follows:

> A non-exclusive jurisdiction agreement precludes either party from later arguing that the forum identified is not appropriate forum on grounds foreseeable at the time of the agreement, for the parties must be taken to have been aware of such matters at the time of the agreement. For that reason an application to stay on forum non conveniens grounds an action brought in England pursuant to an English non-exclusive jurisdiction clause will ordinarily fail unless the factors relied upon were unforeseeable at the time of the agreement.[133]

As for Japan, Article 3-7 of the Japanese Code of Civil Procedure applies to a non-exclusive choice of court agreement if the proceeding is brought before a Japanese court. A non-exclusive choice of court agreement in favor of a foreign court does not have direct negative effects to oust the jurisdiction of the Japanese court which it has under the Code of Civil Procedure even when the party brings an action before a court designated in the non-exclusive choice of court agreement.[134] However, when a Japanese court faces a parallel litigation situation, the existence of a non-exclusive choice of court agreement may be one of the important factors to dismiss proceedings in Japan in favor of a foreign court under an analogous version of the *forum non conveniens* doctrine stipulated in Article 3-9 of the Japanese Code of Civil Procedure.[135] It reads:

> Even when the Japanese courts have jurisdiction over an action (except when an action is filed based on an agreement that only permits an action to be filed with the Japanese courts), the

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[131] Keyes, "Optional Choice of Court Agreements in Private International Law: General Report," 21.
[132] *See e.g. Atlantic Marine Construction Co. v. U.S. District Court*, 134 S.Ct. 568 (2013) ("When parties agree to a forum selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation. A court accordingly must deem the private-interest factors to weigh entirely in favor of the preselected forum."); *United American Healthcare Corp. v. Backs*, 997 F. Supp. 2d 741, 750 (E.D. Mich. 2014) ("Not only did the parties agree that Michigan would be a convenient venue, but Defendants also expressly waived their right to challenge the convenience of Michigan as a venue for this litigation."). *See also*, Fentiman, *International Commercial Litigation*, para. 2.12.
[133] *Highland Crusador Offshore Partners v. Deutsche Bank* [2009] EWCA Civ 725, para. 50.
[134] Takahashi, "Japan: Quests for Equilibrium and Certainty," 266.
[135] Keyes, "Optional Choice of Court Agreements in Private International Law: General Report," 20. *See also*, Takahashi, "Japan: Quests for Equilibrium and Certainty," 266.

> court may dismiss the whole or part of an action without prejudice if it finds that there are special circumstances because of which, if the Japanese courts were to conduct a trial and reach a judicial decision in the action, it would be inequitable to either party or prevent a fair and speedy trial, in consideration of the nature of the case, the degree of burden that the defendant would have to bear in responding to the action, the location of evidence, and other circumstances.

On the other hand, the Hague Convention on Choice of Court Agreements excludes a non-exclusive choice of court agreement from its scope due to the inconsistencies in its negative effects among different jurisdictions, which could raise complicated issues with regard to *lis pendens* and *forum non conveniens* that were difficult to find a harmonized solution in an acceptable way.[136] Nonetheless, Article 22 of the Convention permits Contracting States to make reciprocal declarations to extend the scope for recognition and enforcement of the Convention to a non-exclusive choice of court agreement.[137]

The use of a non-exclusive choice of court agreement is not uncommon, especially in international financial transactions where the parties need to enhance flexibility and provide more options for litigation in the designated court, in addition to any other competent court having jurisdiction. For example, a non-exclusive choice of court agreement may nominate the forum wherever the assets of the debtor or the defendant are likely to be located at the time of litigation. An exclusive choice of court agreement, which consolidates all proceedings in a single forum, may obstruct the claimant from freezing the defendant's assets located outside the preselected forum.[138] The Explanatory Report to the Hague Convention on Choice of Court Agreements illustrates some examples of a non-exclusive choice of court agreement such as "The courts of State X shall have non-exclusive jurisdiction to hear proceedings under this contract," and "Proceedings under this contract may be brought before the

[136] Art 1 (1) of the Hague Convention on Choice of Court Agreements. *See* Hartley and Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements. Explanatory Report*, 801 para. 47–48.
[137] *See* Hartley and Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements. Explanatory Report*, 843 para. 240.
[138] Fentiman, *International Commercial Litigation,* 44 para. 2.11.

courts of State X, but this shall not preclude proceedings before the courts of any other State having jurisdiction under its law."[139]

(c) Asymmetric choice of court agreements

Sometimes choice of court agreements may be asymmetrical or unilateral in which one party is provided with more freedom than the other party with regard to the choice of forum. Asymmetric choice of court agreements can provide that one party must bring the proceedings before the courts designated in the agreement, while permitting the other to sue in any other court of competent jurisdiction. As a result, only one party submits to the agreed jurisdiction while the other party has wider choices for litigation.[140] This asymmetric choice of court agreement can be seen as exclusive with respect to proceedings brought by one party, but not in regard to proceedings brought by the other.[141] It is commonly used in financial transactions where a lender and a borrower agree to submit to the exclusive jurisdiction of the chosen court, generally in the state of the lender's headquarters or offices, while the lender often reserves its right to sue the borrower in any other court. For example:

> 34.1. Jurisdiction of Hong Kong courts
> (a) Subject to paragraph (c) below, the courts of Hong Kong have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute regarding the existence, validity or termination of this Agreement) (a "Dispute").
> (b) The Parties agree that the courts of Hong Kong are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.
> (c) This Clause 34.1 is for the benefit of the Lender only. As a result, the Lender shall not be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Lender may take concurrent proceedings in any number of jurisdictions.[142]

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[139] Hartley and Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements. Explanatory Report*, 813 para. 109.
[140] Fentiman, *International Commercial Litigation,* 46 para. 2.17.
[141] Hartley and Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements. Explanatory Report*, 811 para. 105.
[142] *Industrial and Commercial Bank of China (Asia) Limited v. Wisdom Top International Limited* [2020] HKCFI 322.

Also, the Explanatory Report to the Hague Convention on Choice of Court Agreements illustrates an example of an asymmetric choice of court agreement as follows:

> Proceedings by the borrower against the lender may be brought exclusively in the courts of State X; proceedings by the lender against the borrower may be brought in the courts of State X or in the courts of any other State having jurisdiction under its law.[143]

The asymmetric choice of court agreements substantially enhance flexibility, especially for a lender, to seek enforcement in the jurisdictions wherever a borrower has its assets at the time of the litigation or in the case where a borrower changes its domicile after the conclusion of a loan contract. In this way, the lender can increase the predictability of the forum with regard to any proceedings which may be brought against it, while preserving flexibility for the initiation of lawsuits against the borrower in any jurisdiction. The flexibility in financial transactions is significant because the borrower may move its assets across jurisdictions to resist enforcement. This asymmetric agreement can minimize enforcement risks associated with the cross-border nature of financial transactions and reduce the transaction costs between the lender and the borrower.[144] Therefore, it could encourage a lender to provide more finance with a lower interest rate, resulting from the increased flexibility and reduced risks of unexpected foreign litigation.[145] From these advantages, the Loan Market Association also recommends the use of asymmetric choice of court agreements in its several standard form agreements.[146]

However, there are conflicting views concerning the validity of the asymmetric choice of court agreements among jurisdictions due to the issues of fairness and possible abuse. On the one hand, the

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[143] Hartley and Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements. Explanatory Report*, 811 para. 105.
[144] *See* Fentiman, *International Commercial Litigation*, 47 para. 2.18.
[145] Mills, *Party Autonomy in Private International Law*, 158.
[146] "Documents & Guidelines," Loan Market Association, accessed July 2, 2021, https://www.lma.eu.com/documents-guidelines/documents. *See also* Oprea, "Romania: Interpretation and Effects of Optional Jurisdiction Agreements in International Disputes," 314.

English courts have given effect to asymmetric choice of court agreements under common law[147] and the Brussels I Regulation (Recast)[148]. English case law overwhelmingly supports the enforcement of an asymmetric choice of court agreement, though some imbalances exist between the parties, unless it is considered to be contrary to the public policy.[149] The United States courts also take a similar approach. It is generally viewed in the United States that the fact that a choice of court agreement is one-sided and binding only one party does not affect its enforceability.[150]

On the other hand, in some countries, asymmetric choice of court agreements entirely giving one party the option to choose a choice of court are not enforceable. For example, the French Cour de Cassation held in *Soc Banque privée Edmond de Rothschild Europe v. Mme X*[151] that an asymmetric choice of court agreement was invalid and contrary to the object and purpose of Article 23 of the Brussels I Regulation 2001 due to the potestative character of the agreement which allowed one party to assert unilateral control over the other party. Similarly, the Russian Supreme Court suggested in *Sony Ericsson Mobile Communications Rus LLC v. Russian Telephone Company CJSC*[152] that an asymmetric choice of court agreement would violate the parties' equality of access to justice.[153] In addition, it is generally assumed that asymmetric choice of court agreements do not fall within the scope of the Hague Convention on Choice of Court Agreements. The Explanatory Report to the Hague Convention on Choice of Court Agreements states that "such agreements count as non-exclusive agreements for the

[147] *See e.g. Law Debenture Trust Corportation plc v. Elektrim Finance BV* [2005] EWHC 1412 (Ch)*; Mauritius Commercial Bank Ltd v. Hestia Holdings Ltd* [2013] EWHC 1328 (Comm).
[148] *See e.g*. Commerzbank Aktiengesellshcaft v. Liquimar Tankers Management [2017] EWHC 161 (Comm); Continental Bank v. Aeakos [1994] 1 Lloyd's Rep 505.
[149] Louise Merrett and Janeen Carruthers, "United Kingdom: Giving Effect to Optional Choice of Court Agreements- Interpretation, Operation and Enforcement," in *Optional Choice of Court Agreements in Private International Law*, ed. Mary Keyes (New York: Springer International Publishing, 2020), 483.
[150] *See e.g. Superior Nut & Candy Co., Inc., v. TDG Brands, Inc.*, 2017 WL 319149, at 2 (N.D. Ill. 2017); *General Electric Capital Corp. v. John Carlo, Inc.*, 2010 WL 3937313, at 2 (E.D. Mich. 2010).
[151] Cour de Cassation, 1st Civil Chamber, 26 September 2012, No 11-26.022.
[152] *Sony Ericsson Mobile Communications Rus LLC v. Russian Telephone Company* CJSC, Decision of the Presidium of the Supreme Arbitrazh Court of the Russian Federation of 19 June 2012, Case No. VAS-1831/12.
[153] Mills, *Party Autonomy in Private International Law*, 160, 163.

purpose of the Convention because they exclude the possibility of initiating proceedings in other courts for only one of the parties."[154] At present, there is still no uniform approach as regards the validity and enforcement of asymmetric choice of court agreements.

(d) Hybrid agreements

A choice of court agreement may adopt a hybrid form incorporating both litigation in national courts and arbitration or other means of alternative dispute resolution such as mediation, negotiation and neutral or expert determination. Such hybrid agreement may designate litigation as a primary method for settlement and arbitration as an alternative or vice versa. For example, the facility agreement between a bank and a borrower may provide that "the courts of England shall have jurisdiction to settle any disputes or proceedings which may arise in connection with any Finance Document," but further states that:

> notwithstanding [the forum selection clause], it is agreed that any disputes arising out of or in connection with the Finance Documents, including any question regarding its existence, validity or termination may at the option of the relevant Finance Party or Finance Parties be referred to and finally resolved by arbitration.[155]

On the contrary, a hybrid agreement may provide that "[a]ny dispute arising out of or in connection with these presents … may be submitted by any party to arbitration for final settlement," but provides further that:

> Notwithstanding [the arbitration clause], for the exclusive benefit of the Trustee and each of the Bondholders, … hereby agree that the Trustee and each of the Bondholders shall have the exclusive right, at their option, to apply to the courts of England, who shall have non-exclusive jurisdiction to settle any disputes which may arise out of or in connection with these presents …. and that accordingly any suit, action or proceedings … arising out of or in connection with any of the above may be brought in such courts.[156]

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[154] Hartley and Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements. Explanatory Report*, 845 para. 249.
[155] *Deutsche Bank AG v. Tongkah Harbour Public Co Ltd* [2011] EWHC 2251 (QB).
[156] *Law Debenture Trust Corporation Plc v. Elektrim Finance BV* [2005] EWHC 1412.

A hybrid agreement is often found in loan agreements and tends to be unilateral, which usually gives the bank the option to select a method for dispute resolution between litigation and arbitration or other forms of alternative dispute resolution. Furthermore, some hybrid agreements adopt a multi-tiered form (also known as an "escalation clause") in which parties agree to engage in a series of steps comprising of various types of alternative dispute resolution mechanisms, such as structured negotiations, mediation, or expert determination, to resolve their dispute until finally resorting to the formal dispute resolution, either litigation or arbitration.[157] The parties are typically required to engage in each stage of the process before moving on to the next step until the final resort where they can resolve the dispute. An example of such an escalation clause is as follows:

> The Parties shall attempt in good faith to resolve any dispute or claim arising out of or relating to this Agreement or any Local Services Agreement promptly through negotiations between the respective senior executives of the Parties who have the authority to settle the same pursuant to Clause 40.
>
> If the matter is not resolved through negotiation, the Parties shall attempt in good faith to resolve the dispute or claim through an Alternative Dispute Resolution (ADR) procedure as recommended to the Parties by the Centre for Dispute Resolution. However, an ADR procedure which is being followed shall not prevent any Party or Local Party from issuing proceedings.[158]

If a hybrid agreement is drafted carefully, it will provide more flexibility and a cost-effective route for the parties to tailor the dispute resolution mechanism to best suit their needs and particular circumstances. It also offers an opportunity to resolve a dispute in a less adversarial manner and protect more privacy than formal dispute resolution, which allows the parties to preserve an ongoing commercial relationship. Furthermore, a hybrid agreement can pave the way for an effective enforcement mechanism with access to the New York Convention regime.[159] However, if drafted unclearly, it can lead to uncertainty as to whether the parties satisfy the preconditions to move on to the

[157] *See* Fentiman, *International Commercial Litigation,* 45 para. 2.14.
[158] *Cable & Wireless v. IBM UK* [2002] 2 ALL ER (Comm 1041).
[159] Fentiman, *International Commercial Litigation,* 46 para. 2.16.

next step and may delay the overall dispute resolution.[160] A hybrid agreement itself may give rise to a dispute.

3.4 Conclusion

It is undeniable that national laws remain a significant source of party autonomy. In reality, the will of the parties is not truly self-governing. It still requires national legal systems to give effect. Therefore, national law ultimately determines the scope, conditions, and limits of party autonomy. On the other hand, international law alone cannot yet constitute a source for party autonomy because there is no sufficient consensus at the international level to establish universal rules giving authority to the parties to exercise their freedom in choice of law and forum. However, the widespread recognition of party autonomy and the freedom of individuals in international law and state practices suggests that individuals hold a prominent role in contemporary private international law. Furthermore, conflicts problems generally arise in the private sphere and exist between private parties. Therefore, individuals have become the main actors in dispute resolution mechanisms. It is legitimate for them to be able to choose the applicable law and forum that best accommodates their needs to resolve their dispute. Although a state can ultimately control party autonomy through its conflict-of-laws rules, mandatory rules, or public policy, its law should evolve to reflect the trend in actual practices and international law of recognizing the role of individuals and their autonomy.

There are several justifications for states to uphold party autonomy in choice of court. A choice of court agreement can be a practical device to enhance legal certainty in cross-border transactions and realize party expectations in dispute resolution mechanisms. Party autonomy can also be justified on the basis of fundamental human rights as an inherent autonomy to arrange personal and economic affairs.

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[160] *See e.g. Sulamerica CIA Nacional De Seguros SA v. Enesa Engenharia SA* [2012] EWHC 42 (Comm*)*.

Furthermore, party autonomy in choice of court not only brings substantial benefits to individuals but also advantageous effects on the public as a whole. It facilitates international trade and commerce by reducing litigation risks associated with the cross-border nature of international transactions. It also encourages states to compete for more efficient and favorable legal systems. In addition, economic theories further confirm that party autonomy leads to the maximization of both private wealth and public welfare.

However, this does not mean that party autonomy in choice of court should be granted without any limits. Depending on the justification, it may offer different views on the effects and boundaries for a choice of court agreement. For example, from an economic viewpoint, a choice of court agreement that does not increase economic efficiency and public welfare should be limited. On this view, the third-party effects, externalities, information asymmetry, and inequality in bargaining power should be considered in order to delimit the scope and effects of a choice of court agreement. Chapter V will address the issues of limits on party autonomy in choice of court in detail.

Finally, choice of court agreements can take numerous different forms ranging from exclusive, non-exclusive, asymmetric to hybrid agreements. The distinction between the exclusive and non-exclusive choice of court agreements is important because they pose different effects on the chosen and non-chosen courts. Also, asymmetric choice of court agreements are controversial in many jurisdictions. While such agreements are widely used in several jurisdictions, especially in the field of international financial transactions, some view that they violate the parties' equality of access to justice because they allow one party to assert unilateral control over the other party. The validity and exclusivity of choice of court agreements will be thoroughly examined in Chapter IV.

Chapter IV: Validity of Choice of Court Agreements

To be effective and enforceable, choice of court agreements are required to be both formally and substantively valid. As was analyzed in Chapter III, choice of court agreements have two aspects: private-law contracts and procedural consequences. First of all, they have to comply with general requirements as contracts under private law in order to have jurisdictional effects. Then, the law of procedure will determine whether such agreements confer or deprive jurisdiction of the designated courts and all other courts concerned. Where the law lays down formality requirements, choice of court agreements must satisfy these agreements in order to be formally valid. Furthermore, there must be valid consent between the parties. If the consent is lacking, for instance, due to duress, fraud or mistake, the agreements will not be substantively valid, and therefore, unenforceable. However, since choice of court agreements have complex nature possessing both procedural and substantive dimensions, there are various views on the law that governs the formation, validity, and interpretation of choice of court agreements.

This chapter aims to examine the formal and substantive validity of choice of court agreements including asymmetric choice of court agreements, which are controversial in several jurisdictions. Section 4.1 will first explore the rationales behind the formality requirements and compare regulations concerning the formal validity in various jurisdictions such as Japan, the European Union, and the Hague Convention on Choice of Court Agreements. Then Section 4.2 will examine the substantive validity of choice of court agreements, beginning with the principle of severability and various approaches for ascertaining the law applicable to choice of court agreements to determine their substantive validity. It will also discuss the requirement for the "connection with a particular legal relationship" and the presumption concerning the exclusivity of choice of court agreements, which have been introduced in several international instruments for enhancing legal certainty and predictability. Subsequently, Section 4.3 will examine the validity of asymmetric choice of court agreements in various jurisdictions and

propose a theoretical framework for assessing the validity of such agreements. Finally, Section 4.4 will offer a brief conclusion with some remarks.

4.1 Formal Validity of Choice of Court Agreements

Many legal systems and international instruments lay down special rules regarding the formal validity of choice of court agreements in the form of overriding mandatory rules. In principle, choice of court agreements under these legal systems are required to be in writing, or comparable means, irrespective of the law applicable to choice of court agreements. By contrast, common law jurisdictions do not generally impose special requirements on the formation of choice of court agreements. For instance, the English courts usually give effect to choice of court agreements through the *forum conveniens* or *forum non conveniens* doctrine, which does not require specific forms of choice of court agreements.[1] Also, in the United States, federal law and most state laws do not stipulate formality requirements for choice of court agreements. In these jurisdictions, the formal validity of choice of court agreements is generally treated as a general question of contract law. Courts may also give effect to the jurisdiction asserted by the parties on the basis of purely oral choice of choice agreements.[2]

The primary justification of the formality requirements for choice of court agreements is to ensure that parties, especially weak and non-commercial ones, pay greater attention to the existence of such an agreement and contractual obligations so that they do not conclude it lightly. Requiring the formality of a choice of court agreement also assures parties that a choice of court agreement will not be imputed to them where they have not made or documented it. These requirements can mitigate the concern that courts may find an implied choice of court agreement where parties did not actually intend

[1] *See* Hamed El Chiaty & Co. (t/a Travco Nile Cruise Lines) v. Thomas Cook Group Ltd. (The "Nile Rhapsody") [1994] 1 Lloyd's Rep. 382.
[2] Alex Mills, *Party Autonomy in Private International Law* (Cambridge, United Kingdom; New York, NY, USA: Cambridge University Press, 2018): 218–20.

to make one. Therefore, they can ensure the legitimacy of the parties' choices and prevent certain abuse of party autonomy.[3]

Furthermore, the formality requirements help increase legal certainty and reduce disputes regarding the existence and terms of a choice of court agreement. Imposing evidentiary requirements such as a choice of court agreement documented in writing or recorded in a particular form may significantly resolve disputes over the existence and other questions such as the scope, exclusiveness, and contractual obligations of a choice of court agreement through the examination of documentary evidence, which is more precise and clearer than other types of evidence. Also, such requirements can preclude some oral testimonies of witnesses and other potential jurisdictional disputes, which tend to be more lengthy and costly.[4]

Because of the above benefits of the formality requirements, many jurisdictions and international conventions impose certain formality requirements on choice of court agreements. This section comparatively examines the formality requirements under Japanese law, the Hague Convention on Choice of Court Agreements, and the Brussels I Regulation (Recast).

4.1.1 Japan

Article 3-7 of the Japanese Code of Civil Procedure permits the parties to agree upon the courts they wish to confer jurisdiction provided that the choice of court agreement must satisfy the formality requirements which are either (a) in writing[5] or (b) in the form of "electronic or magnetic records."[6] The

[3] Ibid, 210–11.
[4] Ibid, 211.
[5] Japanese Code of Civil Procedure Art. 3-7(2):
> "The agreement as referred to in the preceding paragraph is not valid unless it is made regarding actions that are based on a specific legal relationship, and executed by means of a paper document."

[6] Japanese Code of Civil Procedure Art. 3-7(3):
> "If Electronic or Magnetic Records (meaning records used in computer data processing which are created in electronic form, magnetic form, or any other form that is otherwise impossible to perceive through the human senses alone; the same applies hereinafter) in which the content of the agreement is recorded are used to execute the agreement as referred to in paragraph (1), the agreement is

latter requirement includes any records used in computer data processing that are created in electronic form, magnetic form, or any other form which can durably retain information such as memory IC, magnetic disk, and tape. Electronic and magnetic records can perform comparable functions as a "paper document" in that they can help the parties be aware of the consequences of the choice of court agreement and ensure that there would be tangible evidence confirming the intent of the parties and the terms of the agreement. Therefore, Article 3-7(3) provides that a choice of court agreement recorded in an electronic or magnetic form is "deemed to have been executed by means of a paper document."[7]

4.1.2 The Hague Convention on Choice of Court Agreements

Article 3 *c)* of the Hague Convention on Choice of Court Agreements stipulates the formality requirements for a choice of court agreement that it must be concluded or documented either (a) "in writing" or (b) "by any other means of communication which renders information accessible so as to be usable for subsequent reference."[8] Under the first requirement, parties do not need to sign the agreement, although the lack of the signature may cause difficulties in proving the existence of the agreement.[9] The wording of the latter requirement was taken from Article 6(1) of the UNCITRAL Model Law on Electronic Commerce 1996, which intended to set the basic standard for electronic means in order to be considered as meeting the "in writing" requirement where the law requires information to be in writing.[10] It covers all electronic means of data transmission where the data is retrievable such as fax and

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deemed to have been executed by means of a paper document and the provisions of the preceding paragraph apply."

[7] *See* Tatsubumi Satō （佐藤達文） and Yasuhiko Kobayashi （小林康彦）, eds., *2011 Reform of the Code of Civil Procedure etc.: Legislation on International Jurisdiction [一問一答　平成 23 年　民事訴訟法等改正　国際裁判管轄法制の整備]*, 1st ed., Ichimon Ittō Series (Tokyo: Shōji Hōmu, 2012): 134–35.

[8] Hague Convention on Choice of Court Agreements Art. 3 *c)*

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

[9] *See* Trevor Hartley and Masato Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements. Explanatory Report.* (Mortsel: Intersentia Uitgevers NV, 2013): 813, para. 112.

[10] UNCITRAL Secretariat, *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996: With Additional Article 5 Bis as Adopted in 1998* (New York: United Nations Publication, 1999): 35 para. 47.

e-mail.[11] A choice of court agreement that does not meet either of these requirements will not be covered by this Convention. However, Contracting States may still enforce a choice of court agreement that is excluded from the scope of the Convention based on their national laws.[12]

4.1.3 The Brussels I Regulation (Recast)

Article 25 of the Brussels I Regulation (Recast) lays down the formality requirements that a choice of court agreement must be "in writing or evidenced in writing."[13] These requirements have been imposed to ensure that "the consensus between the parties is in fact established."[14] Article 25 further provides that "[a]ny communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'."[15] This provision was also derived from Article 6(1) of the UNCITRAL Model Law on Electronic Commerce 1996.[16] It has been interpreted to broadly cover choice of court agreements concluded by electronic means including an online "click-wrapping" contract by which a party agrees to the general terms and conditions of the contract on a website by clicking on a hyperlink that opens a separate window showing the text of those contractual terms and a choice of court agreement.[17]

Moreover, Article 25(1)(b) and (c) add further flexibility to the formality requirements in some specific contexts as follows:

> (b) in a form which accords with practices which the parties have established between themselves; or
>
> (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

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[11] *See* Hartley and Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements. Explanatory Report*, 813, para. 112.
[12] Ibid, 793, para. 13.
[13] *See* Article 25(1)(a) of the Brussels I Regulation (Recast).
[14] C-214/89 *Powell Duffryn plc v. Wolfgang Petereit* [1992] ECR I-1745, para. 24.
[15] *See* Art 25(2) of the Brussels I Regulation (Recast).
[16] Trevor C. Hartley, *Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*, Oxford Private International Law Series (Oxford: Oxford University Press, 2013), 163.
[17] C-322/14 *Jaouad El Majdoub v. CarsOnTheWeb.Deutschland GmbH* EU:C:2015:334.

Article 25(1)(b) allows any form of choice of court agreement that accords with the practices established between the parties. Such practices have been understood as the routine continuing trading relationship of the parties.[18] On the other hand, Article 25(1)(c) approves a more flexible approach of a choice of court agreement which is to be confirmed by the usage in international trade or commerce and the actual or presumed awareness of the parties, provided that the contract was made in international trade or commerce. It aims to facilitate the speed of cross-border commercial transactions and does not require any specific forms of a choice of court agreement. This provision leaves national courts of the Contracting States to determine the existence of the usage concerning the form of choice of court agreement in the particular international trade or commerce concerned and examine whether the parties are or ought to have been aware of the usage.[19] Thus, there is a possibility that one of the parties may be bound by a choice of court agreement if that party is presumed to be aware of the usage even though he is not actually aware of it.[20] The rationale behind this is that the parties as professionals in the international trade have knowledge of the usage observed in that area and implicitly abide by it.[21]

4.1.4 Interim Conclusion

Since a choice of court agreement has jurisdictional effects to confer jurisdiction on the court or deprive that of the court that would otherwise have had been competent, it significantly affects the parties' interests and the judicial power of national courts.[22] From a legal policy viewpoint, it is

[18] Paul Beaumont and Burcu Yüksel, "The Validity of Choice of Court Agreements Under the Brussels I Regulation and the Hague Choice of Court Agreements Convention," in *Convergence and Divergence in Private International Law: Liber Amicorum Kurt Siehr*, ed. Katharina Boele-Woelki et al. (The Hague: Eleven International Publishing, 2010), 569.
[19] *See generally*, Hartley, Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention, 154–62.
[20] Beaumont and Yüksel, "The Validity of Choice of Court Agreements Under the Brussels I Regulation and the Hague Choice of Court Agreements Convention," 570–71.
[21] Opinion of Advocate General Léger in Case C-159/97 *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA* [1999] ECR I-01597, para. 64.
[22] *See* Chapter III Section 3.3.2 (i).

important to introduce a strict requirement as to form to ensure legal certainty and assure that there is true agreement between the parties.[23] The Report by Mr P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (hereafter referred to as the "Jenard Report") also noted that "in order to ensure legal certainty, the formal requirements applicable to agreements conferring jurisdiction should be expressly prescribed."[24] Therefore, for the sake of legal certainty and authenticity of the parties' intention, formality requirements in the form of overriding mandatory rules should be clearly established. As a result, only choice of court agreements which pass the formal validity requirements should be given effect.

4.2 Substantive Validity of Choice of Court Agreements

Choice of court agreements need to be both formally and substantively valid in order to be given effect. Once they are decided that they comply with the formality requirements, the next question is whether they are substantively valid. If the consent for the choice of court agreements is lacking, for example, due to duress, fraud or mistake, the agreements may be null and void under general contract law. This section discusses what law should be applicable to determine the substantive validity of choice of court agreements through the examination of the principle of severability and various views on the law applicable to choice of court agreements. It also examines the requirement for the connection with a particular legal relationship and the presumption concerning the exclusivity of choice of court agreements, which have been introduced in several international instruments for enhancing legal certainty and predictability.

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[23] *See* "Complementary Explanation to the Interim Draft on the Legislation on International Jurisdiction [国際裁判管轄法制に関する中間試案の補足説明]" (Tokyo: Civil Affairs Bureau, Ministry of Justice of Japan, July 2009), 27 https://www1.doshisha.ac.jp/~tradelaw/UnpublishedWorks/ExplanatoryNoteOnBillOfJurisdictionAct.pdf.

[24] "Report by Mr P. Jenard on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Jenard Report)" (European Economic Community, 1979), 37.

4.2.1 Principle of Severability

It is extensively recognized that the validity of choice of court agreements should be assessed independently from that of the underlying contracts.[25] For the purpose of determining the validity, choice of court agreements are considered as distinct agreements from the contracts of which they form part. The invalidity of the contracts does not necessarily render choice of court agreements invalid. Similarly, the invalidation of choice of court agreements will not affect the underlying main contracts.[26] This notion is generally called the principle of severability, which is also applied in the context of arbitration.[27] For instance, Article 25(5) of the Brussels I Regulation (Recast) provides:

> An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.
>
> The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.

Similarly, Article 3 *d)* of the Hague Convention on Choice of Court Agreements states:

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

Japanese law also adopts a similar position although the Japanese Code of Civil Procedure does not contain an express provision for the principle of severability. It is generally accepted that defects in the underlying contract, such as duress or fraud, do not necessarily invalidate a choice of court agreement

[25] *See e.g. Deutsche v. Asia Pacific Broadband* [2008] EWCA Civ 1091; *Preferred Capital, Inc. v. Associates in Urology*, 453 F.3d 718, 722 (2006).
[26] *See* Hartley, Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention, 135–36.
[27] *See e.g.* Art. 16(1) of the UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006; Art. 13(6) of the Japanese Arbitration Act; Section 7 of the English Arbitration Act.

contained in it.[28] As a result, it is possible for the courts to invalidate the underlying main contract without nullifying the choice of court agreement although it is a part of the underlying contract. On the other hand, this principle does not necessarily ensure that the validity of the two agreements is always different. It is also possible that the grounds for the invalidity of the contract such as nullity, rescission, or any other reasons may equally apply to the choice of court agreement.[29]

The rationale behind the principle of severability is that the choice of court agreement consists of promises that are separable and independent from the underlying main contract.[30] If one party could argue that the invalidity of the main contract would automatically invalidate a choice of court agreement, it would lead to the end of the mode of settlement selected by the parties and jeopardize party autonomy in choice of court. The party could easily avoid the pre-selected court and opt for litigation in the court that would otherwise have had been competent by invoking defects in the main contract. Therefore, this principle acts as a shield against this argument and ensures that the choice of court agreement survives for purpose of determining which court can adjudicate challenges to the validity of the underlying contract.[31] Consequently, the principle of severability should be clearly established as a part of overriding mandatory rules which apply irrespective of the law applicable to a choice of court agreement. The principle of severability also affects the views on how to ascertain which law should

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[28] Koji Takahashi (高橋宏司), "Choice of Court Agreement [管轄合意]," in *Selected Hundred Cases in Private International Law [国際私法判例百選]*, ed. Masato Dogauchi (道垣内正人) and Yasushi Nakashini (中西康), 3rd ed. (Tokyo: Yuhikaku, 2021), 164–65; Satō（佐藤）and Kobayashi（小林）, *Ichimon ittō heisei 23-nen minji soshō-hō tō kaisei*, 135.

[29] Hartley and Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements. Explanatory Report*, 813 para. 115.

[30] *See* Gary Born, *International Commercial Arbitration: Commentary and Materials*, 2nd ed. (New York: Transnational Publishers, 2001), 56.

[31] *See generally*, Koji Takahashi (高橋宏司), "The Principle of Severability in Arbitration and Jurisdiction Agreements: Reconsidering the Process of Detemining the Applicable Law [仲裁合意・管轄合意の独立性原則ー準拠法決定プロセスにおける再検討]," *Journal of Civil and Commercial Law [民商法雑誌]* 147, no. 3 (2012): 256–84.

apply to determine the substantive validity of choice of court agreements. This issue will be discussed further below.

4.2.2 The Views on the Law Applicable to Choice of Court Agreements

Due to the hybrid nature of choice of court agreements and the principle of severability, there is scholarly debate on what law should govern the validity of choice of court agreements. Various views on the applicable law can be summarized as follows:

(i) The *lex fori* approach

Some scholars view that a choice of court agreement is procedural in nature and it predominantly concerns jurisdictional effects on national courts such as the prorogation and derogation of jurisdiction. According to the *lex fori regit processum* doctrine, which is almost universally recognized in most jurisdictions, the domestic law of the forum (‘*lex fori’*) should exclusively govern procedural matters. As a consequence, the formation and substantive validity of a choice of court agreement should be determined by *lex fori*.[32] For instance, in the United States, a choice of court agreement is generally considered to have procedural character, and thus most US courts apply the law of the forum to assess its validity.[33] This view was also adopted by the previous majority opinion in Japan which advocated that *lex fori* or the Japanese international civil procedure law should govern the substantive validity of a choice of court agreement.[34] Under this view, Japanese law, especially the Civil Code, will be referred to determine the substantive validity of a choice of court agreement in the event

[32] *See* Pietro Franzina, “The Substantive Validity of Forum Selection Agreements under the Brussels Ibis Regulation,” in *Research Handbook on the Brussels Ibis Regulation*, Research Handbooks in European Law Series, ed. Peter Mankowski (Cheltenham: Edward Elgar Publishing, 2020), 99–100.
[33] *See e.g.* Symeon C. Symeonides, “Choice of Law in the American Courts in 2016: Thirtieth Annual Survey,” *American Journal of Comparative Law* 65, no. 1 (2017): 56; *Martinez v. Bloomberg LP*, 740 F.3d 211 (2nd Cir. 2014).
[34] *See e.g.* Sueo Ikehara（池原季雄）and Makoto Hiratsuka（平塚真）, “Jurisdiction in International Litigation [涉外訴訟における裁判管轄],” in *Practice of Civil Procedure Law 6 [実務民事訴訟講座 6]*, ed. Chuichi Suzuki (鈴木忠一) and Akira Mikazuki（三々月章）, 1st ed. (Tokyo: Nihon Hyôronsha, 1971), 23; Tokyo District Court, Judgment, June 19, 2003 (2006WLJPCA06190004).

that there are any defects in the consent such as fraud or misrepresentation.[35] The idea of this approach is also consistent with the principle of severability, which differentiates a choice of court agreement from the underlying contract and argues for the independent treatment of such an agreement.

However, the choice of court agreement not only possesses a procedural dimension but also has a private substantive law aspect. Essentially, it is a contractual agreement between private parties, which confers legal obligations on them. It also needs to meet the normal requirements set for a private-law contract.[36] Therefore, it is impractical to conclude that all issues concerning a choice of court agreement are procedural matters and should be governed by *lex fori*, pursuant to the *lex fori regit processum* doctrine.[37] Furthermore, this approach may jeopardize the predictability and legal uniformity in the interpretation and the substantive validity of a choice of court agreement due to the forum-dependent evaluation. The substantive validity of a choice of court agreement can be varied and conflicting, depending on the forum where the litigants choose to bring proceedings. It also leaves room for abusive litigation tactics in which the litigants can do forum shopping and select the law of the forum where they can assert the validity or defeat the choice of court agreement.[38]

(ii) The *lex for prorogati* or the law of the chosen court approach

In order to ensure the uniformity and predictability of the substantive validity of a choice of court agreement, some scholars propose the *lex for prorogati* approach, submitting the validity of the agreement to the law of the chosen court. According to this approach, the substantive validity of a choice

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[35] *See* Shunichiro Nakano (中野俊一郎), "Jurisdiction, Arbitration, and Choice of Law Agreements: The Possility and Limits on the Parallel Processing in Private International Law and International Litigation Law [管轄合意・仲裁合意・準拠法合意ー国際私法・国際民事訴訟法における合意の並行的処理の可能性と限界]," in *Party Autonomy in Cross-Border Disputes [国際取引紛争における当事者自治の進展]*, ed. Akira Saito（斎藤彰） (Kyoto: Horitsu Bunkasha, 2005), 67.

[36] Hartley, *Choice-of-Court Agreements under the European and International Instruments*, 4.

[37] Koji Takahashi, "Cases and Issues in Japanese Private International Law: Law Applicable to Choice-of-Court Agreements," *Japanese Yearbook of International Law* 58 (2015): 391–92.

[38] Franzina, "The Substantive Validity of Forum Selection Agreements under the Brussels Ibis Regulation," 100.

of court agreement will be determined by a single legal order, irrespective of the court seised. Even if the proceedings are brought in multiple courts, the same rules will be applied to determine the issue regarding the substantive validity of a choice of court agreement. This approach has been adopted in several international instruments and model rules. For example, Article 6 *a)* of the Hague Convention on Choice of Court Agreements provides:

> 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.

Similarly, Article 25(1) of the Brussels I Regulation (Recast) stipulates that the courts of a Member State, as agreed by the parties, shall have jurisdiction unless the choice of court agreement is "null and void as to its substantive validity under the law of that Member State." This approach is also adopted in the European Max Planck Group on Conflict of Laws in Intellectual Property (hereafter referred to as "CILP") Principles[39] and the American Law Institute (hereafter referred to as "ALI") Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes[40].

The Hague Convention on Choice of Court Agreements, the Brussels I Regulation (Recast), and the ALI Principles appear to choose the law of the chosen forum, including the choice-of-law rules of that forum[41], to govern the substantive validity of a choice of court agreement. Therefore, *renvoi* is permitted under this approach and there is a possibility that the chosen court may apply the law of

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[39] CLIP Principles Art. 2:301 (2):
> "Subject to paragraphs 3 to 5, the validity of a choice of court agreement shall be determined according to the national law of the State of the designated court or courts."

[40] ALI Principles §202 (3)(a):
> "Except as provided in subsection (4), a choice-of-court agreement is valid as to form and substance if it is valid under the entire law of the designated forum State, including its conflicts rules."

[41] *See* Hartley and Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements. Explanatory Report*, 815 para 125; Recital 20 of the Brussels I Regulation (Recast) ("Where a question arises as to whether a choice-of-court agreement in favour of a court or the courts of a Member State is null and void as to its substantive validity, that question should be decided in accordance with the law of the Member State of the court or courts designated in the agreement, including the conflict-of- laws rules of that Member State."); ALI Principles §202 (3)(a).

another country to this issue according to its conflict-of-law rules. The reason for the inclusion of the choice-of-law rules is to respect and protect the parties' freedom in choosing the law applicable to their agreements. In the case where the conflict-of-law rules of the chosen court recognize the principle of party autonomy in choice of law, the parties can exercise the freedom to select the law other than that of the chosen court to govern the substantive validity of their choice of court agreement. However, without a clear agreement on choice of law, the forum court has to determine the law applicable to the choice of court agreement based on the conflict-of-law rules of the chosen court, which may involve difficult processes of ascertaining the applicable law, including *renvoi*.[42] On the other hand, the CILP Principles explicitly exclude the application of the choice-of-law rules of the chosen court in order to avoid unpredictable results and any difficulties caused by *renvoi*[43] and to increase legal certainty in the negotiation of a choice of court agreement.[44]

Although the *lex for prorogati* approach can enhance legal certainty in the validity and promote the uniform interpretation of a choice of court agreement, it suffers from serious shortcomings with regard to the difficulty in referring to the law of the chosen court in an asymmetric choice of court agreement and when the agreement designates different courts for each party. Due to the fact that multiple courts are chosen or one party is given a choice of possible courts, it is not possible to determine which law should govern the substantive validity of the said agreement under this approach. It is not helpful to refer to the laws of all chosen courts as well.[45] Furthermore, this approach may jeopardize party autonomy in designing the mode of settlement and choice of law in which the parties

[42] Beaumont and Yüksel, "The Validity of Choice of Court Agreements Under the Brussels I Regulation and the Hague Choice of Court Agreements Convention," 575–76.
[43] *See generally*, Frederick Allemes, "The Problem of Renvoi in Private International Law," *Transactions of the Grotius Society* 12 (1926): 63–80.
[44] *See* Note 2:301.N02 to the Article 2:301 (2) of the CLIP Principles.
[45] Mary Keyes, "Optional Choice of Court Agreements in Private International Law: General Report," in *Optional Choice of Court Agreements in Private International Law*, ed. Mary Keyes (New York: Springer International Publishing, 2020), 39.

wish to govern their choice of court agreement, especially in the case where the law of the chosen forum does not recognize party autonomy in choice of law or the forum's conflict-of-laws rules are excluded.

(iii) The *lex causae* approach

Some commentators admit the hybrid nature of a choice of court agreement[46] and view that the substantive validity of such an agreement should be assessed by the law which governs the subject matter of the dispute or the law applicable to the agreement to which the dispute refers. The so-called *lex causae* is determined according to the conflict-of-laws rules of the court seised.[47] Under this approach, the applicable law to a choice of court agreement ought to be determined according to the choice-of-law analysis and the nature of the issue in question, rather than regarding all issues concerning a choice of court agreement as procedural matters. A better view is to distinguish between procedural and non-procedural issues, and submit the former to the *forum regit processum* doctrine while conducting the choice-of-law analysis to decide applicable laws for the latter.[48] The issues concerning the substantive validity of a choice of court agreement such as the lack of consent, fraud, duress, and mistake are not specific to the said agreement but can be pertinent to any other kind of private-law contract. There is no reason why these issues should be treated differently from those of other kinds of contracts.[49] Therefore, the issues concerning the substantive validity of a choice of court agreement should not be regarded as procedural matters and thus fall outside the scope of the *forum regit processum* doctrine. As a consequence, the validity issue ought to be assessed by the law applicable to the choice of court agreement, as established by the conflict-of-laws rules of the forum. In fact, the recent trend in many

[46] *See* Hartley, Choice-of-Court Agreements under the European and International Instruments, 4.
[47] *See* Franzina, "The Substantive Validity of Forum Selection Agreements under the Brussels Ibis Regulation," 100.
[48] Takahashi, "Cases and Issues in Japanese Private International Law: Law Applicable to Choice-of-Court Agreements," 392.
[49] *See* Erwin Spiro, "Forum Regit Processum," *International and Comparative Law Quarterly* 18, no. 4 (1969): 951–52.

national courts shows the movement towards the view of considering a choice of court agreement as a substantive issue.[50]

In practice, the law applicable to the choice of court agreement tends to be the same as that of the remainder of the contract or the contract as a whole, although they need not always be the same, depending on the conflict-of-laws rules of the forum.[51] Under this approach, the determination of the law applicable to the substantive validity of a choice of court agreement should be analyzed in the same way as the law applicable to contractual obligations. The same conflict-of-laws rules are expected to apply to determine the law applicable to the choice of court agreement and that of the underlying contract, which is likely to lead to the same applicable law.[52] The parties can also explicitly or implicitly choose the law that they wish to govern their contract and directly specify the governing law for their choice of court agreement.[53] By the same token, a choice of court agreement is subject to public policy and other mandatory provisions such as those aiming to protect weak parties.[54]

In general, it is common in international contracts to insert a choice of law clause specifying the governing law for the contract while it is rare to find one particularly identifying the law applicable to a choice of court agreement. In the case where the parties provide an express choice of law clause in the underlying contract without directly specifying the governing law for the choice of court agreement, it

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[50] *See generally*, Jason Webb Yackee, "Choice of Law Considerations in the Validity & Enforcement of International Forum Selection Agreements: Whose Law Applies," *UCLA Journal of International Law and Foreign Affairs* 9, no. 1 (Spring/Summer 2004): 43–96; *See also*, Mills, *Party Autonomy in Private International Law*, 103.

[51] *See e.g. Phillips v. Audio Active Ltd*, 494 F.3d 378, 386 (2nd Cir. 2007) ("[The Court] cannot understand why the interpretation of a forum selection clause should be singled out for application of any law other than that chosen to govern the interpretation of the contract as a whole.").

[52] Mills, *Party Autonomy in Private International Law*, 105.

[53] *See e.g.* The Hague Principles on Choice of Law in International Commercial Contracts 2015 Art. 2(2):

> "The parties may choose -
> a) the law applicable to the whole contract or to only part of it; and
> b) different laws for different parts of the contract."

[54] Takahashi (高橋), "The Principle of Severability in Arbitration and Jurisdiction Agreements: Reconsidering the Process of Detemining the Applicable Law [仲裁合意・管轄合意の独立性原則ー準拠法決定プロセスにおける再検討]," 278.

appears reasonable to assume that the choice of law clause will also apply to a choice of court agreement.[55] This is because a choice of court agreement is also a part of the contract which the parties have agreed that it should be governed by the designated legal system.[56] As the United Kingdom Supreme Court stated in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* in the context of an arbitration agreement, "for [commercial parties] a contract is a contract; not a contract with an ancillary or collateral or interior arbitration agreement."[57] Therefore, it is natural for them to expect that their choice of law clause would apply to the whole contract including a choice of court agreement. This view not only provides legal certainty regarding the governing law but also achieves consistency in the interpretation of the whole contract because it helps ensure that closely related issues in that contract will be governed by the same system of law chosen by the parties.[58]

Some commentators argue that the *lex causae* approach runs against the principle of severability which treats a choice of agreement as a separate instrument from the underlying contract of which it forms part.[59] However, this principle only means that the defects of the underlying contract do not automatically invalidate a choice of court agreement whose validity should be assessed independently. The notion that the fates of the underlying contract and the agreement should be independent does not necessarily follow that the applicable laws to both instruments must be different.[60] As discussed in *Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA*, which can be similarly applied to the context of choice of court agreement:

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[55] Lord Collins of Mapesbury and Jonathan Harris, eds., Dicey, Morris & Collins on the Conflict of Laws, 15th ed. (London: Sweet & Maxwell, 2018), para. 12–109.
56 *See* Enka Insaat ve Sanayi AS (Respondent) v. OOO Insurance Company Chubb (Appellant) [2020] UKSC 38, para. 43.
57 *See* Ibid, para. 53(iv).
58 *See* Ibid, para. 53(i)(ii).
59 Franzina, "The Substantive Validity of Forum Selection Agreements under the Brussels Ibis Regulation," 101.
[60] Takahashi (高橋), "The Principle of Severability in Arbitration and Jurisdiction Agreements: Reconsidering the Process of Detemining the Applicable Law [仲裁合意・管轄合意の独立性原則ー準拠法決定プロセスにおける再検討]," 276.

> The concept of separability itself, however, simply reflects the parties' presumed intention that their agreed procedure for resolving disputes should remain effective in circumstances that would render the substantive contract ineffective. Its purpose is to give legal effect to that intention, not to insulate the arbitration agreement from the substantive contract for all purposes.[61]

Therefore, the principle of severability in itself is not in contradiction with the *lex causae* approach. On the contrary, this approach gives greater effect to the parties' intentions and further implement parties' autonomy in choice of law and court.[62] It gives the parties wider discretion in designing their mode of settlement. Furthermore, it mitigates the risks of conflicting decisions regarding the validity of a choice of court agreement, which may occur under the *lex fori* approach.[63]

Compared to the *lex for prorogati* approach, the *lex causae* approach has some drawbacks concerning the uniformity and predictability in the substantive validity of a choice of court agreement because the law applicable to the validity is determined by the conflict-of-law rules of the forum seised, which may lead to differing results. However, even under the Hague Convention on Choice of Court Agreements and the Brussels I regimes which adopt the *lex for prorogati* approach, it is still difficult to prevent all conflicting decisions due to the complexity of *renvoi* and the non-uniform conflict-of-laws rules.[64] Furthermore, it remains unclear under the *lex for prorogati* approach whether which law should govern the interpretation of a choice of court agreement. Thus, some commentators argue that the law applicable to a choice of court agreement which is to be decided by conflict-of-laws rules should be referred to determine the issue of interpretation.[65]

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[61] *Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA* [2012] EWCA Civ 638; [2013] 1 WLR 102, para. 26.
[62] Takahashi, "Cases and Issues in Japanese Private International Law: Law Applicable to Choice-of-Court Agreements," 393.
[63] Mills, *Party Autonomy in Private International Law*, 104.
[64] *See* Note 2:301.N02 to the Article 2:301 (2) of the CLIP Principles.
[65] *See* Takahashi, "Cases and Issues in Japanese Private International Law: Law Applicable to Choice-of-Court Agreements," 393. *See also*, Mills, *Party Autonomy in Private International Law*, 110–11.

4.2.3 Requirement for the Connection with a Particular Legal Relationship (Specificity Requirement)

The Japanese Code of Civil Procedure[66], the Brussels I Regulation (Recast)[67], and the Hague Convention on Choice of Court Agreements[68] similarly require that a choice of court agreement be made regarding disputes which have arisen or may arise "in connection with a particular legal relationship." This requirement aims to "ensure the predictability for the parties and prevent any unexpected damages which may be caused by a choice of court agreement."[69] If a choice of court agreement does not sufficiently specify a particular legal relation which it aims to encompass, it is difficult for the parties to predict the scope of disputes which will be covered by such an agreement.[70] Also, the Court of Justice of the European Union (CJEU) clarified the purpose of this requirement in *Powell Duffryn plc v. Wolfgang Petereit* as follows:

> That requirement is intended to limit the scope of an agreement conferring jurisdiction solely to disputes which arise from the legal relationship in connection with which the agreement was entered into. Its purpose is to avoid a party being taken by surprise by the assignment of jurisdiction to a given forum as regards all disputes which may arise out of its relationship with the other party to the contract and stem from a relationship other than that in connection with which the agreement conferring jurisdiction was made.[71]

Since a choice of court agreement could confer jurisdiction on the court or deprive that of the court that would otherwise have had been competent, it significantly affects the parties' rights and duties as well as the judicial power of national courts. From a legal policy viewpoint, it is important to

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[66] *See* Art. 3-7(2) of the Japanese Code of Civil Procedure.
[67] *See* Art. 25 of the Brussels I Regulation (Recast).
[68] *See* Art. 3 *a)* of the Hague Convention on Choice of Court Agreements.
[69] Tokyo District Court, Interlocutory Judgment, February 15, 2016. *See also*, Masato Dogauchi (道垣内正人), "The Validity of International Choice of Court Agreements: With Regard to the Tokyo District Court Interlocutory Judgment on February 15, 2016 [国際裁判管轄合意の有効性ー東京地裁平成 28 年 2 月 15 日中間判決をめぐって]," *NBL* 1077 (July 2016): 27–28.
[70] *See* Tokyo High Court, Judgment, July 22, 2020, Hanreijiho [判例時報] no. 2491 (2021), 10.
[71] Case C-214/89 *Powell Duffryn plc v. Wolfgang Petereit* [1992] ECR I-1745 para. 31.

introduce a certain safeguard to ensure caution and foreseeability for the parties in making a choice of court agreement.[72] Therefore, the specificity requirement has been imposed in many instruments to limit the scope of choice of court agreement to the disputes concerning a particular legal relationship as specified by the parties and avoid unexpected situations where the parties might be taken by surprise to respond to all possible disputes including those they do not intend to cover by their agreement or those stemming beyond their contractual relationship. In addition, the disputes covered by a choice of court agreement can be future disputes or those that have already occurred.[73]

A choice of court agreement may not only cover contractual claims but also encompass certain tort claims, provided that they arise in connection with a particular legal relationship specified in the agreement.[74] The above requirement does not implicate that the claim must be contractual. For example, the Explanatory Report on the Hague Convention on Choice of Court Agreements notes that "a choice of court clause in a partnership agreement could cover tort actions between the partners relating to the partnership."[75] However, it should not be interpreted to extend to all possible non-contractual claims unrelated to the contractual relationship between the parties. Since this requirement aims to ensure foreseeability and avoid any surprise, the scope of the claim should be restricted by its proximity to the contractual relationship.[76] As pointed out in the Opinion of Advocate General Niilo Jääskinen in

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[72] *See* Satō（佐藤）and Kobayashi（小林）, *Ichimon ittō heisei 23-nen minji soshō-hō tō kaisei*, 134; Dogauchi (道垣内), "The Validity of International Choice of Court Agreements: With Regard to the Tokyo District Court Interlocutory Judgment on February 15, 2016 [国際裁判管轄合意の有効性ー東京地裁平成 28 年 2 月 15 日中間判決をめぐって]," 27–28.

[73] *See* Hartley and Dogauchi, Convention of 30 June 2005 on Choice of Court Agreements. Explanatory Report, 811 para. 101.

[74] Hartley, *Choice-of-Court Agreements under the European and International Instruments*, 142. *See also*, Masato Dogauchi (道垣内正人), *Fundamentals of Drafting Boilerplate Clauses in International Contracts [国際契約実務のための予防法学ー準拠法・裁判管轄・仲裁条項]*, 1st ed. (Tokyo: Shōji Hōmu, 2012), 199.

[75] Hartley and Dogauchi, Convention of 30 June 2005 on Choice of Court Agreements. Explanatory Report, 811 para. 101.

[76] Mills, *Party Autonomy in Private International Law*, 187.

Refcomp SpA v. Axa Corporate Solutions Assurance SA, a choice of court agreement "must not be worded in such a general manner as to include all possible disputes between the parties, irrespective of the contracts concluded by them."[77]

Whether a particular legal relationship specified in a choice of court agreement covers a particular claim is a matter of interpretation, depending on the terms of the agreement.[78] In other words, in determining the scope of claims covered by the choice of court agreement, courts will have to interpret the actual intention of the parties, principally through the language used in their choice of court agreement, in accordance with the law applicable to a choice of court agreement.[79] For example, the Tokyo High Court held that the meaning of the term stating "in the case where the dispute arose from this contract" should be considered from the general interpretation of the parties' intention. The court further noted that in this particular case, it should cover the disputes arose from the contract preparation process until the liquidation process after the termination of the contract.[80]

On the other hand, whether a choice of court agreement satisfies the specificity requirement is a different matter. It should be distinguished from the question of whether a choice of court agreement covers a particular dispute, which is subject to the interpretation of the parties' intent. Due to the fact that this requirement limits the scope of jurisdictional effects of a choice of court agreement and purports to ensure legal certainty as to the jurisdiction of national courts, it predominantly concerns procedural aspects of choice of court agreements. In other words, it is established as a procedural condition under

[77] Opinion of Advocate General Niilo Jääskinen in Case C-543/10 *Refcomp SpA v. Axa Corporate Solutions Assurance SA* [2012] EU:C:2012:637, para. 44.
[78] *See* Hartley, *Choice-of-Court Agreements under the European and International Instruments*, 142; Hartley and Dogauchi, Convention of 30 June 2005 on Choice of Court Agreements. Explanatory Report, 811 para. 101.
[79] *See* Mills, *Party Autonomy in Private International Law*, 180.
[80] Tokyo High Court, Decision, March 24, 1994, Hanrei Times [判例タイムズ] no. 867 (1995), 265.

international civil procedure law, which aims to regulate the exercise of the judicial power of states.[81] Considering the public law nature and public interests of the specificity requirement, the satisfaction of this requirement should be determined by *lex fori*, rather than *lex causae*.[82] In this regard, it is argued that since the purpose of this requirement is to ensure legal predictability and certainty of the parties at the time of the conclusion of a choice of court agreement, the existence of the specificity should be objectively determined by the construction and the language of a choice of court agreement without further considering whether one or both of the parties actually knew that the dispute in question would be covered by their choice of court agreement.[83] As a result, the parties should not be allowed to agree on a choice of court agreement that is unclear with respect to the scope of disputes covered by their agreement, such as the agreement which is "worded in such a general manner as to include all possible disputes between the parties, irrespective of the contracts concluded by them."[84] Moreover, it is generally viewed that the specificity requirement is met if a choice of court agreement sufficiently specifies a particular legal relationship which can provide a basis for the action.[85]

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[81] *See* Dai Yokomizo, "Scope of Private International Law [国際私法の範囲]," in *Private International Law Annotated [注釈国際私法]* vol. 1, ed. Yoshiaki Sakurada (櫻田嘉章) and Masato Dogauchi (道垣内正人) (Tokyo: Yuhikaku, 2011), 33.

[82] *See* Chapter IV Section 4.2.2 (iii).

[83] Shiho Kato (加藤紫帆), "The Case Which Invalidated a Choice of Court Agreement on the Basis of the Lack of a Specificity [一定の法律関係を対象としない国際裁判管轄合意を無効とした事例]," *Jurist* 1508 (July 2017): 146.

[84] Opinion of Advocate General Niilo Jääskinen in Case C-543/10 Refcomp SpA v. Axa Corporate Solutions Assurance SA [2012] EU:C:2012:637, para. 44. *See also*, Shiho Kato, "Recent Developments in Rules on Choice of Court Agreements in Japan: New Codification and Remaining Problems," in *Preventive Instruments of Social Governance*, ed. Alexander Bruns and Masabumi Suzuki (Tübingen: Mohr Siebeck, 2017), 191; Shiho Kato (加藤紫帆), "The Validity of a Choice of Court Agreement Designating a California State Court [カリフォルニア州裁判所を指定する専属的管轄合意の有効性]," *Jurist* 1557 (April 2021): 249.

[85] *See* Mikio Akiyama (秋山幹男) et al., ed., *Commentary on Civil Procedure I [コンメンタール民事訴訟法 I]*, 2nd ed. (Tokyo: Nihon Hyoronsha, 2014), 178, 639; Hajime Kaneko (兼子一) and Kaoru Matsuura (松浦馨) et al., eds., *Interpretation of Civil Procedure [条解民事訴訟法]*, 2nd ed. (Tokyo: Kobundo, 2011), 113.

4.2.4 Presumption Concerning Exclusivity of Choice of Court Agreements

Although the effects of exclusive and non-exclusive choice of court agreements are significantly different, as discussed in Chapter III, distinguishing one from the other is not always easy. For example, in Japan, there are no guiding statutory rules for the distinction between these two types of choice of court agreements. Japanese lawmakers deliberately decided to leave this issue to the interpretation of the actual intention of the parties due to the concern over the international business practice which was seen to prefer non-exclusive choice of court agreements.[86] However, the ascertainment of the actual intention of the parties may be difficult and often result in lengthy and uneconomical disputes in the early stage of the litigation. The Japanese courts appear to treat this issue as a factual question and rely on the language which the parties have chosen to use in their choice of court agreement to determine the exclusivity of the agreement on a case-by-case basis without conducting choice-of-law analysis.[87]

To illustrate, when the wording and language in a choice of court agreement clearly indicate the exclusivity of a choice of court agreement, Japanese courts will consider such an agreement as an exclusive choice of court agreement.[88] On the other hand, when the exclusivity is unclear from the wording, the Japanese courts tend to ascertain the intention of the parties through contractual

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[86] "Complementary Explanation to the Interim Draft on the Legislation on International Jurisdiction [国際裁判管轄法制に関する中間試案の補足説明]" (Tokyo: Civil Affairs Bureau, Ministry of Justice of Japan, July 2009), 30.

[87] Koji Takahashi, "Japan: Quests for Equilibrium and Certainty," in *Optional Choice of Court Agreements in Private International Law*, ed. Mary Keyes (New York: Springer International Publishing, 2020), 268. *See also*, Yasushi Nakanishi (中西康), "The Validity and Exclusivity of a Choice of Court Agreement Designating a Russian Court [ロシア連邦の裁判所への国際裁判管轄の合意の有効性及び専属性]," *Remarks on Private Law Cases [私法判例リマークス]* 54 (2017): 146–47.

[88] *See e.g.*, *Chisadane* case, Supreme Court, Judgment, November 28, 1975, 29 Minshu (10) 1554 [1975] ("All actions under this contract of carriage shall be brought before the court in Amsterdam and no other court shall have jurisdiction with regard to any other action unless the carrier brings such an action before a court of other jurisdiction or voluntarily accepts the jurisdiction of such court."); Tokyo District Court, Judgment, April 11, 2008, Hanrei Times [判例タイムズ] no. 1276, (2008), 332.

interpretation.[89] For instance, in a case where the parties agreed to submit any dispute between them to the Arbitration Court of Primorsk Region of Russian Federation, the Tokyo District Court found that the parties intended to exclude the jurisdiction of any other courts because they deliberately specified the Russian court which would have jurisdiction over their dispute under Russian jurisdictional rules even without the choice of court agreement. Therefore, it was reasonable to interpret that the parties expected their choice of court agreement to be exclusive.[90] However, in a case where a choice of court agreement similarly stating "Any dispute concerning or arising out of this Agreement shall be amicably settled between the parties hereto. Failing this, any dispute between the parties shall be submitted to the Commercial Court in Paris, France," the Tokyo District Court reached an opposite conclusion. It found that the parties did not intend to exclude the jurisdiction of other competent courts, including Japanese courts. The court viewed that interpreting this agreement as conferring a non-exclusive jurisdiction on the Commercial Court in Paris, which would have jurisdiction over the claim even without a choice of court agreement, would not be inconsistent with the reasonable interpretation of the parties' intention.[91] The lack of clear principles regarding exclusivity appear to lead to uncertainty and conflicting decisions, as to whether a particular choice of court agreement is exclusive, even in the case where the languages used in choice of court agreement are similar.[92]

Also, the English common law treats the issue of exclusivity of a choice of court agreement as a matter of contractual interpretation, pursuant to ordinary interpretative principles.[93] For instance, in *Sinochem International Oil (London) Co. Ltd. v. Mobil Sales and Supply Corporation*, the English court held that "[t]he test which has been developed for distinguishing an exclusive from a non-exclusive

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[89] Nakanishi (中西), "The Validity and Exclusivity of a Choice of Court Agreement Designating a Russian Court [ロシア連邦の裁判所への国際裁判管轄の合意の有効性及び専属性]," 147.

[90] Tokyo District Court, Judgment, March 27, 2015, Hanrei Times [判例タイムズ] no. 1421, (2016), 238.

[91] Tokyo District Court, Judgment, March 26, 2014, 2014WLJPCA03269011.

[92] *See* Takahashi, "Japan: Quests for Equilibrium and Certainty," 268–69.

[93] Mills, *Party Autonomy in Private International Law*, 98.

jurisdiction clause is whether on its proper construction the clause obliges the parties to resort to the relevant jurisdiction, irrespective of whether the word 'exclusive' is used."[94] Nonetheless, the House of Lords' decision in *Fiona Trust v. Privalov* seems to establish an interpretative presumption in favor of exclusivity for a choice of court agreement in the commercial context. The House of Lords held as follows:

> [T]he construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.[95]

Although *Fiona Trust* originally dealt with the scope of arbitration agreements, its rationale and the presumption in favor of exclusivity based on the presumed intention of "rational businessmen" have been applied in the context of commercial choice of court agreements as well.[96] Therefore, it appears that, at least in the case where the English law is the governing law of a choice of court agreement in the commercial context, the English courts tend to apply the special interpretative presumption and find such an agreement to be exclusive.[97]

Treating the issue of exclusivity as a factual question may cause uncertainty since it is likely to depend on case-by-case basis. However, constructing it as a legal question does not necessarily lead to greater legal certainty and predictability because it would require complex choice-of-law analysis to ascertain the law applicable to the question of the exclusivity of a choice of court agreement. The *lex causae* approach seems to be the most appropriate way to ascertain the governing law, as discussed in Section 4.2.2. But even so, the ascertained governing law may not provide a clear answer on how to

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[94] *Sinochem International Oil (London) Co. Ltd. v. Mobil Sales and Supply Corporation* (No. 2) [2000] 1 Lloyd's Rep 670, [32].
[95] *Fiona Trust v. Privalov* [2007] UKHL 40, [13].
[96] *See e.g., Maple Leaf Macro Volatility Master Fund v. Rouvroy* [2009] EWHC 257 (Comm), [199]; *Starlight Shipping Company v. Allianz Marine and Aviation Versicherungs* AG [2014] EWCA Civ 1010.
[97] Mills, *Party Autonomy in Private International Law*, 99.

distinguish an exclusive from a non-exclusive choice of court agreement.[98] Therefore, several international instruments provide presumptions regarding exclusivity in order to promote legal certainty in the interpretation of a choice of court agreement. For instance, Article 25 of the Brussels I Regulation (Recast) provides that a choice of court agreement "shall be exclusive unless the parties have agreed otherwise." Also, Article 3 *b)* of the Hague Convention on Choice of Court Agreements stipulates that "a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise." As a result, if the parties do not agree on whether their choice of court agreement will be exclusive or non-exclusive, their agreement will be deemed exclusive.[99]

On the other hand, the presumption of exclusivity risks undermining the fundamental principle of party autonomy since it may suggest national courts not to carefully examine the actual intention of the parties. The overreliance on the presumed intention based on a legal presumption may jeopardize the authenticity of the parties' intention.[100] Some parties may prefer flexibility enhanced by a non-exclusive agreement over a rigid exclusive choice of court agreement. Therefore, in order to improve the authenticity of intentions, it is important to secure a reasonable opportunity for the parties to prove their actual intention whether their agreement is intended to be exclusive or non-exclusive. Indeed, under the Brussels I and the Hague Convention regimes, the presumptions of exclusivity are rebuttable. The parties are still able to present their evidence to establish that their agreement is in fact intended to be non-exclusive.

Consequently, for the sake of legal certainty and the authenticity of the parties' intention, a clear interpretative principle should be established to distinguish an exclusive from a non-exclusive choice of court agreement. This principle can be in the form of the rebuttable presumption in favor of exclusivity

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[98] Takahashi, "Japan: Quests for Equilibrium and Certainty," in *Optional Choice of Court Agreements in Private International Law*, 271–72.
[99] Hartley, *Choice-of-Court Agreements under the European and International Instruments*, 140, 143.
[100] Mills, *Party Autonomy in Private International Law*, 97.

and should be considered as a part of overriding mandatory rules which applies irrespective of the law applicable to a choice of court agreement.[101] Furthermore, the adoption of the presumption in favor of exclusivity in the Hague Convention on Choice of Court Agreements suggests a growing acceptance of this approach in the international level. The presumption of exclusivity will not only promote legal certainty and uniformity in the interpretation of a choice of court agreement but also mitigate the risks of a prolonged and costly dispute in the jurisdictional stage of the litigation.

4.3 The Validity of Asymmetric Choice of Court Agreements

As discussed in Chapter III, although the asymmetric choice of court agreements have been widely used in practice, especially in cross-border financial transactions, the validity of the agreements has been called into question in several jurisdictions due to the unilateral nature and the concern over fairness. There is still no uniform approach regarding the validity of the asymmetric choice of court agreements at the international level. Therefore, this section examines the validity of the asymmetric choice of court agreements in various jurisdictions and aims to propose a theoretical framework for assessing the validity of such agreements.

4.3.1 The Construction and Effects of Asymmetric Choice of Court Agreements

An asymmetric choice of court agreement is an agreement whereby one party alone agrees to submit to the designated court's jurisdiction, whereas the other party is provided with a wider choice of forum. It contains different jurisdictional provisions for each party. As a result, the obligations on the parties differ since one party is generally obligated to bring proceedings in one jurisdiction, while the counterparty may sue elsewhere. An asymmetric choice of court agreement is also referred to as a "one-sided" or "unilateral" agreement.[102] It is often used in international loan contracts and financial

[101] *See* Takahashi, "Japan: Quests for Equilibrium and Certainty," in *Optional Choice of Court Agreements in Private International Law*, 272.
[102] Louise Merrett, "The Future Enforcement of Asymmetric Jurisdiction Agreements," *The International & Comparative Law Quarterly* 67 (January 2018): 40.

transactions. For example, in a typical loan agreement situation, a borrower agrees to submit to the exclusive jurisdiction of the chosen court, while a lender reserves the right to bring proceedings against the borrower in the chosen court and in any other court of competent jurisdiction.[103]

The asymmetric choice of court agreement combines both exclusive and non-exclusive aspects. It is intended to be exclusive in regard to the actions brought by one party but non-exclusive in regard to the actions initiated by the other party. With respect to the exclusive aspect, it comprises both positive and negative effects. The positive effect of the agreement is that it can establish the jurisdiction of the chosen court chosen even though that court may not have had jurisdiction from the beginning. Also, the negative effect may deprive the jurisdiction of the court that would otherwise have had been competent. On the other hand, with regard to the non-exclusive aspect, it contains only positive effects in the same way as a non-exclusive choice of court agreement.[104] Furthermore, due to the non-exclusive aspect of the asymmetric choice of court agreement, it is considered to fall outside the scope of an exclusive choice of court agreement for the purposes of the Hague Convention on Choice of Court Agreements. An exclusive choice of court agreement under the Convention requires exclusivity in all proceedings based on a choice of court agreement irrespective of the party who initiates the proceedings.[105]

4.3.2 Case Law Regarding the Validity of Asymmetric Choice of Court Agreements

The question which appears to be more important with regard to the asymmetric choice of court agreement is its validity. Although it is frequently used in international transactions, the positions on its validity are still inconsistent among jurisdictions. In particular, English case law overwhelmingly supports the enforcement of the asymmetric choice of court agreement under both English common

[103] *See* Mukarrum Ahmed, *The Nature and Enforcement of Choice of Court Agreements: A Comparative Study*, Studies in Private International Law (Oxford, UK ; Portland, Oregon: Hart Publishing, 2017), 62.
[104] *See* Takahashi, "Japan: Quests for Equilibrium and Certainty, 269–70."
[105] Hartley and Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements. Explanatory Report*, 811 para 106.

law[106] and the Brussels I Regulation (Recast).[107] Although some imbalances exist between the parties in the asymmetric choice of court agreement, the principle of party autonomy tends to be respected unless the agreement is considered to be contrary to public policy.[108] The English courts view that merely giving additional advantages to one party does not bar enforcement of contractual promises provided in the asymmetric choice of court agreement. For example, in *Law Debenture Trust Corporation PLC v Elektrim Finance BV*, the judge noted that "[asymmetric clauses] give an additional advantage to one party, but so do many contractual provisions… ."[109] Also, in *Mauritius Commercial Bank Ltd v. Hestia Holdings Ltd*[110], the court cited Fentiman's opinion to support the enforcement of an asymmetric choice of court agreement, which stated that "indeed, despite their asymmetric, optional character it is difficult to conceive how in English law their validity could be impugned, or what policy might justify doing so … ."[111] Furthermore, the United States courts adopt a similar approach. It is generally viewed in the United States that the fact that a choice of court agreement is one-sided and binding only one party does not affect its enforceability.[112]

On the other hand, a series of decisions of the French courts have spurred the controversy surrounding the validity of an asymmetric choice of court agreement. To begin with, the French Supreme Court (the Cour de cassation) assessed the validity of the asymmetric choice of court agreement under the Brussels I Regulation in *Mme X v. Banque Privée Edmond de Rothschild (Société)*

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[106] *See e.g. Mauritius Commercial Bank Ltd v. Hestia Holdings Ltd* [2013] EWHC 1328 (Comm); *NB Three Shipping Ltd v. Harebell Shipping Ltd* [2004] EWHC 2001 (Comm); *Law Debenture Trust Corporation PLC v. Elektrim Finance BV* [2005] EWHC 1412 (Ch); *Lornamead Acquisitions Limited v. Kaupthing Bank HF* [2011] EWHC 2611 (Comm).
[107] *See Commerzbank Aktiengesellshcaft v. Liquimar Tankers Management* [2017] EWHC 161 (Comm).
[108] Louise Merrett and Janeen Carruthers, "United Kingdom: Giving Effect to Optional Choice of Court Agreements- Interpretation, Operation and Enforcement," in *Optional Choice of Court Agreements in Private International Law*, ed. Mary Keyes (New York: Springer International Publishing, 2020), 483.
[109] *Law Debenture Trust Corporation PLC v. Elektrim Finance BV* [2005] EWHC 1412 (Ch).
[110] *Mauritius Commercial Bank Ltd v. Hestia Holdings Ltd* [2013] EWHC 1328 (Comm).
[111] Richard Fentiman, "Universal Jurisdiction Agreements in Europe," *The Cambridge Law Journal* 72, no. 1 (March 2013): 24.
[112] *See e.g. Superior Nut & Candy Co., Inc., v. TDG Brands, Inc.*, 2017 WL 319149, at 2 (N.D. Ill. 2017); *General Electric Capital Corp. v. John Carlo, Inc.*, 2010 WL 3937313, at 2 (E.D. Mich. 2010).

(hereinafter referred to as "*Rothschild*").[113] The asymmetric choice of court agreement in *Rothschild* provided:

> The relations between the bank and the client are governed by Luxembourg law. The potential disputes between the client and the bank shall fall within the exclusive jurisdiction of the Luxembourg courts. However, the bank reserves the right to sue before the courts of the domicile of the client or before any other court having jurisdiction in the absence of selection of any of the courts previously referred to.[114]

The agreement compelled Mme X, a French national, to sue Banque de Rothschild, a Luxembourg bank, in the Luxembourg courts where she had a bank account whereas permitting the bank to bring proceedings either in Luxembourg courts, the courts of the domicile of the client, or any other court having jurisdiction. The Cour de cassation found that this agreement was potestative (*caractère potestatif*) because it bound only Mme X to sue before the Luxembourg courts but allowed the bank to reserve its right to sue before any court of competent jurisdiction. As a result, it was contrary to the objectives and purposes of Article 23 of the Brussels I Regulation and, therefore unenforceable. It appears that the Cour de cassation referred to the *potestatif* doctrine[115] under French contract law to deny the validity of an asymmetric choice of court agreement.[116]

In *Danne Holding v Crédit Suisse*[117], the Cour de cassation examined the validity of an asymmetric choice of court agreement which similarly compelled a borrower to submit to the exclusive jurisdiction of the Zurich courts but permitted a Swiss bank to sue before any other court of competent jurisdiction. Unlike *Rothschild*, however, the Cour de cassation did not mention the *potestatif* doctrine

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[113] *Mme X v. Banque Privée Edmond de Rothschild (Société)* Casss civ, 1 ere, 26.9.2012 No 11-26.022, [2013] ILPr 12.
[114] *See* Merrett, "The Future Enforcement of Asymmetric Jurisdiction Agreements," 48.
[115] *See* French Civil Code Art. 1170:
"A potestative condition is one which makes the execution of the agreement depend upon an event that one or the other of the contracting parties has the power to bring about or to prevent."
French Civil Code Art. 1174:
"Any obligation is null when it has been contracted subject to a potestative condition on the part of the party who binds himself."
[116] *See* Ahmed, *The Nature and Enforcement of Choice of Court Agreements*, 63.
[117] *Danne Holding v Crédit Suisse* Cass civ 1 ere, 25.3.2015, No. 13-27.264 [2015] ILPr 39.

to invalidate the agreement. Instead, it quashed the decision of the Court of Appeal and ruled that the agreement permitting the bank to sue before any competent court could be contrary to the goal of legal certainty and predictability set in Article 23 of the Brussels I Regulation if it did not specify objective elements for the alternative jurisdictions which the bank could rely on.[118] The Cour de cassation appears to shift from the *potestatif* doctrine under *Rothschild* to a new standard based on legal certainty and predictability in order to evaluate the validity of an asymmetric choice of court agreement.[119]

Also, the Cour de cassation reaffirmed the predictability requirement in *eBizcuss.com v. Apple*[120] where the asymmetric choice of court agreement provided:

> [T]his Agreement and the corresponding relationship between the parties shall be governed by and construed in accordance with the law of the Republic of Ireland and the parties shall submit to the jurisdiction of the courts of the Republic of Ireland. Apple reserves the right to institute proceedings against Reseller in the courts having jurisdiction in the place where the Reseller has its seat [Ireland] or in any jurisdiction where a harm to Apple is occurring.

The Cour de cassation upheld the validity of the agreement based on the fact that it sufficiently provided objective elements for determining jurisdiction, which satisfied the goal of legal predictability under Article 23 of the Brussels I Regulation. Although the choice of court agreement in this case was asymmetrical, it allowed the Reseller to more precisely identify the courts where Apple could bring proceedings by specifying "any jurisdiction where a harm to Apple was occurring."[121] This particular clause was more predictable because it provided a narrower range of ascertainable jurisdictions as compared to "any other court of competent jurisdiction" which was often used in other asymmetric choices of court agreements.[122] The Cour de cassation viewed that "the place of harm" offered objective elements for the determination of jurisdiction. Therefore, if the asymmetric choice of court agreement

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[118] *See* François Mailhé, "France: A Game of Asymmetries, Optional and Asymmetrical Choice of Court Agreements Under French Law," in *Optional Choice of Court Agreements in Private International Law,* ed. Mary Keyes (New York: Springer International Publishing, 2020), 206–07.
[119] *See* Merrett, "The Future Enforcement of Asymmetric Jurisdiction Agreements," 49.
[120] *eBizcuss.com v. Apple* Cass 1ere Civ, 7.10.2015, No. 14-16.898.
[121] *See* Merrett, "The Future Enforcement of Asymmetric Jurisdiction Agreements," 50.
[122] Ahmed, *The Nature and Enforcement of Choice of Court Agreements,* 65.

does not provide any objective element precise enough for the identification of the courts where the parties could bring proceeding, it is likely that French courts will set aside such an agreement due to the lack of predictability. However, the objective element may be as vague as "the place of harm."[123]

With respect to Japan, the asymmetric choice of court agreements is generally considered to be valid and enforceable under case law.[124] For example, in *Chisadane* case[125], where the Japanese Supreme Court firstly laid down general requirements for international choice of court agreements[126], the choice of court agreement in question was in fact an asymmetric one, providing that:

> All actions under this contract of carriage shall be brought before the court in Amsterdam and no other court shall have jurisdiction with regard to any other action unless the carrier brings such an action before a court of other jurisdiction and or voluntarily accepts the jurisdiction of such court.[127]

The Japanese Supreme Court did not question the asymmetric character of the choice of court agreement in dispute. The Court only examined the exclusive aspect of the agreement and held that it was not extremely unreasonable and contrary to public policy.[128]

Also, the Tokyo District Court enforced the asymmetric choice of court agreement in the bill of lading which stated that:

> All claims and disputes under this bill of lading shall be decided, at the carrier's option, by the laws and courts of the country where the principal office of the carrier is located, or the point of shipment or delivery is located, or those of the port of shipment or discharge.

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[123] Mailhé, "France: A Game of Asymmetries, Optional and Asymmetrical Choice of Court Agreements Under French Law," 208.
[124] Shiho Kato (加藤紫帆), "The Validity of International Asymmetric Choice of Court Agreements [一方当事者に選択権を付与する国際的管轄合意の有効性]," in *The Globalization of Policy-Making Process [政策実現課程のグロバール化]*, ed. Yuki Asano (浅野有紀) et al., 1st ed. (Tokyo: Koubundou, 2019), 185.
[125] Supreme Court, Judgment, November 28, 1975, 29 Minshu (10) 1554 [1975].
[126] *See* Dai Yokomizo, "The New Act on International Jurisdiction in Japan: Significance and Remaining Problems," *Zeitschrift Fuer Japanisches Recht [Journal of Japanese Law]* 34 (2012): 107.
[127] Takahashi, "Japan: Quests for Equilibrium and Certainty," 268.
[128] Ibid.

The Tokyo District Court reasoned that the courts provided in the agreement were sufficiently connected to the legal disputes under the bill of lading and thus were appropriate to resolve the disputes. The court further noted that the said agreement, which conferred the right to choose the jurisdiction to the carrier alone, did not excessively harm the legal certainty and the interests of the owner of the goods because the holder of the bill of lading could inquire the carrier about which court it will select for adjudication before the commencement of action.[129]

Furthermore, the Tokyo District Court similarly confirmed the validity of the asymmetric choice of court agreement which stipulated that "all claims…under this bill of lading shall be decided, at the carrier's option, … by the court in Copenhagen and no other courts shall have jurisdiction." However, the court invalidated the right of the carrier to exercise the option to choose a court in Copenhagen. In this case, according to the law applicable to the bill of lading (Hong Kong law), any claims against the carrier must be brought before the court within one year after the delivery took place. If the carrier had been allowed to exercise the right to select a foreign court after the plaintiff had brought proceedings in Japan and more than one year had passed after the delivery of goods, it would have been equivalent to exempting the carrier from liability. Therefore, the court viewed that the exercise of the right in a manner that would render the action before the contractual forum meaningless should not be allowed in the interest of justice.[130]

4.3.3 Framework for the Assessment of the Validity of Asymmetric Choice of Court Agreements

The positions toward the validity of the asymmetric choice of court agreements vary among jurisdictions, even in the case where they are governed by the same instrument as being discussed above.

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[129] Tokyo District Court, Judgment, September 24, 2008. *See also*, Fumiko Masuda (増田史子), "An Asymmetric Choice of Court Agreement in the Bill of Lading [船荷証券上の選択的な専属的国際裁判管轄条項]," *Jurist* 1442 (June 2012): 120–23.

[130] Tokyo District Court, Judgment, October 17, 1967, Hanrei Times [判例タイムズ] no. 216 (1968), 225.

Some jurisdictions are highly supportive of such agreements, while others take a restrictive view regarding their validity. However, despite the unilateral and asymmetrical character, such choice of court agreements are still the products of party autonomy and fall within the scope of contractual freedom of the parties. The principle of party autonomy should not be simply ignored just because the agreements are asymmetrical.[131]

Furthermore, asymmetric choice of court agreements have been used worldwide in international transactions.[132] There are persuasive commercial reasons for the use of such agreements. For example, in international financial markets, the asymmetric choice of court agreements can ensure the creditor that it can only be sued in its pre-selected forum whilst preserving the creditor's flexibility to sue the debtor in jurisdictions wherever the debtor has its assets at the time of the litigation, or in the debtor's home court. Therefore, the agreements help increase the prospect of the creditor recovering a debt, which would ultimately contribute to the readiness to provide finance and reduces the transaction costs of borrowing. As a result, the debtor may also enjoy the benefits in the form of lower interest rates or transaction fees, and a higher chance to receive financing from lenders.[133] Accordingly, it may not be completely correct to conclude that the asymmetric choice of court agreements unilaterally benefit only the creditor.

Due to the advantages of asymmetric choice agreements and the actual practices in international transactions, it is crucial to formulate a theoretical framework for assessing the validity of such agreements in order to respect party autonomy and facilitate the use of choice of court agreements in international transactions. The validity of the asymmetric choice of court agreements can be assessed

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[131] For the principles of freedom of contract and party autonomy in choice of forum, *see* Peter Nygh, *Autonomy in International Contracts*, Oxford Monographs in Private International Law (Oxford : New York: Clarendon Press ; Oxford University Press, 1999), 1–30.
[132] "Report on Issues of Legal Uncertainty Arising in the Context of Asymmetric Jurisdiction Clauses" (Financial Markets Law Committee, July 2016), para 1.2, http://fmlc.org/report-asymmetric-jurisdiction-clauses-29-july-2016/.
[133] Ibid, paras. 4.1–4.2. *See also*, Fentiman, "Universal Jurisdiction Agreements in Europe," 24.

from three perspectives: the law applicable to the validity of the choice of court agreements, legal certainty, and fairness.

(i) Law Applicable to the Validity of Asymmetric Choice of Court Agreements

The starting point to determine the validity of the asymmetric choice of court agreements is to ascertain the law applicable to the agreements. The applicable law will determine whether the asymmetric choice of court agreements are permissible. The formal and substantive validity of the asymmetric choice of court agreements will also be evaluated according to the applicable law. In particular, *lex causae*, as determined by relevant conflict-of-laws rules of the forum, should govern the formation, validity, and interpretation of the asymmetric choice of court agreements as discussed in Section 4.2.2 (iii), in the absence of the specific choice-of-law rules. Furthermore, under *lex causae* approach, the parties can choose the law which they prefer to govern the validity of the asymmetric choice of court agreements.[134] As a result, the asymmetric choice of court agreements may be invalid if the applicable law does not permit the use of such agreements, such as requiring a non-potestative character or imposing strict requirements of mutuality on the choice of court agreements.[135] However, parties can avoid the non-enforcement of the asymmetric choice of court agreements by choosing the system of law, which is supportive of such agreements, to specifically govern their agreements.

(ii) Legal Certainty and Predictability

Legal certainty is one of the basic requirements for the choice of court agreements to be enforceable. For example, Article 25 of the Brussels I Regulation (Recast) requires that the choice of court agreements be certain enough to ascertain the chosen courts.[136] The specificity requirement under Article 3-7(2) of the Japanese Code of Civil Procedure is also understood to ensure legal certainty and

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[134] *See* Kato (加藤), "The Validity of International Asymmetric Choice of Court Agreements [一方当事者に選択権を付与する国際的管轄合意の有効性]," 189.
[135] *See* Ahmed, *The Nature and Enforcement of Choice of Court Agreements*, 69.
[136] Ibid, 60.

predictability in the choice of court agreements.[137] It may be argued that the asymmetric choice of choice agreements, which permit one party to sue before any competent court, undermine legal certainty and predictability. The French courts often found that the asymmetric choice of court agreements that did not provide any objective element precise enough for the identification of the courts where the parties could bring proceedings to be invalid due to the lack of legal certainty and predictability.[138]

In this regard, if a choice of court agreement is sufficiently certain in the sense that the contractual forum can be objectively ascertainable, it should be considered to satisfy the objectives of the legal certainty and specificity requirement.[139] For example, the asymmetric choice of court agreement which provides that one party may bring proceedings in "any other court of competent jurisdiction" should not be seen as creating wanton uncertainty because the other party can objectively anticipate the competent courts where proceedings can be brought based on general rules on international jurisdiction in a manner similar to a non-exclusive choice of court agreement.[140] Therefore, it is unlikely to lead to unexpected situations where the parties might be taken by surprise to respond to the proceedings in totally unforeseen fora. Furthermore, this level of uncertainty as to the venue has already been contemplated in most national legislation with respect to a non-exclusive choice of court agreement.[141] The asymmetric choice of court agreement in this case means only that one party agrees to submit to the exclusive jurisdiction of the designated court, while the other party agrees to the non-

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[137] *See* Kato (加藤), "The Validity of International Asymmetric Choice of Court Agreements [一方当事者に選択権を付与する国際的管轄合意の有効性]," 189; Dogauchi (道垣内), "The Validity of International Choice of Court Agreements: With Regard to the Tokyo District Court Interlocutory Judgment on February 15, 2016 [国際裁判管轄合意の有効性ー東京地裁平成 28 年 2 月 15 日中間判決をめぐって]," 27–28.
[138] *See e.g. Danne Holding v Crédit Suisse* Cass civ 1 ere, 25.3.2015, No. 13-27.264 [2015] ILPr 39.
[139] *See* Richard Fentiman, *International Commercial Litigation*, 2 ed. (Oxford: Oxford University Press, 2005), 84.
[140] Kato (加藤), "The Validity of International Asymmetric Choice of Court Agreements [一方当事者に選択権を付与する国際的管轄合意の有効性]," 190. *See also*, Ahmed, *The Nature and Enforcement of Choice of Court Agreements*, 70.
[141] *See* Fentiman, *International Commercial Litigation*, 83.

exclusive jurisdiction.[142] If the specific forum can be objectively anticipated, there is no reason why the fact that the options for each party are different should make this asymmetric choice of court agreement more uncertain than other non-exclusive ones.[143]

By contrast, the asymmetric choice of court agreement that allows the designated party to commence proceedings in any court of its choice or named by that party should be distinguished from the above-mentioned agreement. For instance, the asymmetric choice of court agreement in the bill of lading that gives the carrier's option to name one court from the list provided in the agreement[144] should be seen as failing the legal certainty and specificity requirement because the other party cannot objectively anticipate the jurisdiction of the court until the carrier exercises its option.[145] In this case, the contractual forum cannot be ascertained based on objective elements or ordinary rules on international jurisdiction. The jurisdiction of the court will be known only after the party who possesses the choice has exercised its option at the time of the litigation. As a result, the other party to the agreement is not in a position to anticipate with reasonable certainty where it may sue and where it may be sued at the time of the conclusion of a choice of court agreement.[146]

(iii) Fairness

Another argument against the validity of the asymmetric choice of court agreements is the concern over fairness stemming from the imbalance between the parties. In *Rothschild*, the Cour de cassation denied the validity of the asymmetric choice of court agreement, which unilaterally bound one party to submit to the exclusive jurisdiction of one particular court while allowing the other party to sue before any court of competent jurisdiction, due to the potestative character and inequality between the

[142] Ibid, 84–85.
[143] *See* Merrett, "The Future Enforcement of Asymmetric Jurisdiction Agreements," 46.
[144] Tokyo District Court, Judgment, September 24, 2008. *See* Chapter IV Section 4.3.2.
[145] Masuda (増田), "An Asymmetric Choice of Court Agreement in the Bill of Lading [船荷証券上の選択的な専属的国際裁判管轄条項]," 122.
[146] *See* Kato (加藤), "The Case Which Invalidated a Choice of Court Agreement on the Basis of the Lack of a Specificity [一定の法律関係を対象としない国際裁判管轄合意を無効とした事例]," 146.

parties.[147] Also, it is argued that an asymmetric choice of court agreement is incompatible with the principle of equal access to justice. However, since party autonomy is the main principle in private international law and international business transactions, the mere imbalance between the parties or the fact that the choice of court agreement confers better rights to one party should not bar the enforcement of such an agreement, especially in the context of agreements between commercial parties where both of them generally stand on the same footing.[148] Furthermore, considering the fact that the asymmetric choice of court agreements are widely used in international transactions and their benefits are generally accepted, the invalidation of such agreements should be considered carefully.[149]

Moreover, in *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd & Sujana Universal Industries* where the asymmetric clause was claimed to infringe the principle of equal access to justice under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950 (hereafter referred to as the "ECHR"),[150] the English court held that:

> The public policy to which was said to be inimical was 'equal access to justice' as reflected in Article 6 of the ECHR. But Article 6 is directed to access to justice within the forum chosen by the parties, not to choice of forum. No forum was identified in which the Defendant's access to justice would be unequal to that of MCB [the bank] merely because the bank had the option of choosing the forum.[151]

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[147] *Mme X v. Banque Privée Edmond de Rothschild (Société)* Casss civ, 1 ere, 26.9.2012 No 11-26.022, [2013] ILPr 12.

[148] *See* Merrett, "The Future Enforcement of Asymmetric Jurisdiction Agreements," 44–45.

[149] *See* Kato (加藤), "The Validity of International Asymmetric Choice of Court Agreements [一方当事者に選択権を付与する国際的管轄合意の有効性]," 191.

[150] ECHR Art. 6 (1):

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

[151] *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd & Sujana Universal Industries* [2013] EWHC 1328 (Comm), [43].

The court implied that the principle of equal access to justice dealt with the civil rights of the parties before a particular court chosen by the parties. It did not concern with whether the parties had an equal choice of court before the litigation.[152]

On the other hand, the asymmetric choice of court agreement may raise an issue about fairness if it renders one party an unreasonably excessive advantage[153] or forces the parties to litigate in the court where they would not get a fair trial.[154] However, this issue is not specific to the asymmetric choice of court agreement. It can be pertinent to ordinary choice of court agreements without asymmetry as well. Therefore, unless a particular asymmetric choice of court agreement is considered to be extremely unreasonable and contrary to public policy[155], a mere imbalance between the parties should not bar its enforcement.[156] Moreover, the special jurisdictional rules for the protection of weak parties such as consumers and employees can considerably lessen concerns over imbalance and fairness.[157] Jurisdictional protection for weak parties and public policy exceptions will be further examined in the next chapter.

In addition, the principle of good faith may be used to deny the enforcement of the asymmetric choice of court agreement in the case where the enforcement of which leads to injustice or unfair outcomes.[158] The concept of good faith in the enforcement of choice of court agreements is recognized under the Brussels I regime by the CJEU in *F. Berghoefer GmbH & Co. KG v ASA SA*.[159] The CJEU

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[152] *See* Ahmed, *The Nature and Enforcement of Choice of Court Agreements* 73.
[153] *See e.g.* Section 4 of the Unfair Contract Terms Act, B.E. 2540 (1997); Article 548-2 of the Japanese Civil Code.
[154] *See* Ahmed, *The Nature and Enforcement of Choice of Court Agreements* 73.
[155] *See e.g. Chisadane* case, Supreme Court, Judgment, November 28, 1975, 29 Minshu (10) 1554 [1975].
[156] Merrett, "The Future Enforcement of Asymmetric Jurisdiction Agreements," 44.
[157] Kato (加藤), "The Validity of International Asymmetric Choice of Court Agreements [一方当事者に選択権を付与する国際的管轄合意の有効性]," 191.
[158] *See* Kazunori Ishiguro (石黒一憲), "The Validity of an Exclusive Choice of Court Agreement in the Bill of Lading Which Designated a Court in Amsterdam as an Exclusive Forum [アムステルダムの裁判所を国際的専属的合意管轄裁判所と定めた船荷証券上の合意管轄約款の有効性]," *Jurist* 616 (1976): 148–52.
[159] Case 221/84, *F. Berghoefer GmbH & Co. KG v ASA SA* [1985] ECLI:EU:C:1985:337.

held that it would be a "breach of good faith" to allow a party who did not raise any objection to contest a choice of court agreement within a reasonable time to disavow it in subsequent proceedings.[160] Also, the Tokyo District Court denied the enforcement of the valid asymmetric choice of court agreement in the bill of lading, where the question arose whether the carrier could exercise his option to choose a court in Copenhagen after the plaintiff had brought proceedings in Japan and more than one year had passed after the delivery of goods.[161] The court concluded that there was no reason to allow the carrier to exercise his right under the asymmetric choice of court agreement in a manner that would render the action before the contractual forum meaningless and lead to the exemption of his liability.[162] While the court did not question the validity of the asymmetric choice of court agreement, it denied the possibility of invoking such an agreement where it led to injustice.[163] This judgment suggests that the enforcement of the asymmetric choice of court agreements may depend on the considerations of good faith.[164]

However, when the asymmetric choice of court agreement is not contrary to public policy and its validity is upheld, the agreement should be respected and enforced, pursuant to the fundamental principle of party autonomy. The reliance on the principle of good faith, which is generally vague and subject to interpretation on a case-by-case basis, may disturb legal certainty and predictability in international transactions. Therefore, it should be used as a last resort to prevent injustice only in exceptional circumstances where the party possessing the option to select jurisdiction exercises its right

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[160] Fentiman, *International Commercial Litigation*, 73.

[161] Tokyo District Court, Judgment, October 17, 1967, Hanrei Times [判例タイムズ] no. 216 (1968), 225. (The asymmetric choice of court agreement in dispute provided that "all claims…under this bill of lading shall be decided, at the carrier's option, … by the court in Copenhagen and no other courts shall have jurisdiction.")

[162] *See* Chapter IV Section 4.3.2.

[163] Dai Yokomizo (横溝(大), "Exclusive Choice of Court Agreements Designating a Foreign Court and Overriding Mandatory Rules [外国裁判所を指定する専属的管轄合意と強行的適用法規]," *Hosojiho [法曹時報]* 70, no. 11 (2018): 2985.

[164] Kato (加藤), "The Validity of International Asymmetric Choice of Court Agreements [一方当事者に選択権を付与する国際的管轄合意の有効性]," 186–87.

in bad faith, which should not be allowed under procedural due process or in a manner that would deprive the other party of access to justice.[165] For example, the principle of good faith may be invoked to deny enforcement when the party exercises its option in an untimely manner after the other party has brought proceedings in the court, pursuant to a choice of court agreement, without raising any objection or it exercises the option with an intention to prevent the other party from accessing to courts.[166]

4.4 Conclusion

The validity of the choice of court agreements raises a range of complicated issues in private international law. The starting point is to determine what law should govern the formal and substantive validity of the choice of court agreements. With respect to the formal validity, if private international law does not provide clear formality rules, the validity issue ought to be assessed by the law applicable to the choice of court agreements, as established by the conflict-of-laws rules of the forum.[167] In this regard, many legal systems specifically lay down rules on the formality of the choice of court agreements. They generally require the said agreements to be in writing or comparable electronic means. The justification for the formality requirements is to increase legal certainty and reduce controversies over the existence and the terms of choice of court agreements. These requirements also urge the parties to pay greater attention to the choice of court agreements before entering into a contractual relationship and ensure that the agreements will not be imputed to them where they have not made or documented the agreements. When private international law rules provide clear mandatory rules on the formal

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[165] *See* Ishiguro (石黒), "The Validity of an Exclusive Choice of Court Agreement in the Bill of Lading Which Designated a Court in Amsterdam as an Exclusive Forum [アムステルダムの裁判所を国際的専属的合意管轄裁判所と定めた船荷証券上の合意管轄約款の有効性]," 152. *See also* Kato (加藤), "The Validity of International Asymmetric Choice of Court Agreements [一方当事者に選択権を付与する国際的管轄合意の有効性]," 192.

[166] *See e.g,*. Case 221/84, *F. Berghoefer GmbH & Co. KG v ASA SA* [1985] ECLI:EU:C:1985:337; Tokyo District Court, Judgment, October 17, 1967, Hanrei Times [判例タイムズ] no. 216 (1968), 225.

[167] *See* Chapter IV Section 4.2.2 (iii).

validity, such as the Japanese Code of Civil Procedure, the Brussels I Regulation (Recast), and the Hague Convention on Choice of Court Agreements, the uncertainty as to whether a choice of court agreement is validly formed and what law should govern the formal validity can be significantly reduced.

By contrast, greater divergence is found in regard to the substantive validity of choice of court agreements. The views toward the law applicable to the substantive validity significantly differ among jurisdictions, depending on how they perceive the character and nature of the choice of court agreements. In particular, when private international law rules are silent on the issue of substantive validity, uncertainty arises as to what law should govern this matter. There are three main approaches to ascertain the law applicable to the substantive validity of the choice of court agreements: *lex fori*, *lex for prorogati*, and *lex causae* approaches. Firstly, some jurisdictions, such as the United States, view that the choice of court agreement is procedural in nature and it predominantly concerns jurisdictional effects on national courts. Therefore, the question of the substantive validity should be governed by *lex fori*, pursuant to the *lex fori regit processum* doctrine. Secondly, the Brussels I Regulation (Recast) and the Hague Convention on Choice of Court Agreements adopt the *lex for prorogati* approach, submitting the validity of the choice of court agreement to the law of the chosen court to ensure legal certainty and uniformity. Thirdly, in other legal systems, the choice of court agreement is considered to have hybrid nature comprising both procedural dimension and private-law aspect. In these jurisdictions, the applicable law to the choice of court agreement is determined according to the choice-of-law analysis and the nature of the issue in question, rather than regarding all issues concerning the choice of court agreement as procedural matters.

The *lex causae* approach appears to be the most appealing among the three approaches because it gives greater effect to the parties' intentions and further implements parties' autonomy in choice of law and court. The parties can specifically designate their preferred law to govern their choice of court agreement and that law may or may not be the same as the governing law of the underlying contract.

This approach also mitigates the risks of conflicting decisions regarding the validity of the choice of court agreement, which may occur under the *lex fori* approach due to the forum-dependent assessment. The *lex fori* approach seems to ignore the private-law aspect of a choice of court agreement and treat all issues of choice of court agreement as procedural matters. Furthermore, the *lex causae* approach can provide helpful solutions for difficult issues which the *lex for prorogati* approach cannot be easily applied, such as the validity of a choice of court agreement in favor of different courts and the question of interpretation.

Moreover, many legal systems, including Japan, the European Union, and the Hague Convention on Choice of Court Agreements, require that the choice of court agreement be made regarding disputes which have arisen or may arise "in connection with a particular legal relationship." Since a choice of court agreement significantly affects the parties' rights concerning access to justice, this so-called specificity requirement helps ensure predictability for the parties and prevents any unexpected damages. It can avoid unforeseen situations where the parties might be taken by surprise to respond to all possible disputes, including those they do not intend to cover by their agreement or those stemming beyond their contractual relationship. In addition, whether a particular choice of court agreement satisfies the specificity requirement should be determined by *lex fori* since this requirement is established as a procedural condition under international civil procedure law, which aims to regulate the exercise of the judicial power of states.

Furthermore, distinguishing a non-exclusive choice of court agreement from an exclusive one is not always easy. The ascertainment of the actual intention of the parties may be difficult and often result in lengthy and uneconomical disputes in the early stage of the litigation. On the other hand, constructing this issue as a legal question does not necessarily lead to greater legal certainty because it would require a complex choice-of-law analysis to ascertain the law applicable to the question of the exclusivity of a choice of court agreement. Also, the applicable law may not always provide useful guidance on this question. In order to reduce uncertainty concerning the exclusivity, several international instruments

such as the Brussels I Regulation (Recast) and the Hague Convention on Choice of Court Agreements have established the rebuttable presumption of exclusivity to distinguish non-exclusive from exclusive choice of court agreements, irrespective of the law governing the interpretation of such agreements. Therefore, for the sake of legal certainty and the authenticity of the parties' intention in choice of court agreements, the clear validity rules, the specificity requirement, and the rebuttable presumption of exclusivity should be established in the Thai legal system in the form of statutory provisions. A new legal framework for international choice of court agreements in Thailand will be thoroughly examined in Chapter VI.

Finally, further controversies arise in relation to the asymmetric choice of court agreements. Although they are widely used in practice, especially in international financial transactions, their validity is contested in many jurisdictions and there is still no uniform approach on how to assess their validity. This chapter proposes that the validity of such agreements should be evaluated from three perspectives: the law applicable to the choice of court agreement, legal certainty and predictability, as well as fairness. Firstly, the law applicable to the validity of the asymmetric choice of court agreements should be ascertained to determine whether the applicable law permits such agreements. They must satisfy both formal and substantive validity requirements for choice of court agreements to be valid. Furthermore, the asymmetric choice of court agreements may be invalid if the applicable law specifically does not permit the use of such agreements, such as requiring a non-potestative character or imposing strict requirements of mutuality on choice of court agreements. Secondly, the asymmetric choice of court agreements must be sufficiently certain in the sense that the contractual forum can be objectively ascertainable in order to satisfy the legal certainty and specificity requirement. For instance, the asymmetric choice of court agreements which provide that one party may bring proceedings in "any other court of competent jurisdiction" should not be seen as creating wanton uncertainty because the other party can objectively anticipate the competent courts where proceedings can be brought based on general rules on international jurisdiction. On the other hand, the agreements that allow the designated party to

commence proceedings in any court of its choice or named by that party should be seen as failing the legal certainty and specificity requirement since the other party cannot objectively anticipate the jurisdiction of the court until the option to choose jurisdiction is exercised. The jurisdiction of the court will be known only after the party who possesses the choice has exercised its option at the time of the litigation. As a result, the other party to the agreement is not in a position to anticipate with reasonable certainty where it may sue and where it may be sued at the time of the conclusion of a choice of court agreement. Thirdly, the mere imbalance between the parties as to the different choices of forum should not automatically bar the enforcement of asymmetric choice of court agreements on the ground of fairness unless they are considered to be extremely unreasonable and contrary to public policy. Moreover, the special jurisdictional rules for the protection of weak parties such as consumers and employees can considerably lessen concerns over inequality. The public policy exception and special jurisdictional protection in favor of weak parties will be discussed in detail in Chapter V. In addition, the principle of good faith may be used as a last resort to prevent unfairness in exceptional circumstances where the party possessing the option to select jurisdiction under the asymmetric choice of court agreements exercises its right in bad faith which should not be allowed under procedural due process or in a manner that would deprive the other party of access to justice.

Chapter V: Jurisdictional Protection of Weak Parties in Choice of Court Agreements

A choice of court agreement has been widely used around the world and is one of the most important legal instruments in international transactions. It is based on the principle of party autonomy, which grants parties' freedom to choose jurisdiction. Party autonomy in choice of court helps increase legal certainty and predictability in cross-border contracts and enables parties to manage their transaction and litigation risks. The basic presumption for such autonomy is that rational individuals could maximize their own welfare through the calculation of risks and the design of dispute settlement mechanisms that would best suit their needs. In reality, however, parties are not always rational or possess the ability to make rational and informed decisions. In particular, weak parties, such as consumers and employees, often have bounded rationality and limited capability to solve complex problems due to cognitive biases and systematic misperceptions. Granting these weak parties' full autonomy in choice of court without any limits or proper protection could conversely impair their welfare and expose them to the risks of being exploited by stronger parties.

This chapter aims to develop the appropriate framework for the jurisdictional protection of weak parties in the choice of court agreements. Section 5.1 examines the need for providing jurisdictional protection to weak parties and analyzes the regulatory techniques based on the behavioral economic analysis. Then, Section 5.2 comparatively surveys the state practices in regulating the choice of court and arbitration agreements in relation to consumers and employees, who are considered typical weak parties, and proposes an effective jurisdictional framework for these parties in the context of the choice of court agreement in accordance with the behavioral insights. Section 5.3 examines the comprehensive framework for the jurisdictional protection of non-typical weak parties other than consumers and employees, and formulates the use of public policy as a tool for providing jurisdictional protection. Finally, Section 5.4 offers a brief conclusion on the jurisdictional protection of weak parties in the choice of court agreements.

5.1 Protection of Weak Parties from a Behavioral Economic Perspective

In general, granting a private party the freedom to select a forum would be an efficient approach in private international law and increase economic efficiency in international dispute resolution.[1] The basic proposition would be that parties would be assumed to be rational maximizers of their own welfare and aware of their unique preferences unknown to others.[2] Parties could also maximize their welfare by seeking a forum that would make the highest possible return. In particular, they would likely choose a jurisdiction that would best accommodate their needs, such as a forum that would have a favorable conflict of law and procedural rules, high expertise, neutrality, or effective enforcement mechanisms. In this way, they could avoid extra litigation costs associated with jurisdictional uncertainty and the costs of predicting the forum and applicable law, as well as hope for the best possible outcome of the litigation. As a result, a choice of court agreement would likely be made only when it was in the parties' interests to do so. Party autonomy in the choice of court would enable parties to calculate the transaction and litigation risks and allow them to devise the most appropriate dispute settlement mechanism to meet their specific needs in particular contractual relations. This would lead to greater efficiency in transactions and increase economic welfare.[3]

Neoclassical economic analysis assumes that people act 'rationally' in making decisions to enhance their welfare. It is also assumed individuals know their preferences, and that they are able to rank their sets of preferences, including distinct combinations of goods or services, in accordance with

[1] For a detailed discussion on the economic benefits of party autonomy, *see* Andrew T. Guzman, "Choice of Law: New Foundations," *Georgetown Law Journal* 90, no. 4 (April 2002): 883-940; Giesela Rühl, "Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency," *Comparative Research in Law & Political Economy Research Paper No. 4/2007*, Legal Research Institute Research Paper Series, 3, no. 1 (2007).
[2] *See* Rühl, "Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency," 32–33.
[3] *See* Andrew T. Guzman, "Choice of Law: New Foundations," *Georgetown Law Journal* 90, no. 4 (April 2002): 913–14.

the utility they could derive from each good or service.[4] Under neoclassical economic theory, even when each individual behaves rationally, market failure could still occur if there were some conditions that would hinder the optimal operation of a competitive market; for example, monopoly, barriers to enter a market, a lack of product homogeneity, information asymmetries, and third-party effects.[5] Therefore, in such a circumstance, party autonomy in choice of court could require intervention and protective measures in order to correct an inefficient outcome resulting from a market failure.[6]

In reality, however, individuals are not always rational to maximize their own welfare. As Simon observes, "[t]he capacity of the human mind for formulating and solving complex problems is very small compared with the size of the problems whose solution is required for objectively rational behavior in the real world - or even for a reasonable approximation to such objective rationality."[7] Individuals have "bounded rationality" and they react to these limits by making mental shortcuts in the decision-making process which would diverge from the rational choice model and the utility theory under neoclassical economics.[8] Additionally, cognitive biases and heuristics are the main causes of bounded rationality and make human judgments appear inaccurate when compared with perfectly rational people. Therefore, it would be unrealistic to expect that all individuals, especially weak parties, such as consumers and employees who typically suffer from inequality in bargaining power, information asymmetries, and systematic misperceptions, would always make rational and informed choices. The bounded rationality and cognitive biases of humans could also lead to market failure situations.[9] Hence, behavioral economic analysis would help to explain the creation of individuals' preferences and human

[4] Eyal Zamir and Doron Teichman, *Behavioral Law and Economics* (New York, NY: Oxford University Press, 2018): 9–10.
[5] Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets*, Third edition (Oxford: Hart Publishing, 2012): 43.
[6] *See* Rühl, "Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency," 34.
[7] Herbert A Simon, *Models of Man: Social and Rational; Mathematical Essays on Rational Human Behavior in Society Setting* (New York: Willey, 1957), 198.
[8] Tomer Broude, "Behavioral International Law," *University of Pennsylvania Law Review* 163 (2015): 1114.
[9] *See* Eyal Zamir and Doron Teichman, *Behavioral Law and Economics* (Oxford: Oxford University Press, 2018): 11.

decision-making processes in a real-world situation. Consequently, the insights of behavioral economics could thus identify the cognitive biases that could constrain human judgment and induce behavioral market failure. They could also help to provide precise solutions to achieve regulatory goals in protecting weak parties.

5.1.1 Behavioral Findings: Bounded Rationality

Behavioral economics and psychological studies of human decision-making demonstrate that humans deviate from the rational choice theory under neoclassical economics in three significant ways: bounded rationality, bounded willpower, and bounded self-interest.[10] Bounded rationality refers to the fact that individuals have limited capabilities to process information and they often rely on heuristics to make decisions due to cognitive biases. Bounded willpower reflects the phenomenon that individuals sometimes make a choice that they know to be in conflict with their long-term interest for self-control reasons. As a consequence, it appears that people frequently have difficulties in making judgments that would realize the benefits only in the long run. As such, they tend to give greater weight to immediate concerns than to concerns in the future. This psychological constraint could prevent people from achieving their best welfare possibilities.[11] For example, many people fail to save money for their retirement even though they recognize the significance of a retirement savings plan. Bounded self-interest captures the fact that individuals are boundedly selfish. Unlike the assumption of self-interested behavior under neoclassical economics, numerous psychological experiments have shown that people often take selfless actions and care about others only in some circumstances. They also have a sense of fairness and altruism in market transactions.[12]

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[10] Sendhil Mullainathan and Richard Thaler, "Behavioral Economics," NBER Working Paper 7948 (October 2000), https://econpapers.repec.org/paper/nbrnberwo/7948.htm.
[11] Christine Jolls, Cass R. Sunstein, and Richard Thaler, "A Behavioral Approach to Law and Economics," *Standford Law Review* 50, no. 5 (May 1998): 1479.
[12] Ramsay, *Consumer Law and Policy*, 60.

This section focuses on bounded rationality and identifies some important cognitive biases which might affect individual behavior in making decisions concerning the exercise of party autonomy in choice of court. Empirical research in cognitive and behavioral psychology has identified particular biases and heuristics which make human judgment depart from the assumptions of the rational choice theory. The following provides a summary of the cognitive biases, which could be relevant to the decision-making in the context of the choice of court agreements.

(i) Overoptimism

Overoptimism refers to a psychological phenomenon that individuals are overoptimistic. They tend to think that they are better than others and overestimate their abilities. This is also referred to as the above-average effect.[13] Repeated experiments have shown that a majority of people assess themselves more favorably than they assess their peers. When people are asked to compare themselves with their peers, they tend to believe that they are better than average.[14] For example, in one study, a majority of the subjects regarded themselves to be more skillful and less risky than the average driver when they were asked about their competence as drivers.[15] Individuals may also overestimate the likelihood of positive events. For instance, there is a strong tendency that consumers overestimate their future use of health services or attendance at fitness clubs, which could lead to the conclusion of a suboptimal contract.[16]

Furthermore, overoptimism has adverse effects resulting from the underestimation of the risk of harmful incidents. Overly optimistic people may neglect their health and fail to take precautions or

[13] Sean Hannon Williams, "Probability Errors: Overoptimism, Ambiguity Aversion, and the Certainty Effect," in *The Oxford Handbook of Behavioral Economics and the Law*, ed. Eyal Zamir and Doron Teichman (Oxford: Oxford University Press, 2014): 336.
[14] Mark D. Alicke and Olesya Govorun, "The Better-Than-Average Effect," in *The Self in Social Judgment*, ed. Mark D. Alicked et al. (New York: Psychology Press, 2005), 85-106.
[15] Ola Svenson, "Are We All Less Risky and More Skillful than Our Fellow Drivers?," *Acta Psychologica* 47, no. 2 (February 1981), 143-48.
[16] Della Vigna Stefano and Ulrike Malmendier, "Paying Not to Go to the Gym," *American Economic Review* 96, no. 3 (June 2006), 694-719.

periodic medical examinations.[17] Overoptimism about the outcomes of the litigation could also prevent parties from reaching mutually beneficial compromises.[18] In the context of a choice of court agreement, overoptimism could cause parties to underestimate the risks of such an agreement and overlook the consequences of the litigation in the chosen jurisdiction. They could refrain from conducting a sufficient risk-benefit analysis before entering into a choice of court agreement. Hence, overoptimism would be important for the design of protective regulations because individuals may assume that the risk would not affect them despite generic warnings.[19]

(ii) Myopia

The standard economic model assumes that individuals have a single set of explicit goals, and they would choose a behavior that would best achieve these goals. In reality, however, when people are faced with intertemporal choices involving tradeoffs between current benefits and future costs, they are often motivated to take myopic actions. In other words, they would tend to care more about the immediate benefits even though they may have to pay greater future expenses.[20] For instance, people might choose to eat unhealthy high-calorie foods while recognizing that this action would not be in their self-interest.

Loewenstein and O'Donoghue explained that this behavior was the outcome of an interaction between "a deliberative system that assesses options with a broad, goal-based perspective, and an affective system that encompasses emotions and motivational drives."[21] As such, the two minds would be involved in the human decision-making process concerning intertemporal choices. The affective

[17] Harold Sigall, Arie W Kruglanski, and Jacl Fyock, "Wishful Thinking and Procrastination," *Journal of Social Behavior and Personality* 15, no. 5 (January 2000): 283–96.
[18] Linda Babcock and George Loewenstien, "Explaining Bargaining Impasse: The Role of Self-Serving Biases," *Journal of Economic Perspectives* 11, no. 1 (Winter 1997): 109–26.
[19] Ramsay, *Consumer Law and Policy*, 58.
[20] Oren Bar-Gill, "Consumer Transactions," in *The Oxford Handbook of Behavioral Economics and the Law*, ed. Eyal Zamir and Doron Teichman, (Oxford: Oxford University Press, 2014), 474.
[21] George Loewenstein and Ted O'Donoghue, *Animal Spirits: Affective and Deliberative Processes in Economic Behavior* (May 4, 2004): 1. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=539843.

system would then powerfully motivate people to care primarily about immediate and short-term benefits, thus leading to myopic actions.[22] This would cause human decision-making to deviate from the rational choice model. In the context of party autonomy in choice of court, myopia could lead parties to prefer immediate benefits received from a contract even at the expense of the cost in the future incurred by the choice of court agreement. Society might also develop economic and legal devices to help individuals to overcome myopia, for example, automatic savings plans, compulsory pension plans, as well as legal regulations, such as cooling-off periods and mandatory rules.[23]

(iii) Availability heuristic and anchoring effect

Availability is a heuristic or a mental shortcut whereby individuals make decisions about the probability of a risk, which would be based on how easily the particular risk, case, or instance would come to mind. This is also known as availability bias. People tend to rely on information and immediate examples that are brought to their minds quickly and easily when evaluating a specific risk or judgment about the future.[24] Due to the availability heuristic, there would be a strong tendency to use more recent information and the latest news to make decisions. For instance, investors may assess the quality and profitability of the investment based on the news that was recently reported by the media and ignore other relevant factors.[25] This could lead to overestimation of a risk that could be readily recalled and underestimation of less vividly reported risk.[26]

The anchoring effect is cognitive bias that describes human behavior which tends to rely too heavily on a particular reference point (the "anchor") or the first piece of information offered during the decision-making. Individuals often focus on easily accessible information when making judgments. Once the anchor is set, subsequent judgments and estimates would be shaped toward that anchor. As

[22] Ibid.
[23] Ramsay, *Consumer Law and Policy*, 58.
[24] Ibid, 59.
[25] *See* Amos Tversky and Daniel Kahneman, "Judgment under Uncertainty: Heuristics and Biases," *Science (New Series)* 185 (September 1974): 1124–31.
[26] Ramsay, *Consumer Law and Policy*, 59.

such, the anchoring effect would cause a cognitive bias toward evaluating other information around the anchor.[27] For example, the initial price offered by a seller would set the reference for a consumer throughout the rest of the negotiations in reaching the ultimate price. Due to the anchoring effect, a consumer may find that a price lower than the initial price would be reasonable even if it was higher than the actual market value.[28] Thus, the availability heuristic and anchoring effect would highlight the significance of the media and marketing strategies in affecting people's perceptions.[29] Therefore, they would be relevant to the design of the regulations for the protection of weak parties in a market.

(iv) Information overload

Individuals have limited capacities to deal with new information. As a consequence, information overload occurs when individuals are given a level of information that would exceed their processing capabilities in terms of the amount, complexity, redundancy, or inconsistency. This could lead to a poorer quality decision because individuals would have scarce resources, such as limited time and budget, or limited short-term memory, to process all the information and determine the best possible decision.[30] One study has suggested that consumers may ignore much of the information provided on pre-packaged foodstuffs if there is too much of it. As such, overloading with product information could confuse consumers in making decisions.[31] Furthermore, individuals who are overwhelmed with lengthy and complex contractual terms or numerous small print in an adhesion contract may fail to read it.[32] In

[27] *See* Feng Ni, David Arnott, and Shijia Gao, "The Anchoring Effect in Business Intelligence Supported Decision-Making," *Journal of Decision Systems* 28, no. 2 (April 3, 2019): 67–81.
[28] "The Anchoring Effect and How It Can Impact Your Negotiation," *PON - Program on Negotiation at Harvard Law School* (blog), November 26, 2019, https://www.pon.harvard.edu/daily/negotiation-skills-daily/the-drawbacks-of-goals/.
[29] Ramsay, *Consumer Law and Policy*, 59.
[30] *See* Peter Gordon Roetzel, "Information Overload in the Information Age: A Review of the Literature from Business Administration, Business Psychology, and Related Disciplines with a Bibliometric Approach and Framework Development," *Business Research* 12, no. 2 (December 1, 2019): 479–522.
[31] *See* Dave Lennard et al., "Why Consumers Under-Use Food Quantity Indicators," *The International Review of Retail, Distribution and Consumer Research* 11 (April 15, 2011): 177–99.
[32] Horst Eidenmueller and Johanna Stark, "Behavioral Economics and Private International Law," Oxford Legal Studies Research Paper No. 24/2015 (April 6, 2015), 3, https://doi.org/10.2139/ssrn.2591084.

the context of the choice of court agreement, parties may decide to agree on such an agreement without reading it in its entirety or ignore most of the contractual clauses if the agreement provided excessive and complex information. Additionally, information overload may cause individuals to rely on the use of heuristics, such as the anchoring effect, consequently leading to erroneous judgments. Therefore, more information in the decision-making process would not always be better. The information overload problem is thus relevant to legal policies aiming to protect weak parties, especially a disclosure regulation which would often require sellers or companies to disclose detailed information.[33]

5.1.2 Behavioral Market Failure

Behavioral market failures occur as a result of human error in decision-making due to cognitive biases. These biases could be viewed as a new cause for market failures in addition to market power, information asymmetries, and externalities.[34] They are a significant supplement to the standard basis of market failures.[35] In the case of consumer transactions, when a consumer is perfectly rational, a seller would need to design its product, contract, or pricing scheme to respond to consumer psychology and maximize the actual net benefits in order to lure a consumer into purchasing its product. The actual net benefits would be equivalent to the real benefits that a consumer would receive from the product, thus deducting the price that a consumer would have to pay for it.[36] However, in reality, a consumer is not always perfectly rational due to cognitive biases and heuristics. His or her irrational behavior also tends to be predictable and systematic. This may cause a consumer to misperceive the benefits received from a seller's product. As a consequence, instead of maximizing the actual net benefits, a sophisticated seller would adapt its product, contract, or pricing scheme to maximize the perceived net benefits to a

[33] Ramsay, *Consumer Law and Policy*, 60.
[34] *See* Matthew Bennett et al., "What Does Behavioral Economics Mean for Competition Policy?," Competition Policy International 6 (2010): 111–37 (Behavioral biases constitute a "fourth type of market failure.").
[35] Cass R. Sunstein, "The Storrs Lectures: Behavioral Economics and Paternalism," *Yale Law Journal* 122, no. 7 (May 2013): 1834.
[36] Oren Bar-Gill, "Consumer Transactions," 467.

consumer. The perceived net benefits are the benefits perceived by an imperfectly rational consumer and would be equivalent to the benefits which a consumer would think that he or she would receive from the product, as well as deducting the price that a consumer would believe that he or she would have to pay for the product.[37] Hence, a seller could manipulate the perceived net benefits, whereas an imperfectly rational consumer may not recognize the gap between the actual and perceived net benefits. In this way, a consumer would be lured to buy a product or enter into a contract that would appear better or cheaper than it actually is, thus leading to a behavioral market failure.[38] Moreover, an imperfectly rational consumer may not even recognize his or her limited capability and rely on heuristics in making important decisions.

Furthermore, competition alone cannot mitigate or correct behavioral market failures. When a consumer is perfectly rational and able to correctly perceive the benefits, a seller would compete to lower its price and increase the actual net benefits to a consumer. In this case, the competition would be generally advantageous for a consumer. However, when a consumer is imperfectly rational, a seller would be able to exploit the consumer biases by increasing the perceived net benefits and reducing the perceived prices without really expanding the actual net benefits.[39] Under this situation, competition may work in an opposite direction, which would adversely affect the consumer. Therefore, to remain profitable in a market, a seller would be forced to compete to take advantage of consumer psychology and design his or her product, pricing scheme, or contract to create an appearance of a higher benefit or lower price.[40]

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[37] Ibid.
[38] Oren Bar-Gill, *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets*, (Oxford: Oxford University Press, 2013): 2.
[39] *See* Edward L. Glaeser, "Psychology and the Market," *American Economic Review* 94, no. 2 (May 2004): 408–13.
[40] Oren Bar-Gill, "Consumer Transactions," 469.

5.1.3 Cognitive Biases and Contract Designs

Since consumer biases are systematic and predictable, a seller could deliberately devise consumer transactions, including product features, contractual terms, and pricing schemes in response to such biases. According to Bar-Gill, complexity and cost deferral are the two most common features in contract design, which a seller often uses in his or her marketing strategy to increase the perceived net benefits to a consumer.[41] This section illustrates how merchants could incorporate individuals' bounded rationality and cognitive biases into the design of their contracts.

(i) Complexity of a contract

A contract can be designed to be highly complex containing an abundance of contractual clauses, technical terms, legal jargon, and complicated pricing systems. For example, a seller may intentionally create a multidimensional pricing scheme comprising various costs, such as an annual fee, a cash advance fee, a default interest rate, and a late fee, as often seen in a credit card contract.[42] The complexity of a contract would impede the information processing capability of an imperfectly rational consumer and disguise the true cost of the product or service. Therefore, a seller may use a bias exploiting strategy that would decrease salient prices while increasing nonsalient prices. The imperfectly rational consumer would not be able to accurately assess the nonsalient price dimension that was not clearly specified and form an unbiased evaluation of the product.[43] As a result, heuristics would be resorted to making decisions upon the purchase of a product or the conclusion of a contract. Consequently, a consumer may simplify his or her decision and handle the complexity of the contract by ignoring the nonsalient price dimensions.[44]

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[41] Ibid, 471.
[42] *See* Oren Bar-Gill and Ryan Bubb, "Credit Card Pricing: The Card Act and Beyond," *Cornell Law Review* 97, no. 5 (July 2012): 967–1018.
[43] Oren Bar-Gill, "Consumer Transactions," 472.
[44] *See* Richard H. Thaler, "Mental Accounting Matters," *Journal of Behavioral Decision Making* 12 (1999): 183–206.

Dispute resolution clauses, such as choice of forum, mediation, and arbitration clauses, are also examples of the complexity. These clauses are often comprised of lengthy and difficult legal terms, which sometimes are borrowed from boilerplate clauses. Since these clauses are likely to be complicated and nonsalient to nonlawyers, an imperfectly rational consumer may ignore the fine print.[45] As a result, the complexity of a contract would cause an imperfectly rational consumer to overlook an important contractual term or a hidden fee and underestimate the total cost of the product. Furthermore, competition would be likely to drive sellers to increase the complexity in their contracts in order to survive in a market with imperfectly rational consumers.[46]

(ii) Cost deferral

In order to increase the perceived net benefits to a consumer, a sophisticated seller could reduce the perceived total price of his or her product by making price dimensions nonsalient. Long-run and contingent costs would unlikely be noticeable and accurately perceived by an imperfectly rational consumer. Such a consumer would tend to correctly assess the present costs, while failing to perceive costs in the future. Thus, a seller could design a pricing scheme that would contain future costs and defer the materialization of the expense in order to lure an imperfectly rational consumer. A notable example of a deferred cost would be a late fee in a credit card contract. Dispute resolution clauses and legal terms also fall into this category.[47]

This consumer behavior could be explained by two important cognitive biases. Firstly, overoptimism would cause a consumer to underestimate the future costs and the risk of harmful incidents.[48] For example, the cost of dispute resolution would be less noticeable compared to the price

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[45] *See* Yannis Bakos, Florencia Marotta-Wurgler, and David R. Trossen, "Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts," *NYU Law and Economic Research Paper No. 09-40*, 2009, http://www.netinst.org/Bakos_Marotta-Wurgler_Trossen_09-04.pdf.
[46] Oren Bar-Gill, "Consumer Transactions," 472.
[47] Ibid, 473–74.
[48] *See* Neil D. Weinstein, "Unrealistic Optimism About Future Life Events," *Journal of Personality and Social Psychology* 39, no. 5 (1980): 806–20.

directly specified in the contract. Hence, optimistic consumers would tend to underestimate the likelihood of the breach of contract, which would trigger the use of a dispute resolution clause, such as a choice of court agreement. Therefore, they would overlook the significance of such a clause and its crucial consequences in the future. Secondly, myopia would lead consumers to care more about the immediate benefits.[49] Myopic consumers prefer the short-term payoffs even though they may have to pay greater future expenses, such as those incurred by a choice of court agreement when the breach of contract occurs.

In addition, the above contract designs can be seen in not only consumer transactions, but also other categories of contracts where individuals' cognitive biases and systematic misperceptions emerge. For instance, employees and the insured persons may not accurately perceive the total costs of their employment and insurance contracts, respectively due to the nonsalient price dimensions and complexity, such as difficult legal terms, lengthy fine print, complicated pricing schemes, and complex dispute resolution mechanisms.[50] Therefore, sophisticated employers and insurance companies may respond to their vulnerability by using these contract features and increasing the total perceived benefits of their contracts without increasing the actual net benefits.

5.1.4 Behavioral Implications for Legal Policy in the Jurisdictional Protection of Weak Parties

Behavioral economics provide a more accurate and realistic model of human judgment and decision-making. Numerous behavioral studies have shown that cognitive biases and systematic misperceptions could cause people to fail to maximize their own welfare and lead to behavioral market

[49] *See* Ted O'Donoghue and Matthew Rabin, "Doing It Now or Later," *American Economic Review* 89, no. 1 (March 1999): 103–24.
[50] *See generally* Christine Jones, "Behavioral Economics Analysis of Employment Law," in The Behavioral Foundations of Public Policy, ed. Eldar Shafir (Princeton and Oxford: Princeton University Press, 2013), 264–80; "Awareness and Education on Risk and Insurance Revised Analytical and Comparative Report" (Paris: OECD—Organisation for Economic Co-Operation and Development, 2007), 7–8, http://www.oecd.org/finance/insurance/ 38962007.pdf.

failure even without other traditional factors, such as information asymmetries, externalities, and monopoly.[51] Cognitive biases and heuristics would also help to explain why individuals act in an irrational way and how they make decisions that sometimes contradict their own interests. For instance, a consumer may underestimate the risks of choice of court agreements due to overoptimism and simultaneously overestimate the benefits of the chosen forum as a result of the availability heuristic. As such, the behavioral analysis would enable regulators to identify the actual causes in the decision-making process and anticipate more precisely how individuals and weak parties would react to specific types of legal tools.[52]

Furthermore, behavioral expertise could be used to design protective measures for weak parties in the context of a choice of court agreement, which would better correspond to people's behavioral patterns and tendencies. The insights from behavioral studies would be useful for aligning the protective measures for weak parties with the reality of human judgment and decision-making, thus resulting in the achievement of the appropriate level of protection. Moreover, regulators could avoid underprotection situations where certain regulatory tools could not adequately prevent cognitive biases and misperceptions from affecting individuals' decision-making. Failing to evaluate systematic behavioral patterns may also lead to overprotection. For example, giving too much information to consumers may conversely cause them to ignore it entirely.[53] Thus, the behavioral economic model, which offers a more accurate prediction of individual reactions to particular legal rules, could help the legislator to ensure that legal rules could achieve its policy goals.

Additionally, behavioral economics suggest that certain actions should be taken to correct behavioral market failures. Hence, different tools could be used to overcome cognitive biases ranging from "soft paternalism" to "hard paternalism." According to Sunstein, the former refers to "actions of

[51] Zamir and Teichman, *Behavioral Law and Economics*, 168.
[52] Eidenmueller and Stark, "Behavioral Economics and Private International Law," 6.
[53] *See* Omri Ben-Shahar and Carl Schneider, More Than You Wanted to Know: The Failure of Mandated Disclosure (Princeton, New Jersey: Princeton University Press, 2014).

government that attempt to improve people's own welfare by influencing their choices without imposing material costs on those choices." These governmental actions include several types of nudging, such as warnings, disclosures, market norms, and standards, as well as the strategic use of default rules. On the other hand, the latter refers to "actions of government that attempt to improve people's own welfare by imposing material costs on their choices."[54] Hard paternalism can take various forms, such as mandates, mandatory rules, civil bans on certain commercial practices, monetary penalties, and criminal sanctions.

In principle, when government interventions are needed to correct behavioral market failures, the government should consider using the soft paternalistic means to avoid imposing material costs on people's choices unless the benefits of a more aggressive intervention outweigh the costs of intervening to accomplish policy goals, such as the protection of weak parties.[55] The decision tree for government intervention in consumer policy, as developed by the Organization for Economic Co-Operation and Development (OECD), illustrates conditions for preferable government actions from a behavioral economic perspective. This recommends regulators to be aware of the effects of the proposed intervention and ensure that the benefits of such intervention outweigh its costs to protect or empower consumers.[56]

[54] Sunstein, "The Storrs Lectures: Behavioral Economics and Paternalism," 1860.
[55] Ibid, 1861.
[56] "Roundtable on Economics for Consumer Policy: Summary Report" (Paris: OECD, July 2007), 13 https://www.oecd.org/sti/consumer/39015963.pdf.

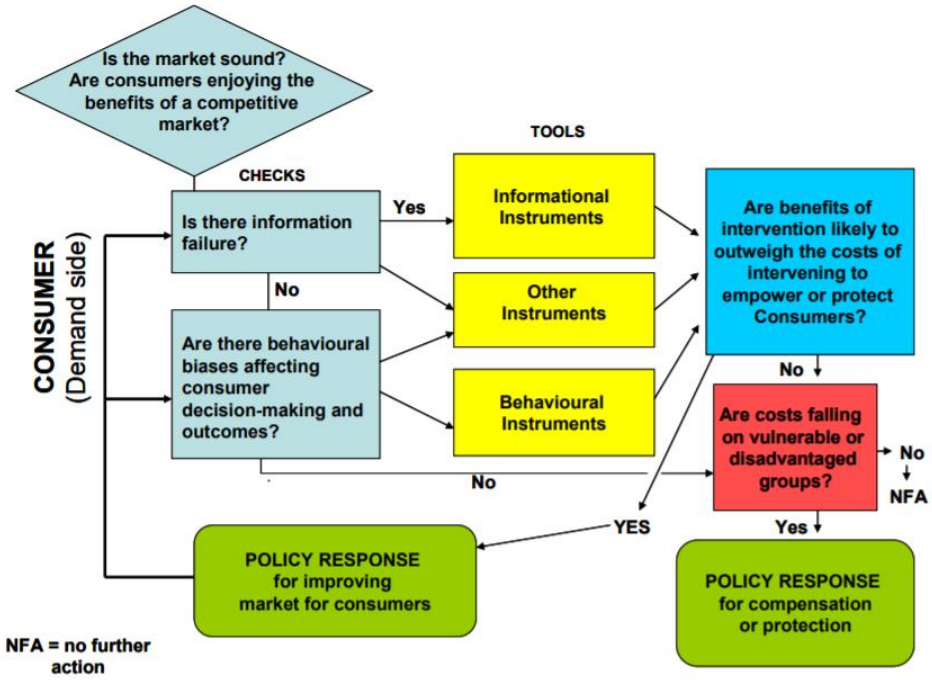

Figure 1: Decision Tree - Demand-side market analysis by consumer regulators.
Source: OECD Roundtable on Economics for Consumer Policy: Summary Report (2007).

Although soft paternalism may be preferable to be used as a corrective action for behavioral market failures, it also has several shortcomings. Unlike hard paternalism, which restricts or overrides people's choices, people may easily ignore the government's attempt to protect weak parties, such as warnings, due to the absence of the substantial costs on those choices. Therefore, the soft paternalistic approach would seem to be reversible without difficulty. Furthermore, it would be subject to the risks of manipulation by stronger parties since it would not be invested with the legal binding power.[57] Thus, each regulatory technique and its relevant costs and benefits would require thorough evaluation according to the specific situation. Several legal tools below, including soft and hard paternalism, are

[57] *See* Sunstein, "The Storrs Lectures: Behavioral Economics and Paternalism," 1890-1894.

examined from a behavioral economic viewpoint in order to explore an effective approach specifically aiming to protect weak parties in the context of a choice of court agreement.

(i) Default rules

In certain contexts, policymakers may promote policy goals with the strategic use of default rules. The prominent advantage of this approach would be that it could preserve flexibility as well as avoid costs on people's choices and unintended adverse effects of a more aggressive hard paternalism, such as bans and sanctions.[58] The persistence or permeability of the default rules could be explained by the omission bias, inertia, and the endowment effect.[59] Individuals may also prefer not to make an active choice between options that could contain both advantages and disadvantages or benefits and risks. They may choose to do nothing or remain unchanged when facing options.[60] Moreover, there would be a tendency for people to overvalue something that they own. Consequently, they would be more likely to demand much more to give up a product they own than pay to acquire the same good.[61] Therefore, default rules could be used to establish a point of reference from which individuals would be unwilling to deviate and direct their behavior in desirable ways for their best interest.[62] Several behavioral experiments have shown that making default arrangements or default rules, such as automatic enrollment of savings or pension plans could become effective in prompting people to make the right decision to maximize their own welfare.[63]

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[58] Cass R. Sunstein, "Nudges.gov: Behaviorally Informed Regulation," in *The Oxford Handbook of Behavioral Economics and the Law*, ed. Eyal Zamir and Doron Teichman (Oxford ; New York: Oxford University Press, 2014), 733.
[59] Ramsay, *Consumer Law and Policy*, 94.
[60] Zamir and Teichman, *Behavioral Law and Economics*, 180.
[61] *See* Carey K. Morewedge and Colleen E. Giblin, "Explanations of the Endowment Effect: An Integrative Review," *Trends in Cognitive Sciences* 19, no. 6 (June 2015): 339–48.
[62] Zamir and Teichman, *Behavioral Law and Economics*, 180.
[63] *See* William G Gale, J Mark Iwry, and Spencer Walters, "Retirement Saving for Middle- and Lower-Income Households: The Pension Protection Act of 2006 and the Unfinished Agenda" (Washington DC: The Retirement Security Project, 2007), https://www.brookings.edu/wp-content/uploads/2016/06/04_pension_protection.pdf.

In the context of a choice of court agreement, policymakers may create default rules aiming to grant jurisdictional protection for weak parties, such as consumers and employees. Similarly, businesses may self-regulate contractual terms which could adversely affect weak parties in the forms of a corporate code of conduct, guidance, or best practices. However, it is questionable whether there are adequate incentives for market actors to abide by such default rules or develop self-regulation that would provide more protection to weak parties than the law. Furthermore, stronger parties could easily reverse the default rules provided by the regulators or industries and force weak parties to opt out of the default regime due to superior bargaining power.[64] In addition, there could be a possibility that businesses could even exploit the use of default rules in transactions with weak parties, such as automatic checkboxes in Internet contracting.

(ii) Disclosures

Information disclosure can be an effective regulatory technique to mitigate the information asymmetry problem and help individuals to overcome behavioral biases. Disclosure regulation is particularly useful when an inefficient outcome or a market failure is the result of imperfect information. This regulatory tool would still preserve people's free choices because it would merely adjust the availability and presentation of information to the people and urge them to protect themselves in accordance with their unique preferences. Moreover, since this would impose fewer costs and rigidity on the market, this would impose less significant risks or harm than hard paternalism if the government interventions eventually resulted in an error.[65]

[64] *See* Michael S. Barr, Sendhil Mullainathan, and Eldar Shafir, "The Case for Behaviorally Informed Regulation," in *New Perspectives on Regulation*, ed. David A Moss and John Cistrenino (Cambridge MA: The Tobin Project, 2009), 25-61.
[65] Howard Beales, Richard Craswell, and Steven C. Salop, "The Efficient Regulation of Consumer Information," *The Journal of Law and Economics* 24, no. 3 (December 1981): 513–14.

From a behavioral viewpoint, the simplicity and clarity of information disclosure are important.[66] In some circumstances, disclosed information may not be useful if it is too detailed, complex, vague, or abstract. Therefore, the disclosure regulation should be designed to respond to people's actual behavioral patterns and information processing capabilities. Otherwise, people may face an information overload problem and predominantly rely on heuristics to make decisions, thus leading to erroneous judgments. In general, the disclosure ought to be simple, straightforward, and salient.[67]

In addition, policymakers may put in place a mandate requiring businesses and employers to disclose certain information about their products and contracts. The disclosure mandate could take the form of a summary or full disclosure targeting at a nonsalient dimension of prices or contractual terms, thus allowing weak parties to better calculate the total costs and benefits of the transactions. For example, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 aimed to protect consumers from abusive financial service practices by introducing a disclosure mandate of important information regarding consumer financial products or services.[68]

In the context of a choice of court agreement, many jurisdictions, such as Japan and the European Union as well as the Hague Convention on Choice of Court Agreements, have imposed a writing requirement on a choice of court agreement, which makes such an agreement more salient to contracting parties. The Chinese Civil Procedure Law further requires a business operator to notify or remind a consumer of the existence of a choice of court agreement used in standard contracts by

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[66] *See* Cass R. Sunstein, "Empirically Informed Regulation," *University of Chicago Law Review* 78, no. 4 (2011): 1349–1429.
[67] Cass R. Sunstein, "Nudges.gov: Behaviorally Informed Regulation," 729.
[68] Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 USC 5533 § 1033 (2010) Consumer Rights to Access Information:

> "(a) IN GENERAL. - Subject to rules prescribed by the Bureau, a covered person shall make available to a consumer, upon request, information in the control or possession of the covered person concerning the consumer financial product or service that the consumer obtained from such covered person, including information relating to any transaction, series of transactions, or to the account including costs, charges and usage data. The information shall be made available in an electronic form usable by consumers."

reasonable means.[69] This regulation aims to disclose information concerning a choice of court agreement, which is usually hidden among numerous contractual terms and overlooked by consumers. Similarly, with respect to an arbitration agreement, Article 4 of the Brazilian Arbitration Law requires that an arbitration agreement in a consumer standard contract be printed in bold letters, or be in a separate document and separately signed by the consumer.[70] The Czech Arbitration Act also previously required arbitration agreements in consumer contracts to disclose information on the arbitrator, arbitration proceedings, the place of arbitration, arbitration fees and other expenses, the delivery of the arbitral award, and the enforceability of the award. The Czech legislator believed that the information disclosure mandate could mitigate asymmetric information problems and consumers' cognitive biases during the conclusion of arbitration agreements.[71]

Although disclosure regulation is effective in raising awareness and leading weak parties to make an informed decision without restricting the freedom of choice in many situations, its advantages may be limited in the context of a choice of court agreement. Due to its unique characteristic as a dispute resolution mechanism, it would be difficult to disclose all relevant information, such as costs and other legal consequences of the chosen forum, to nonlawyers in a way that would be easy to comprehend. In contrast, if the disclosed information was too detailed or complicated for imperfectly rational persons to understand, they may deal with the overwhelming information by disregarding the disclosures.[72] In addition, a choice of court agreement often constitutes only a small part of a long and complex contract

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[69] Interpretations of the Supreme People's Court on Applicability of the Civil Procedure Law of the People's Republic of China Art. 31:

> "Where a business operator executes a jurisdiction agreement with consumers with standard clauses but fails to remind such consumers by reasonable means, the people's court shall uphold consumers' claim for invalidation of such jurisdiction agreement."

[70] *See* George A Bermann, *International Arbitration and Private International Law*, General Course on Private International Law (Leiden/Boston: Brill-Nijhoff, 2017), 175. *See also*, Deborah Alcici Salomão, "Effective Methods of Consumer Protection in Brazil. An Analysis in the Context of Property Development Contracts," *Revista de Derecho Privado*, no. 29 (December 2015): 194.

[71] Friedrich Rosenfeld, "Limits to Party Autonomy to Protect Weaker Parties in International Arbitration," *Limits to Party Autonomy in International Commercial Arbitration*, ed. Franco Ferrari (New York: JurisNet, 2016), 430.

[72] Oren Bar-Gill, "Consumer Transactions," 479.

and tends to be less significant than other agreements, such as payment, delivery, liabilities, and termination. As a result, individuals, especially weak parties, may overlook its importance and underestimate the likelihood of the risk. Furthermore, a disclosure mandate may be inadequate to prevent businesses with superior bargaining power from exploiting weak parties who would be usually provided with only two options – take it or leave it. Therefore, in the context of the choice of court agreement, information disclosure may complement other regulatory tools to increase efficiency but hardly replace them.

(iii) Mandatory rules

Regulators may establish mandatory rules to restrict particular contractual terms or commercial practices which could appear to be excessively unfavorable or unfair to weak parties. Legal tools range from moderate legal interventions, including the limits on the effect of the choice of court agreements and the creation of special jurisdictional rules in favor of weak parties, to hard interventions, such as bans on the use of a choice of court agreements in certain transactions involving weak parties.[73] In many jurisdictions, mandatory rules are the primary tools to limit party autonomy in choice of court and provide jurisdictional protection for weak parties.

For example, the United States generally allows the use of the choice of court agreements, even involving weak parties, but resorts to public policy to limit the effects of a choice of court agreement that unfairly treats weak parties.[74] The Japanese Code of Civil Procedure and Brussels I Regulation (Recast) provide protective jurisdictional rules for certain presumptively weak parties, such as consumers, employees, and insured persons. Some jurisdictions even exclude party autonomy in choice of court in transactions with weak parties. For instance, in consumer and employment contracts, parties are not allowed to agree on a foreign court other than the court of the domicile of the consumers and

[73] *See* Giesela Rühl, "The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy," *Journal of Private International Law* 10, no. 3 (December 2014): 346–56.
[74] *See e.g. The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1 (1972).

employees.[75] Another example of mandatory rules is the right to withdraw or cooling-off periods, which is often used in consumer transactions to protect consumers. In the context of consumer arbitration, the Japanese Arbitration Act empowers a consumer with the right to cancel or withdraw from an arbitration agreement.[76]

5.1.5 Interim Conclusion

Behavioral economics can help to provide a more realistic model of human decision-making. This reveals that cognitive biases could cause people to behave irrationally and fail to maximize their own welfare, consequently leading to a behavioral market failure. The behavioral expertise would also be useful for designing regulatory tools that could provide optimal protection for weak parties in the context of a choice of court agreement. The insights of behavioral patterns and accurate prediction of people's reactions to particular interventions could also help regulators to increase the efficiency of the regulatory measure and achieve the appropriate level of legal protection.

Hence, several regulatory techniques may be used to protect weak parties in the choice of court agreements ranging from a soft paternalistic approach to hard paternalism. Soft paternalism would attempt to correct people's mistakes in choosing the means and making decisions that would promote their own interest without placing material burdens on their choices.[77] However, in this specific context, soft paternalistic measures used in isolation, such as default rules and information disclosures, would be unlikely to be adequately effective in protecting weak parties. Additionally, policies concerning the protection of weak parties often utilize a wide range of government interventions, including mandatory rules to ensure effectiveness.[78] Moreover, empirical research on legal policies in many jurisdictions have suggested that mandatory rules would be the most frequently used regulatory tool to protect weak parties

[75] *See* Art. 3149 of the Civil Code of Québec.
[76] *See* Art. 3 para. 2 of the supplementary provisions to the Japanese Arbitration Act.
[77] Sunstein, "The Storrs Lectures: Behavioral Economics and Paternalism," 1898–99.
[78] *See* "Second Report Behaviour Change" (London: The House of Lords Committee on Science and Technology, 2011), https://publications.parliament.uk/pa/ld201012/ldselect/ldsctech/179/17902.htm.

in the choice of court agreements.[79] Such rules could also be used in combination with soft paternalistic measures, such as disclosure regulation.

However, critics of hard paternalism argue that this approach would be subject to the higher risks of errors and abuse by regulators.[80] If the government intervention also resulted in an error, this would be more likely to pose more serious harm than a soft paternalistic approach since this would directly intervene in the operation of market forces and restrict the freedom of choice.[81] These arguments may be overstated because regulators could use public resources, professional knowledge, and statistical data, which would generally be inaccessible for individuals to create paternalistic rules designed to protect them from their cognitive biases and psychological constraint. Moreover, regulators would be less likely to be affected by self-serving biases that could disturb individuals' decision-making.[82] Therefore, regulators would be more likely to develop policies from a higher construal level, which would ultimately meet the people's long-term interests.[83] As for the risks of abuse by state officials, the transparency and political safeguards of government measures could help reduce such risks.[84] In particular in democratic systems, any legal policies must be discussed in parliament and could be investigated and scrutinized by the public before entering into force. Therefore, paternalistic rules would likely be more visible, which the general public could observe and criticize.[85] Furthermore, since the

[79] *See e.g.* Patrick J. Borchers, "Categorical Exceptions to Party Autonomy in Private International Law," *Tulane Law Review* 82, no. 5 (May 2008): 1645–62; Yuko Nishitani, "International Jurisdiction of Japanese Courts in a Comparative Perspective," *Netherlands International Law Review* 60, no. 02 (January 2013): 251–77; Giesela Rühl, "The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy."
[80] *See e.g.* W. Kip Viscusi and Ted Gayer, "Behavioral Public Choice: The Behavioral Paradox of Government Policy," *Harvard Journal of Law and Public Policy* 38 (January 2015): 973–1007.
[81] Howard Beales, Richard Craswell, and Steven C. Salop, "The Efficient Regulation of Consumer Information," 513–14.
[82] Zamir and Teichman, *Behavioral Law and Economics*, 170.
[83] *See* Yaacov Trope and Nira Liberman, "Construal-Level Theory of Psychological Distance," *Psychological Review* 117, no. 2 (April 2010): 440–63.
[84] Sunstein, "The Storrs Lectures: Behavioral Economics and Paternalism," 1890.
[85] *See* Edward L. Glaeser, "Paternalism and Psychology," *University of Chicago Law Review* 73, no. 1 (January 2006): 133–56.

government could be held accountable for its policies in the case of errors or abuse, this would incentivize the government to take cautious and deliberate action.

Nonetheless, people's heterogeneity would be a significant challenge for lawmakers in designing paternalistic rules. People have different preferences, needs, and degrees of sophistication. They also vary in how they react to cognitive biases and heuristics.[86] Typical weak parties, such as consumers and employees, do not necessarily have the same preferences or the same level of information processing capability, education, and socio-economic status. Hence, this would reflect the reality that the demand for paternalistic rules and their actual effects may be different from one person to another.[87] Paternalistic rules aimed at protecting less sophisticated weak parties may adversely affect certain weak parties with a higher degree of sophistication. As a result, a one-size-fits-all paternalistic rule may not always protect weak parties, even in the same category, with differing preferences, needs, and degrees of sophistication.[88] Therefore, regulators should carefully calculate the costs and benefits of paternalistic legal intervention and ensure that the costs do not exceed the benefits of such intervention. They would also need to determine and delimit the scope of the weak parties who truly deserve protection, especially in the context of a choice of court agreement.

5.2 Categorical Protection of Weak Parties: Consumers and Employees

As previously stated, mandatory rules are the most common regulatory technique used in many jurisdictions in providing jurisdictional protection for weak parties in the choice of court agreements. In particular, Japan and the European Union confer special jurisdictional protection to consumers and employees, who are generally deemed as weak parties, by establishing protective jurisdiction rules in

[86] *See* Jeffrey Rachlinski, "Cognitive Errors, Individual Differences, and Paternalism," *University of Chicago Law Review* 73, no. 1 (January 2006): 207–29.
[87] Zamir and Teichman, *Behavioral Law and Economics*, 170–71.
[88] *See* Oren Bar-Gill, "Consumer Transactions," 478.

favor of these parties. Some jurisdictions go one step further, excluding parties' choice of a forum in transactions involving weak parties. This section discusses various mandatory rules with a special emphasis on consumers and employees, as well as explores the most effective way to pursue policy goals from a behavioral economic perspective.

This section also comparatively examines mandatory rules aimed at protecting weak parties in the context of commercial arbitration. Some weak parties in arbitration agreements suffer from cognitive biases, unequal bargaining powers, and information asymmetries, which raise similar problems with regard to the choice of court agreements. Regulators in several jurisdictions have responded to these problems with various legal approaches ranging from the law on arbitrability to special rules on the validity of arbitration agreements. Some important lessons from arbitration could also be applied to design effective legal instruments for the protection of weak parties in the choice of court agreements.

5.2.1 Exclusion of Party Autonomy in Choice of Forum

The strongest legal intervention for the protection of weak parties in the choice of court agreements is the exclusion of party autonomy in the choice of the court. The preestablished mandatory rules would replace the parties' choices concerning the selection of a forum. Certain categories of disputes involving weak parties may be reserved to be exclusively adjudicated by designated courts, which mostly are those for the weak parties' domiciles. For example, Article 3149 of the Civil Code of Québec provides:

> Québec authorities also have jurisdiction to hear an action based on a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.

Although the province of Québec generally allows party autonomy in choice of court[89], it has mandatory rules that forbid the contracting parties to agree to submit consumer or employment disputes to a foreign court other than the Québec authorities if one of the parties is a consumer or employee and his or her residence is in Québec. A consumer and employee cannot also voluntarily waive this jurisdictional protection. In other words, the Québec authorities, which are the courts for the place of the domicile or residence of the consumers and employees, have exclusive jurisdiction over consumer and employment disputes. This means that consumers and employers living in Québec would not be bound by a choice of agreement that chooses other fora.[90]

This jurisdiction rule aims to guarantee home court advantages for consumers and employees. Therefore, it prevents weak parties from being required to pursue legal remedies or respond to legal actions in a location that is inconvenient, distant, costly, and has an unfamiliar legal system and a language barrier for them. To force weak parties to initiate legal actions in a remote and unaccustomed location may be equivalent to depriving their access to courts. These mandatory rules, which exclude almost all-party autonomy in choice of court, could effectively protect weak parties from the abuse of superior bargaining power and their own cognitive biases in decision-making.

With respect to commercial arbitration, similar legal policies have been adopted in several jurisdictions to protect weak parties. For example, the German lawmaker has decided to exclude party autonomy in arbitration concerning individual labor disputes. Such disputes are deemed non-arbitrable under German law. As a result, an arbitration agreement between an individual employee and his or her employer concerning the employment contract is invalid.[91] On the other hand, certain labor disputes arising out of collective wage agreements are arbitrable. Therefore, an arbitration agreement between

[89] *See* Art. 3148 para. 2 of the Civil Code of Québec.
[90] *See* Sylvette Guillemard, Frédérique Sabourin, "Québec : Les Clauses D'Élection De For facultatives En droit international Privé Québécois," in *Optional Choice of Court Agreements in Private International Law*, ed. Mary Keyes (New York: Springer International Publishing, 2020), 107–35.
[91] Friedrich Rosenfeld, "Limits to Party Autonomy to Protect Weaker Parties in International Arbitration," 423.

employers and trade unions may be valid.[92] The German law differentiates between individual employees and trade unions, and determines that individual employees deserve more powerful protection in the context of arbitration.[93]

Similarly, the Japanese Arbitration Act limits the scope of arbitrability in labor disputes in order to protect employees, who are deemed to be weak parties. It invalidates a pre-dispute arbitration agreement between individual employees and employers concerning working conditions and other matters regarding labor relationships, including disputes between individual job applicants and employers on matters concerning the recruitment and employment of employees.[94] The rationale for excluding party autonomy in these arbitration agreements is the assumption that it is difficult for individual employees to understand the significance of arbitration and properly select their dispute settlement mechanism. Furthermore, due to the striking imbalance of bargaining power and economic status, it would be difficult to expect that individual employees could negotiate with their employers to change the terms of the arbitration agreements. Therefore, the Japanese legislator has decided that the uniform invalidation of such arbitration agreements would be the most effective way to protect weak parties.[95]

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[92] *See* Section 1030 of the German Code of Civil Procedure (ZPO) in conjunction with Art. 2, 4, 101 of the German Labour Court Act (Arbeitsgerichtsgesetz ArbGG).

[93] "International Arbitration Law and Rules in Germany," CMS Expert Guide to International Arbitration, CMS, accessed November 13, 2021, https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/germany.

[94] *See* Art. 4 of the supplementary provision of the Japanese Arbitration Act in conjunction with Art. 1 of the Act on Promoting the Resolution of Individual Labor-Related Disputes.

[95] Takeshi Kojima (小島武司) and Takashi Inomata (猪股孝史), *Arbitration Law [仲裁法]*, 1st ed. (Tokyo: Nihon Hyōronsha, 2014), 157–58.

5.2.2 Special Jurisdictional Regime in Consumer Contracts

(i) Japan

The Japanese Code of Civil Procedure has created a special jurisdictional regime in matters concerning consumer contracts. Due to the special characteristic of the choice of court agreement and a significant imbalance of bargaining power between a consumer and a business operator, it would be difficult to expect that a general consumer could fully understand the consequences of a choice of court agreement, which would be usually inserted as a boilerplate clause in a standard contract, and negotiate with its counterparty for a better term. Therefore, the Japanese legislator decided to provide jurisdictional protection for consumers by establishing jurisdictional rules more favorable to their interests than the jurisdictional rules in general. Article 3-7 (5) of the Japanese Code of Civil Procedure provides:

> An agreement as referred to in paragraph (1) which covers Consumer Contract disputes that may arise in the future is valid only in the following cases:
>
> (i) if the agreement provides that an action may be filed with the courts of the country where the Consumer was domiciled at the time, the Consumer Contract was concluded (except in the case set forth in the following item, any agreement that an action may be filed only with a court of such a country is deemed not to preclude the filing of an action with a court of any other country);
>
> (ii) if the Consumer, in accordance with said agreement, has filed an action with the courts of the agreed-upon country, or if an Enterprise has filed an action with the Japanese courts or with the courts of a foreign country and the Consumer has invoked said agreement.

(a) General principle

In principle, Article 3-7 (5) invalidates a pre-dispute choice of court agreement that covers disputes concerning consumer contracts, except for two cases provided in Subparagraphs (i) and (ii). On the other hand, a choice of court agreement would be concluded after the dispute has arisen remains valid. This would be because, in the post-dispute situation, the point at issue in the dispute as well as the risks and consequences of the choice of court agreement would become salient. Furthermore, a business

operator could no longer use his or her superior bargaining power to force a consumer to enter into a choice of court agreement. Thus, it could be expected that a consumer would carefully consider the costs and benefits of such an agreement before the conclusion. Under this circumstance, general requirements of the choice of court agreements would be deemed sufficient to protect the interests of consumers.[96]

(b) Definition of consumers

Article 3-4 (1) of the Japanese Code of Civil Procedure defines a consumer contract as follows:

> [A] contract concluded between a Consumer (meaning an individual (except for an individual that becomes a party to a contract as a part of a business undertaking or for business purposes); the same applies hereinafter) and an Enterprise (meaning a corporation or any other association or foundation or an individual that becomes a party to a contract as a part of a business undertaking or for business purposes; the same applies hereinafter) (this excludes a labor contract…)

In short, a consumer contract is a contract concluded between a consumer and a business operator. This Article also defines a consumer in a negative way providing that a consumer is a natural person excluding one who becomes a party to a contract "as a part of a business undertaking or for business purposes." On the other hand, this gives a positive definition of a business operator as "a corporation or any other association or foundation or an individual that becomes a party to a contract as a part of a business undertaking or for business purposes." Therefore, a consumer must be a natural person who concludes a contract for purposes other than business or not as a part of a business undertaking. For example, a consumer may enter into a contract for personal, family, or household purposes.[97] The Act on General Rules for Application of Laws also uses the same definitions of a consumer contract and a consumer.[98]

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[96] Tatsubumi Satō（佐藤達文）and Yasuhiko Kobayashi（小林康彦）, eds., *2011 Reform of the Code of Civil Procedure etc.: Legislation on International Jurisdiction [一問一答　平成 23 年　民事訴訟法等改正 国際裁判管轄法制の整備]*, 1st ed., Ichimon Ittō Series (Tokyo: Shōji Hōmu, 2012), 143–44.

[97] *See* Art. 2(1)(a) of the Hague Convention on Choice of Court Agreements.

[98] *See* Art. 11(1) of the Act on General Rules for Application of Laws.

However, the Act on General Rules for Application of Laws excludes an "active consumer" from the scope of consumer protection in the context of applicable laws[99], while Article 3-4 (1) of the Japanese Code of Civil Procedure aims to protect both passive and active consumers. An active consumer is a consumer who would take the initiative to go to a foreign country where a business operator's place of business is located and conclude a consumer contract or receive the entire performance there.[100] If an active consumer was excluded from the scope of jurisdictional protection under the Japanese Code of Civil Procedure, a consumer who briefly stayed in a foreign country may be required to take legal action in that country, which would be in fact equivalent to the deprivation of access to justice.[101] For instance, a foreign consumer domiciled abroad, who would be considered to be an active consumer, may be required to defend himself in Japan if a Japanese business operator initiated a lawsuit against him or her in a Japanese court. This would put an excessive burden upon a foreign consumer who briefly visits Japan.[102] Furthermore, any disadvantages to a business operator, which may be incurred from the inclusion of an active consumer, could be mitigated by the doctrine of special circumstances under Article 3-9 of the Japanese Code of Civil Procedure.[103] As a result, for the sake of consumer protection, the Japanese legislator has decided to provide preferential treatment for both passive and active consumers in the context of international jurisdiction.

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[99] *See* Art. 11(6) of the Act on General Rules for Application of Laws.

[100] Nishitani, "International Jurisdiction of Japanese Courts in a Comparative Perspective," 268.

[101] "Complementary Explanation to the Interim Draft on the Legislation on International Jurisdiction [国際裁判管轄法制に関する中間試案の補足説明]" (Tokyo: Civil Affairs Bureau, Ministry of Justice of Japan, July 2009), 43–44 https://www1.doshisha.ac.jp/~tradelaw/UnpublishedWorks/ExplanatoryNoteOnBillOfJurisdictionAct.pdf.

[102] Naohiro Kitasaka （北坂尚洋）, "International Jurisdiction in Matters Concerning Consumer and Labor Disputes [消費者契約事件・労働関係事件の国際裁判管轄]" in *International Economic Law 2: Transactions, Property, and Procedure [国際経済法講座 II ー取引・財産・手続]*, ed. Noboru Kashiwagi （柏木昇）, 1st ed. (Kyoto: Hōritsu Bunkasha, 2012), 179.

[103] Masato Dogauchi（道垣内正人）, "Forthcoming Rules on International Jurisdiction [日本の新しい国際裁判管轄立法について]," *Japanese Yearbook of Private International Law* 12 (2010): 198.

(c) Subparagraph (i)

The first situation where a choice of court agreement in consumer contracts is exceptionally permitted under Article 3-7 (5) (i) is when a consumer and a business operator agree to submit their dispute to the courts of the country where the consumer was domiciled at the time the consumer contract was concluded. Under this circumstance, consumers and business operators could anticipate that legal action may be brought before the courts of the consumers' domicile at the time they concluded the contract. Thus, this rule could provide a certain amount of legal predictability to both parties in consumer transactions.[104] Moreover, consumers would tend to be more familiar with the legal system, business practice, and language of the country where they had domicile and have easy access to courts located in that country. Therefore, a choice of court agreement in selecting those courts would be less likely to adversely affect the interests of consumers.[105]

Furthermore, the sentence provided in parentheses in Subparagraph (i) stipulates that an exclusive choice of court agreement that designates specific courts to the exclusion of the jurisdiction of any other courts would be deemed a non-exclusive choice of court agreement. This would mean that even if the parties agreed to exclusively submit their dispute to a foreign court, the consumer and business operator may still be able to bring proceedings before Japanese courts if jurisdictional requirements under other provisions are met, such as Articles 3-2, 3-3, and 3-4 (1). This rule aims to secure access to Japanese courts or the court of the residence for consumers.[106]

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[104] Kitasaka （北坂）, "International Jurisdiction in Matters Concerning Consumer and Labor Disputes [消費者契約事件・労働関係事件の国際裁判管轄]," 180.

[105] Satō （佐藤） and Kobayashi （小林）, *2011 Reform of the Code of Civil Procedure etc.: Legislation on International Jurisdiction [一問一答　平成 23 年　民事訴訟法等改正　国際裁判管轄法制の整備]*, 145.

[106] Ibid, 145–46.

(d) Subparagraph (ii)

The second situation where the validity of the choice of court agreement in consumer contracts could be upheld under Article 3-7 (5) (ii) is when consumers themselves bring legal actions before the courts according to the choice of court agreement, or invoke the said agreement when they are sued by business operators. The rationale for this legal policy is similar to that of the post-dispute situation where the risks and benefits of a choice of court agreement become salient. Furthermore, since consumers themselves choose to give effect to a choice of court agreement, it would be unlikely that this would harm their interests.[107] This provision could be justified through the consent of a consumer to abandon his or her rights protected by special jurisdictional rules.[108]

As a result, a consumer may bring legal action against a business operator before a foreign court designated in a choice of court agreement even when that court was not located in a country where the consumer was domiciled at the time the consumer contract was concluded. Moreover, in such case, after instituting a civil action in a foreign court, if the consumer files the same lawsuit again in the Japanese court, this lawsuit may be dismissed due to the fact that the consumer had already invoked a choice of court agreement. In contrast, if a business operator files a complaint against a consumer in the Japanese court according to the general jurisdictional rules, such as Article 3-3, the consumer could invoke an exclusive choice of court agreement in favor of a foreign court to dismiss this lawsuit.[109]

(ii) European Union

Under the framework of the European Union law, the Brussels I Regulation (Recast) created special jurisdictional regimes in favor of typically weak parties in matters relating to consumer,

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[107] Ibid, 147.
[108] Nishitani, "International Jurisdiction of Japanese Courts in a Comparative Perspective," 269.
[109] *See* Kitasaka （北坂）, "International Jurisdiction in Matters Concerning Consumer and Labor Disputes [消費者契約事件・労働関係事件の国際裁判管轄]," 180–82.

employment, and insurance contracts. As Recital (18) of the Regulation states, "in relation to insurance, consumer, and employment contracts, the weaker party should be protected by rules of jurisdiction more favorable to his or her interests than the general rules." In particular, Section 4 of Chapter II of the Regulation (Articles 17-19) provides special jurisdictional rules in consumer contracts, which treat consumers more favorably than the normal rules on jurisdiction.

Article 18 of the Brussels I Regulation (Recast) lays down basic procedural protection of consumers in consumer contracts. It provides that "[a] consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled."[110] On the other hand, a consumer may only be sued "by the other party to the contract only in the courts of the Member State in which the consumer is domiciled."[111]

(a) General principle

In general, a choice of court agreement that covers disputes concerning consumer contracts would be invalid unless it met one of the three special conditions specified in Article 19 of the Brussels I Regulation (Recast). Article 19 states this as follows:

> The provisions of this Section may be departed from only by an agreement:
> (1) which is entered into after the dispute has arisen;
> (2) which allows the consumer to bring proceedings in courts other than those indicated in this Section; or
> (3) which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

First, a business operator and a consumer could freely designate a competent court if their choice of court agreement was made after the dispute had arisen. Second, a non-exclusive choice of

[110] *See* Art. 18 (1) of the Brussels I Regulation (Recast).
[111] *See* Art. 18 (2) of the Brussels I Regulation (Recast).

court agreement for the sole benefit of a consumer would be permitted.[112] Both parties may agree that a consumer could sue a business operator in other courts in addition to the courts for the domicile of the business operator or the consumer, or those specified in Section 4. Third, when a business operator and a consumer are domiciled or habitually resident in the same Member State at the time of conclusion of the contract, they may choose to submit their dispute to the courts of that Member State. However, such an agreement must not be contrary to the law of that Member State. The choice of court agreements in consumer contracts beyond these three scenarios are unenforceable.[113]

(b) Definition of consumers

Article 17 of the Brussels I Regulation (Recast) requires that one party to a consumer contract must be a consumer. It defines a consumer as a person who enters into a contract "for a purpose which can be regarded as being outside his trade or profession."[114] Furthermore, a person who concludes a contract for purposes which are in part within and in part outside his or her trade or profession cannot be regarded as a consumer "unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect."[115] Although Article 17 does not expressly state that a consumer is restricted to a natural person, the Court of Justice of the European Union (hereafter referred to as the "CJEU") has held on several occasions in the different European Union instruments that consumers must be "private final

[112] Alex Mills, *Party Autonomy in Private International Law* (Cambridge: Cambridge University Press, 2018), 250.
[113] Trevor C. Hartley, *Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*, Oxford Private International Law Series (Oxford: Oxford University Press, 2013), 252.
[114] The Brussels I Regulation (Recast) provides a negative definition of a consumer. By contrast, Article 2(1)(a) of the Hague Convention on Choice of Court Agreements gives a positive definition, stating that a consumer is "a natural person acting primarily for personal, family or household purposes." Nonetheless, both definitions are considered to be the same. *See* Hartley, *Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*, 252.
[115] *See* Case C-464/01 *Johann Gruber v. Bay Wa AG* [2005] ECR I-439.

consumers"[116] and the term "consumer" refers to a natural person, which excludes a corporation.[117] Therefore, it would appear that a consumer within the Brussels I regime must be a natural person and the special jurisdictional rules in favor of a consumer do not apply to corporations or other legal persons even if they are not acting in the course of business or intending for profit.[118]

Article 17 paragraph 1 further stipulates that a consumer contract must be one of the following transactions:

> (a) it is a contract for the sale of goods on instalment credit terms;
> (b) it is a contract for a loan repayable by installments, or for any other form of credit, made to finance the sale of goods; or
> (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

In particular, Subparagraph (c) requires a link between a consumer and a business operator to ensure that special jurisdictional rules apply only where a business operator in some way aims his or her commercial or professional activities at the Member State of the consumer's domicile.[119] First, a consumer must have entered into a contractual relation "with a person who pursues commercial or professional activities." Second, the link between the consumer and the business operator may be established either by the facts that a business operator has pursued commercial or professional activities in the State of the consumer's domicile, or that he or she has directed such activities, by any means, to that State or to several States including that State. Moreover, the consumer contract in question must fall within the scope of the activities pursued or be directed by the business operator in the State of the consumer's domicile.[120]

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[116] *See* Case 150/77 *Bertrand v Paul Ott KG* [1978] ECR 1431.
[117] *See* Cases C-541/99 and C-542/99 *Cape and Ideal service* [2001] ECR I-9059 (The CJEU held that "[t]he term 'consumer', as defined in Article 2(b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, must be interpreted as referring solely to natural persons.).
[118] Hélène Gaudemet-Tallon, *Compétence et Exécution Des Jugements En Europe: Règlement No 44-2001, Conventions de Bruxelles 1968, et de Lugano 1988 et 2007*, 4th ed. (Paris: L.G.D.J., 2010), 290.
[119] Hartley, Choice-of-Court Agreements under the European and International Instruments, 255.
[120] Ibid, 256–57.

Therefore, unlike the Japanese Code of Civil Procedure, special jurisdictional rules under the Brussels I regime would aim to protect only passive consumers who mostly limit their demand for goods to their countries of residence and do not take the initiative to enter into the international market.[121] In addition, special jurisdictional rules in favor of consumers would apply to all sorts of consumer contracts except a contract of transport.[122] However, "a contract which, for an inclusive price, provides for a combination of travel and accommodation" would be exceptionally included in the scope of consumer contracts.[123]

(iii) Consumer arbitration

Both Japan and the European Union also recognize the behavioral constraints and the imbalance of the bargaining power between consumers and business operators, which may lead to arbitration agreements detrimental to consumers. Thus, they have created special protective regimes for consumer arbitration. However, they use different regulatory techniques in regulating arbitration agreements with regard to consumer disputes.

(a) Japan

The Japanese Arbitration Act provides that civil and commercial matters that could be settled between the parties would be arbitrable except certain family matters, such as divorce or the dissolution of an adoptive relation.[124] In principle, consumer disputes would be also arbitrable, and post-dispute arbitration agreements between consumers and business operators would be valid. On the other hand, pre-dispute arbitration agreements would be valid to the extent permitted by Article 3 of the

[121] Nishitani, "International Jurisdiction of Japanese Courts in a Comparative Perspective," 268. *Cf.* Thomas Thiede and Judith Schacherreiter, "The Recent Shift from the Passive to the Active Consumer on the Causal Link between 'directing Activities (at the Consumer's State)' and the Consumer's Conclusion of the Contract with Respect to Article 17.1 (c) Brussels I Regulation," *Austrian Law Journal*, no. 1 (2015): 23–31.
[122] Giesela Rühl, "The Consumer's Jurisdictional Privilege: On (Missing) Legislative and (Misguided) Judicial Action," *Cross-Border Litigation in Europe: The Brussels I Recast Regulation as a Panacea?*, ed. Franco Ferrari and Francesca Ragno (Padova: CEDAM, 2015), 80.
[123] *See* Art. 17(3) of the Brussels I Regulation (Recast).
[124] *See* Art. 13 (1) of the Japanese Arbitration Act.

supplementary provisions to the Japanese Arbitration Act. The special protection regime for consumer arbitration is as follows:

> Article 3. (Exception Relating to Arbitration Agreements Concluded between Consumers and Businesses)
>
> (1) For the time being until otherwise enacted, any arbitration agreements (excluding arbitration agreements described in the following article; hereafter in this article referred to as the "consumer arbitration agreement") concluded between consumers (which hereafter in this article shall mean consumers as described in article 2, paragraph (1) of the Consumer Contract Act [Law No. 61 of 2000]) and businesses (which hereafter in this article shall mean businesses as described in article 2, paragraph (2) of the same law) subsequent to the enforcement of this Law, the subject of which constitutes civil disputes that may arise between them in the future, shall follow the provisions described in paragraphs (2) through (7).
> (2) A consumer may cancel a consumer arbitration agreement. Provided, this shall not apply in the event that the consumer is a claimant in arbitral proceedings based on the consumer arbitration agreement.
> (3) In the case where a business is the claimant in arbitral proceedings based on a consumer arbitration agreement, following the constitution of an arbitral tribunal the business shall request without delay that an oral hearing be conducted under the provisions of article 32, paragraph (1). In such case the arbitral tribunal shall make a ruling to carry out the oral hearing and notify the parties of the date, time and place therefor.
> (4) The arbitral tribunal shall carry out the oral hearing described in the preceding paragraph prior to any other proceedings in the arbitral proceedings.
> (5) Notice to the party who is a consumer based on the provisions of paragraph (3) shall be made by the sending of a document stating the following matters. In such case, the arbitral tribunal shall make every effort to use as simple an expression as possible with respect to matters described in items (ii) through (v): (i) date, time and place of the oral hearing; (ii) that in the case where an arbitration agreement exists, the arbitral award with respect to the civil dispute constituting its subject shall have the same effect as a final and conclusive judgment of the court; (iii) that in the case where an arbitration agreement exists, any suit filed with the court in respect of the civil dispute constituting its subject will be dismissed irrespective of the timing when the suit is filed before or after the arbitral award; (iv) that the consumer may cancel the consumer arbitration agreement; and (v) that in the event that the party who is the consumer fails to appear on the date of the oral hearing described in item (i), said party shall be deemed to have canceled the consumer arbitration agreement.
> (6) On the day of the oral hearing described in paragraph (3), the arbitral tribunal shall explain the matters described in items (ii) through (iv) of the preceding paragraph orally to the party who is a consumer. In such case, where the party does not express an intent to waive its right of cancelation described in paragraph (2), said party shall be deemed to have canceled the consumer arbitration agreement.
> (7) In the event that the party who is a consumer fails to appear on the date of the oral hearing described in paragraph (3), said party shall be deemed to have canceled the consumer arbitration agreement.

Firstly, a consumer may cancel a consumer arbitration agreement[125], except when he or she files a request for arbitration according to that consumer arbitration agreement.[126] Secondly, in the case where a business operator is a claimant, the arbitral tribunal must send a written notice using as simple an expression as possible to the consumer. The notice must state, among other things, the date and place of the oral hearing, the effects of the arbitration agreement, the consumer's right to cancel the consumer arbitration agreement, and the fact that if the consumer fails to appear on the date of the oral hearing, he or she shall be deemed to have canceled the consumer arbitration agreement.[127] Thirdly, on the day of the oral hearing, the arbitral tribunal must orally explain the matters stated in the notice to the consumer. Moreover, if the consumer does not express an intent to waive his or her right of cancelation, he or she would be deemed to have canceled the consumer arbitration agreement.[128] Finally, in the case that the consumer does not attend the oral hearing on the designated date, he or she would be deemed to have canceled the consumer arbitration agreement.[129]

On the one hand, the Japanese Arbitration Act respects party autonomy in arbitration, including the freedom of consumers in choosing arbitration as a means of dispute resolution. On the other hand, it utilizes various regulatory techniques to prevent consumers from their systematic cognitive biases and from being abused by the stronger parties. For example, it uses the information disclosure mandate, such as a consumer-friendly written notice and an oral explanation to reduce information problems and clarify the consequences of consumer arbitration. It also confers consumers the right to unilaterally cancel a pre-dispute consumer arbitration agreement even when they have already entered into an arbitration

[125] Art. 3 (1) of the supplementary provisions to the Japanese Arbitration Act defines consumer arbitration agreements as "any arbitration agreements … concluded between consumers (which hereafter in this article shall mean consumers as described in article 2, paragraph (1) of the Consumer Contract Act [Law No. 61 of 2000]) and businesses (which hereafter in this article shall mean businesses as described in article 2, paragraph (2) of the same law)."
[126] *See* Art. 3 (2) of the supplementary provisions to the Japanese Arbitration Act.
[127] *See* Art. 3 (5) of the supplementary provisions to the Japanese Arbitration Act.
[128] *See* Art. 3 (6) of the supplementary provisions to the Japanese Arbitration Act.
[129] *See* Art. 3 (7) of the supplementary provisions to the Japanese Arbitration Act.

agreement.[130] This combination of legal tools would effectively protect consumers in the context of arbitration, while preserving a certain degree of party autonomy.

(b) European Union

Contrary to the Japanese regime, the European Union has adopted a more restrictive approach toward consumer arbitration. The Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts ("the Unfair Terms Directive"), which is the core pillar of the protection of consumers concerning unfair contractual terms in the European legislation, has created a special protective regime for consumers[131] in arbitration agreements. Article 3 of the Directive defines unfair terms as follows:

> 1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
>
> 2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.
>
> The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.
>
> Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.
>
> 3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.

Furthermore, Article 1 (q) of the Annex to the Directive provides that contractual terms which have the object or effect of "excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions" may be regarded as unfair. As a result, Article 3 in conjunction with

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[130] *See* Kojima (小島) and Inomata (猪股), *Arbitration Law [仲裁法]*, 156–57.

[131] *See* Art. 2 of the Unfair Terms Directive ("'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;").

Article 1 (q) of the Annex has established a strong presumption that a pre-dispute consumer arbitration agreement is unfair and thus invalid.[132] However, it should be noted that this presumption does not imply that all consumer arbitration agreements would be necessarily invalid and unenforceable. Since examples contained in the Annex are only indicative[133], it would depend on the circumstances and contexts of each case whether such arbitration agreements would be considered to be unfair.[134] Therefore, business operators may still override this presumption by demonstrating that the contents and arbitral procedures stipulated in the consumer arbitration agreements are not unfair to consumers pursuant to standards adopted by national legislation.[135]

The implementation of the Unfair Terms Directive varies among the Member States.[136] Some jurisdictions have implemented this in a more paternalistic way than others. For instance, the Swedish Arbitration Act completely invalidates a pre-dispute arbitration agreement concerning the sale of goods, services, or any other products supplied principally for private use between a business operator and a consumer.[137] On the other hand, in England and Wales, the Arbitration Act 1996 differentiates between consumer arbitration agreements covering claims above and below £5,000. Pre-dispute consumer

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[132] Pablo Cortés and Tony Cole, "Legislating for an Effective and Legitimate System of Online Consumer Arbitration," in *Arbitration in the Digital Age: The Brave New World of Arbitration*, ed. Maud Piers and Christian Aschauer (Cambridge: Cambridge University Press, 2018), 226.

[133] *See* Art. 3 (3) of the Unfair Terms Directive and the 17th recital in the Preamble to the Directive ("for the purposes of this Directive, the annexed list of terms can be of indicative value only…").

[134] *See e.g.*, Case C-342/13 *Katalin Sebestyén v. Zsolt Csaba Kővári and Others* [2014] ECR 1857, para. 25.

[135] Pablo Cortés and Tony Cole, "Legislating for an Effective and Legitimate System of Online Consumer Arbitration," 226.

[136] The Unfair Terms Directive Art. 6 para. 1:

> "Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms."

[137] The Swedish Arbitration Act (SFS 1999:116) Section 6 para. 1:

> "Where a dispute between a business enterprise and a consumer concerns goods, services, or any other products supplied principally for private use, an arbitration agreement may not be invoked where such was entered into prior to the dispute. However, such agreements shall apply with respect to rental or lease relationships where, through the agreement, a regional rent tribunal or a regional tenancies tribunal is appointed as an arbitral tribunal and the provisions of Chapter 8, section 28 or Chapter 12, section 66 of the Real Estate Code do not prescribe otherwise."

arbitration agreements regarding claims of £5000 or less are automatically considered to be unfair[138], while those concerning claims exceeding £5,000 are subject to the fairness test.[139] Additionally, English law appears to presume that consumers for claims exceeding £5,000 would be in relatively strong bargaining positions. Therefore, robust measures, such as the entire exclusion of party autonomy, would not be necessary.[140]

5.2.3 Special Jurisdictional Regime in Employment Contracts

(i) Japan

The Japanese Code of Civil Procedure has also established a special jurisdictional regime in matters concerning individual labor disputes. Similar to consumers, individual employees are regarded as being in a weak position due to significant imbalances of bargaining power and economic status between employees and their employers. As a consequence, it would be difficult for employees to negotiate with employers on an equal basis to delete an unfair choice of court agreement. Therefore, the Code gives protection to individual employees by the creation of special jurisdictional rules in favor of employees. Article 3-7 (6) provides:

> An agreement as referred to in paragraph (1) which covers an Individual Civil Labor Dispute that may arise in the future is valid only in the following cases:
>
> (i) if the agreement is made at the time a labor contract ends, and establishes that an action may be filed with the courts of the country where the place that the labor was being provided as of that time is located (except in the case set forth in the following item, an agreement that an action may be filed only with the courts of such a country is deemed not to preclude the filing of an action with the courts of any other country);

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[138] *See* Sections 89 and 91 of the Arbitration Act 1996 in conjunction with the Office of Fair Trading's Guidance for the Unfair Terms in Consumer Contracts Regulation 1999 para. 17.2. *See also*, the Unfair Arbitration Agreements (Specified Amount) Order 1999.
[139] Pablo Cortés and Tony Cole, "Legislating for an Effective and Legitimate System of Online Consumer Arbitration," 226. *See also*, Westminster Building Company v. Beckingham [2004] BLR 508 (QB) para. 45; Allen Wilson v. Buckingham [2005] EWHC 1165 (TCC) para. 43.
[140] Rosenfeld, "Limits to Party Autonomy to Protect Weaker Parties in International Arbitration," 428.

(ii) if the worker, in accordance with said agreement, files an action with the courts of the agreed-upon country; or if the enterprise files an action with the Japanese courts or with the courts of a foreign country and the worker invokes said agreement.

(a) General principle

In general, Article 3-7 (6) invalidates a pre-dispute choice of court agreement that covers disputes regarding individual civil labor disputes, except for two cases provided in Subparagraphs (i) and (ii). On the other hand, a choice of court agreement concluded after the dispute has arisen would remain valid. This is because, in the post-dispute situation, the point at issue in dispute as well as the risks and consequences of a choice of court agreement would become salient. Furthermore, an employer could no longer use its economic status and superior bargaining power to compel an employee to enter into a choice of court agreement. Therefore, it could be expected that employees would make a careful judgment on the choice of court agreement before the conclusion. Under this condition, jurisdictional rules and requirements generally applicable to the choice of court agreements would be deemed sufficient to protect their interests.[141]

(b) Definition of individual civil labor disputes

Article 3-4 (2) of the Japanese Code of Civil Procedure defines an individual civil labor dispute as follows:

[A] dispute over a civil matter that arises between an individual worker and that worker's employer with regard to the existence or absence of a labor contract or any other particulars of their labor relations

[141] Satō （佐藤） and Kobayashi （小林）, *2011 Reform of the Code of Civil Procedure etc.: Legislation on International Jurisdiction [一問一答　平成 23 年　民事訴訟法等改正　国際裁判管轄法制の整備]*, 149–50.

This definition is the same as that of the Labor Tribunal Act[142] encompassing claims relating to labor contracts and labor relations, such as the existence of labor contracts, the validity of dismissal, and a request for the payment of wages and retirement allowance.[143] Firstly, the dispute must concern "labor relations." Therefore, a personal dispute between an employee and an employer, such as a personal loan agreement, which is not related to labor contracts or any other particulars of their labor relations, would be excluded. Secondly, the dispute must be between an "individual employee" and an employer. As a result, labor unions, trade unions, and other labor organizations would be excluded from the scope of the individual employee. Furthermore, it would generally be understood that the dispute regarding the recruitment of employees would not fall within the scope of the individual civil labor dispute because it would concern a process before the conclusion of an employment contract, and disputants would still have no contractual or labor relations.[144]

(c) Subparagraph (i)

The first situation where a choice of court agreement regarding labor disputes would be exceptionally permitted under Article 3-7 (6) (i) would be when the agreement was made at the time a labor contract ended, and an employee and employer agreed to submit their dispute to the courts of the country where the place that the labor was being provided at that time. "The place that the labor was being provided" means the place where an employee actually provided the labor, which may be different from the place designated in the labor contract. Furthermore, an employee may have multiple places of

[142] *See* Art. 1 of the Labor Tribunal Act.

[143] Kitasaka （北坂）, "International Jurisdiction in Matters Concerning Consumer and Labor Disputes [消費者契約事件・労働関係事件の国際裁判管轄]," 188.

[144] Satō （佐藤） and Kobayashi （小林）, *2011 Reform of the Code of Civil Procedure etc.: Legislation on International Jurisdiction [一問一答　平成 23 年　民事訴訟法等改正　国際裁判管轄法制の整備]*, 95.

labor if he or she provides labor in various countries.[145] In the case that such a place is not ascertainable, the location of the office that hired the employee would be deemed as the place of labor.[146]

When the labor contract ends, employers could no longer use their superior bargaining power and economic status to coerce employees. Moreover, the country where the place that the labor was being provided at the time when the labor contract ended would usually be the same country where employees have residences. Thus, it could be expected that they would be familiar with the legal system, business practice, and language of that country. In addition, the institution of the legal proceedings in the courts located in that country would unlikely be contrary to the expectations of both the employees and employers because they could predict that labor disputes may be resolved at the place where the employees provided their labor.[147] Witnesses and evidence concerning this dispute would also tend to be located in that place. Therefore, a choice of court agreement under this circumstance would be less likely to adversely affect the interests of employees.

Furthermore, the sentence provided in parentheses in Subparagraph (i) stipulates that an exclusive choice of court agreement that designates specific courts to the exclusion of the jurisdiction of any other courts would be deemed a non-exclusive choice of court agreement. This would mean that even if the parties agreed to exclusively submit their dispute to a foreign court, employees and employers may still be able to bring proceedings before Japanese courts if jurisdictional requirements under other provisions were met, such as Articles 3-2, 3-3, and 3-4 (2). Similar to consumer protection, this rule would aim to secure access to Japanese courts for employees.[148]

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[145] Ibid, 97.
[146] *See* Art. 3-4 (2) of the Japanese Code of Civil Procedure.
[147] Satō （佐藤） and Kobayashi （小林）, *2011 Reform of the Code of Civil Procedure etc.: Legislation on International Jurisdiction [一問一答　平成 23 年　民事訴訟法等改正　国際裁判管轄法制の整備]*, 151–52.
[148] Ibid, 152.

(d) Subparagraph (ii)

The second situation where the validity of the choice of court agreement in labor disputes could be upheld under Article 3-7 (6) (ii) would be when the employees themselves bring legal action before the courts according to the choice of court agreement, or invoke the said agreement when they are sued by their employers. The rationale for this legal policy would be similar to that of the post-dispute situation where the risks and benefits of the choice of court agreement would become salient. Furthermore, since employees themselves would choose to give effect to a choice of court agreement, it would be unlikely that this would harm their interests.[149] This provision could be justified through the consent of an employee to renounce his or her rights protected by special jurisdictional rules.[150]

As a result, an employee may bring legal action against an employer before a foreign court would be designated in the choice of court agreement, and even when that court was not located in a country where the employee provided labor at the time when the labor contract ended. In addition, in such case, after instituting a civil action in a foreign court, if the employee filed the same lawsuit again in the Japanese court, this lawsuit may be dismissed due to the fact that the employee had already invoked the choice of court agreement. In contrast, if an employer filed a complaint against an employee in the Japanese court according to the general jurisdictional rules, such as Article 3-3, the employee could invoke an exclusive choice of court agreement in favor of a foreign court to dismiss this lawsuit.[151]

(ii) European Union

In general, procedural protection with regard to employees in employment contracts is principally similar to that of consumers. Section 5 of Chapter II (Articles 20-23) of the Brussels

[149] Ibid, 154.
[150] Nishitani, "International Jurisdiction of Japanese Courts in a Comparative Perspective," 269.
[151] See Kitasaka （北坂）, "International Jurisdiction in Matters Concerning Consumer and Labor Disputes [消費者契約事件・労働関係事件の国際裁判管轄]," 190–92.

Regulation provides special jurisdictional rules in "matters relating individual contracts of employment." In particular, Article 21(1) of the Regulation states that the employee may sue the employer in the courts of the employer's domicile or in the courts of the place of the employee's habitual employment.[152] On the other hand, the employer may bring proceedings against the employee only in the courts of the employee's domicile.[153]

(a) General principle

In principle, the choice of court agreement that covers disputes concerning employment contracts would be invalid unless it met one of the special conditions specified in Article 23 of the Brussels I Regulation (Recast). Article 23 provides:

> The provisions of this Section may be departed from only by an agreement:
> (1) which is entered into after the dispute has arisen; or
> (2) which allows the employee to bring proceedings in courts other than those indicated in this Section.

The above rules resemble those for consumers provided in Article 19 (1)(2). Employees and their employers would be free to agree on the competent courts after the dispute has arisen. The rationale for this is that the risks of the choice of court agreements would become more salient at that time point, and employees could take advice on whether they should conclude such agreements with the employers.[154] Moreover, such agreements after a dispute has arisen would likely be made in practice.[155] Alternatively, a non-exclusive choice of court agreement for the sole benefit of an employee would be permitted.

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[152] The Brussels I Regulation (Recast) Art. 21(1):
> "An employer domiciled in a Member State may be sued:
> (a) in the courts of the Member State in which he is domiciled; or
> (b) in another Member State:
> (i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or
> (ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business."

[153] *See* Art. 22(1) of the The Brussels I Regulation (Recast).
[154] Hartley, *Choice-of-Court Agreements under the European and International Instruments*, 277.
[155] Mills, *Party Autonomy in Private International Law*, 253.

Additionally, both parties may agree that the employee could sue the employer in additional courts other than those indicated in Section 5. This exception would apply only when the employee brought proceedings against the employer. As such, this agreement would be allowed because it would be entirely in the employee's interest.[156]

(b) Definition of individual contracts of employment

Although Section 5 of the Brussels I Regulation provides special jurisdictional rules in "matters relating to individual contracts of employment,"[157] this defines neither the concept of an "employee", nor that of "individual contracts of employment." In this regard, the case law of the CJEU provides insightful guidance on how to determine the notions of employees and employment contracts.[158] In *Andrea Raccanelli v. Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, the CJEU held that "[a]ny person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'." The Court further stated that "[t]he essential feature of an employment relationship is… that for a certain period of time a person performs services for and under the direction of another person in return for which he or she receives remuneration."[159] As a result, a contract for professional services, such as an architect who is not under the direct supervision of the other party and performs his or her professional activities independently would be excluded from the scope of employment contracts.[160]

Furthermore, Article 20(1) of the Brussels I Regulation requires that the dispute be related to employment contracts. Therefore, the dispute must concern the rights and obligations arising from the

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[156] Hartley, *Choice-of-Court Agreements under the European and International Instruments*, 277.
[157] *See* Art. 20(1) of the Brussels I Regulation (Recast).
[158] *See* Aleš Galič, "International Jurisdiction over Individual Contracts of Employment," in *Transnational, European, and National Labour Relations: Flexicurity and New Economy*, ed. Gerald G. Sander, Vesna Tomljenović, and Nada Bodiroga-Vukobrat 1st ed. (New York: Springer International Publishing, 2018), 111.
[159] Case C-94/07 *Andrea Raccanelli v. Max-Planck-Gesellschaft zur Förderung der Wissenschaften* [2008] ECR I- 5939.
[160] *See* Case 266/85 *Hassan Shenavai v. Klaus Kreischer* [1987] ECR-239.

contract, including those derived from statutes. Consequently, tortuous claims concerning noncontractual damages would not fall within the purview of Article 20.[161] In addition, the Brussels I Regulation limits the scope of jurisdictional protection only to "individual" contracts of employment. Thus, trade unions and collective labor disputes would be excluded from the scope of special jurisdictional rules.[162]

(iii) Employment arbitration

As previously stated, a pre-dispute arbitration agreement concerning individual labor disputes would be null and void in Japan. The Japanese Arbitration Act expressly invalidates arbitration agreements between individual employees and employers with respect to individual labor-related disputes that may arise in the future.[163] This special rule is based on the presumption that employees, in general, do not understand the significance and consequences of an arbitration agreement. Furthermore, even if they recognize its significance, they could not give up their jobs or bargain for a better term with their employers due to the substantial imbalance of the bargaining power and economic status.[164]

On the other hand, some countries provide a special protection regime for employees in the context of arbitration. For example, in Belgium, pre-dispute arbitration agreements between employees and their employers are generally invalid.[165] Disputes concerning employment contracts can only be submitted to arbitration only after they have occurred. However, the Belgian legislator has created two exceptions where certain labor disputes would be arbitrable. Employees, who are entrusted with the

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[161] Galič, "International Jurisdiction over Individual Contracts of Employment," 113–14.
[162] Ibid, 114, 116.
[163] Art. 4 of the supplementary provision of the Japanese Arbitration Act:
> "For the time being until otherwise enacted, any arbitration agreements concluded following the enforcement of this Law, the subject of which constitutes individual labor-related disputes (which means individual labor-related disputes as described in article 1 of the Law on Promoting the Resolution of Individual Labor Disputes [Law No.112 of 2001]) that may arise in the future, shall be null and void."

[164] *See* Kojima (小島) and Inomata (猪股), *Arbitration Law [仲裁法]*, 157–58.
[165] *See* Art. 1676 §5 of the Judicial Code in conjunction with Art. 13 of the Belgian Employment Contracts Law of 3 July 1978.

daily management of the company and whose incomes pass a substantial threshold[166], would be allowed to enter into a pre-dispute arbitration agreement with employers. Employees with significant management responsibilities would also fall within the scope of exceptions.[167] These exceptions would be based on the assumption that high-ranking employees or those who have high incomes would be more informed and sophisticated enough to use arbitration and would be less susceptible to abuse by employers compared to normal employees.[168]

5.2.4 Formality Requirements

Legislators in many countries and international instruments have decided to set requirements of form for a choice of court agreement. Since it would be difficult to accurately ascertain or prove the actual intentions of the parties, the formality requirements would help to improve the authenticity of the intentions and establish that the parties have consented to the choice of court agreement. The Court of Justice of the European Union ("CJEU") has stated that "the purpose of the requirements as to form…is to ensure that consensus between the parties is in fact established."[169] Therefore, if the formality requirements were satisfied, the court may conclude that there was consent between the parties.[170] Although these requirements would aim to protect both parties to a choice of court agreement in determining the real consent, they could function as information disclosure and warnings for weak

[166] The income threshold as of May 2021 is €71,523 gross per year. This amount is subject to indexation each year. *See* Nicolas Simon, "The Labour and Employment Disputes Review: Belgium," The Law Reviews, May 20, 2021, https://thelawreviews.co.uk/title/the-labour-and-employment-disputes-review/belgium#footnote-019-backlink. *See also,* Flip Petillion, Jan Janssen, and Diégo Noesen, "Arbitration Procedures and Practice in Belgium: Overview," Thomson Reuters Practical Law, accessed November 19, 2021, http://uk.practicallaw.thomsonreuters.com/w-013-9378?transitionType=Default&contextData=(sc.Default)&firstPage=true.
[167] *See* Art. 69 of the Belgian Employment Contracts Law of 3 July 1978.
[168] Rosenfeld, "Limits to Party Autonomy to Protect Weaker Parties in International Arbitration," 424.
[169] Case C-387/98 *Coreck Maritime v. Handelsveem* [2000] ECR 9337, para. 13.
[170] Trevor C. Hartley, *Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*, Oxford Private International Law Series (Oxford, United Kingdom: Oxford University Press, 2013), 144.

parties to pay more attention to the existence of a choice of court agreement and carefully consider its consequences and potential harm before concluding such an agreement.[171]

For instance, Article 3-7 of the Japanese Code of Civil Procedure[172], Article 25 (1) of the Brussels I Regulation (Recast)[173], and Article 3 (c) of the Hague Convention on Choice of Court Agreements[174] similarly require that a choice of court agreement be in writing. They also extend the "in writing" requirement to cover electronic means of data transmission or electronic records, which could be retrievable, such as fax and e-mail.[175] Moreover, with the aim to specifically protect a consumer, the Chinese Civil Procedure Law further requires a business operator to notify or remind a consumer of the

[171] *See* Trevor C. Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law*, 2nd ed. (Cambridge: Cambridge University Press, 2015), 182–83.

[172] Japanese Code of Civil Procedure Art. 3-7:

> "(1) Parties may establish, by agreement, the country in which they are permitted to file an action with the courts.
> (2) The agreement as referred to in the preceding paragraph is not valid unless it is made regarding actions that are based on a specific legal relationship, and executed by means of a paper document.
> (3) If Electronic or Magnetic Records (meaning records used in computer data processing which are created in electronic form, magnetic form, or any other form that is otherwise impossible to perceive through the human senses alone; the same applies hereinafter) in which the content of the agreement is recorded are used to execute the agreement as referred to in paragraph (1), the agreement is deemed to have been executed by means of a paper document and the provisions of the preceding paragraph apply."

[173] The Brussels I Regulation (Recast) Art. 25 (1):

> "The agreement conferring jurisdiction shall be either:
> (a) in writing or evidenced in writing;
> (b) in a form which accords with practices which the parties have established between themselves; or
> (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned."

[174] The Hague Convention on Choice of Court Agreements Art. 3 (c):

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

[175] Trevor Hartley and Masato Dogauchi, *Explanatory Report on Convention of 30 June 2005 on Choice of Court Agreements.* (Mortsel: Intersentia Uitgevers NV, 2013), 53 para. 112.

existence of a choice of court agreement used in standard contracts by reasonable means[176], in addition to the written form requirement.[177]

As for arbitration, Article II of the New York Convention[178] and a large majority of national arbitration laws[179] impose the "in writing" requirement on an arbitration agreement. The rationale for this requirement is similar to that of a choice of court agreement, thereby aiming to ascertain the actual intentions and confirm the consent of the parties. This would also help to draw weak parties' attention to arbitration agreements and prevent them from entering into such agreements without careful consideration. Some jurisdictions have further introduced a stricter requirement in order to protect weak parties. For example, Article 4 of the Brazilian Arbitration Law requires that an arbitration agreement in a consumer standard contract be printed in bold letters, or separately signed by a consumer in a separate document.[180] Furthermore, arbitration agreements in consumer contracts in the Czech Republic were

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[176] *See* Art. 31 of the Interpretations of the Supreme People's Court on Applicability of the Civil Procedure Law of the People's Republic of China.

[177] The Chinese Civil Procedure Law Art. 34:

> "Parties to a dispute over contract or any other right or interest in a property may…choose the court for the place where the defendant is domiciled, or where the contract is performed or signed, or where the plaintiff is domiciled, or where the subject matter is located or any other place that has actual connection with the dispute as the court having jurisdiction over their dispute by a written agreement."

[178] New York Convention Art. II:

> "1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

[179] *See e.g.*, Art. 7 of the UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006), Art. 13 of the Japanese Arbitration Act, Art. 5 of the English Arbitration Act 1996, Art. 11 of the Thai Arbitration Act B.E. 2530 (1987).

[180] The Brazilian Arbitration Act (Law No. 9.307/96) Art. 4:

> "An arbitration clause is an agreement by which the parties to a contract undertake to submit to arbitration any disputes that might arise with respect to that contract.
>
> An arbitration clause will be in writing, and it may be inserted into the contract itself or into a separate document to which it refers.

required by the Czech Arbitration Act[181] to provide information, such as the arbitrator, arbitration proceedings, the place of arbitration, arbitration fees and other expenses, the delivery of the arbitral award, and the enforceability of the award. The Czech legislator utilized the information disclosure mandate to correct asymmetric information problems and consumers' cognitive biases that may exist during the decision-making process.[182] However, it should be noted that this information requirement in consumer arbitrations was abolished and consumer disputes have been no longer arbitrable in the Czech Republic since December 2016.[183]

5.2.5 Reflections

The survey of state practices above reveals that mandatory rules aimed at protecting consumers and employees in the context of the choice of court and arbitration agreements comprise various legal techniques ranging from disclosure requirements, the right to withdraw, and special jurisdictional regimes to the exclusion of party autonomy in choice of forum. The scopes of the consumers and employees also vary depending on the country. Some jurisdictions set the amount of claims or income threshold for consumers and employees in order to receive special protection. This section aimed to propose an efficient framework for jurisdictional protection of such weak parties in the context of choice of court agreements by using behavioral economics to analyze each legal technique and the scopes of the consumers and employees.

> In adhesion contracts, an arbitration clause will only be valid if the adhering party takes the initiative to file an arbitration proceeding or if it expressly agrees with its initiation, as long as it is in an attached written document or in boldface type, with a signature or special approval for that clause.
>
> In a consumer relationship, established by means of an adhesion contract, the arbitration clause will only take effect if the adhering party takes the initiative to file an arbitration proceeding, or to expressly agree with its institution."

[181] *See* Art. 2 para. 5 of the Act No. 216/1994 Coll., on Arbitration Proceedings and on Enforcement of Arbitration Awards (prior to 2016).
[182] Rosenfeld, "Limits to Party Autonomy to Protect Weaker Parties in International Arbitration," 430.
[183] Martin Hrodek and Martina Závodná, "The Baker McKenzie International Arbitration Yearbook: Czech Republic," The 10th Aniversary Edition 2016-2017 (Baker Mckenzie, 2017), 142 https://globalarbitrationnews.com/wp-content/uploads/2017/06/Czech-Republic.pdf.

(i) Desirable form of regulation for jurisdictional protection

(a) Disclosure regulation

Some jurisdictions use intervention in the form of disclosure mandates to protect weak parties. For example, a business operator would be required to notify a consumer of the existence of a choice of court agreement used in standard contracts through reasonable means[184], or provide detailed information on certain arbitration proceedings in consumer arbitration.[185] These regulations would presume that weak parties would better evaluate the costs and benefits of the transactions if they were provided with sufficient knowledge.[186] However, the disclosure regulation would only be effective when the disclosed information was properly read and understood. This would appear to be insufficient, particularly in the context of the choice of court agreements in consumer and employment contracts.

Unlike other provisions, the choice of court agreements would tend to be complex and nonsalient as being hidden among other contractual clauses. This chapter has shown that providing detailed information on a choice of court agreement would rather cause an information overload problem, which could confuse weak parties in making decisions or result in the ignorance of the whole agreement.[187] Information disclosures would also be subject to the anchoring effect, thus allowing stronger parties to affect and frame weak parties' decisions.[188] Furthermore, notwithstanding the information provided, the concept of jurisdiction and cross-border litigation remains incomprehensible for the average layperson, such as consumers and employees. In addition, the disclosure regulation would incur some remarkable costs stemming from the compilation and dissemination of information,

[184] *See* Art. 31 of the Interpretations of the Supreme People's Court on Applicability of the Civil Procedure Law of the People's Republic of China.
[185] *See* Art. 2 para. 5 of the Act No. 216/1994 Coll., on Arbitration Proceedings and on Enforcement of Arbitration Awards (prior to 2016).
[186] *See e.g.* Larry Lawrence, "Toward a More Efficient and Just Economy: An Argument for Limited Enforcement of Consumer Promises," *Ohio State Law Journal* 48, no. 3 (1987): 837.
[187] *See* Section 5.1.1 (iv).
[188] *See* Section 5.1.1 (iii). *See also*, Richard L. Hasen, "Efficiency under Informational Asymmetry: The Effect of Framing on Legal Rules," *UCLA Law Review* 38 (1990): 397.

which may ultimately result in higher transaction prices.[189] Therefore, in considering the limited benefits of the disclosure mandate, which weak parties might receive and the costs of providing information, this type of regulation would be unlikely to provide effective protection for weak parties in the context of the choice of court agreements.

(b) Exclusion of party autonomy in choice of court

Some lawmakers have excluded the freedom to select jurisdictions in consumer and labor disputes from the scope of party autonomy.[190] This approach generally confers jurisdiction to courts that are most favorable to weak parties, such as those of their domiciles. On the one hand, this would provide powerful jurisdictional protection for weak parties because it could ensure that weak parties would enjoy home-court advantages and prevent stronger parties from exercising their superior bargaining power to choose jurisdictions that unilaterally favor their interests. On the other hand, the full exclusion of party autonomy in the choice of court may be excessively paternalistic and introduce substantial costs of intervention. Parties in consumer and employment contracts would be then left with no choices to choose the jurisdiction, which might suit their mutual interests even when they are fully aware of the consequences, or the risks of choice of court agreements are significantly low.

Moreover, this approach could not resolve the problem of people's heterogeneity in the preferences, needs, and degrees of sophistication. Consumers and employees do not necessarily have the same preferences or the same level of information processing capability and economic status. As a result, the demand for paternalistic rules and their actual effects may be different from one person to another. Likewise, paternalistic rules aimed at protecting less sophisticated weak parties may adversely affect certain weak parties with a higher degree of sophistication.

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[189] *See* Beales, Craswell, and Salop, "The Efficient Regulation of Consumer Information," 534.
[190] *See e.g.* Art. 3149 of the Civil Code of Québec; Art. 4 of the supplementary provision of the Japanese Arbitration Act.

(c) Right to withdraw

In some countries, weak parties are given jurisdictional protection in the form of the right to withdraw from transactions with stronger parties. For example, in the context of consumer arbitration, the Japanese Arbitration Act uniquely established the right to withdraw from an arbitration agreement for the contracting parties who were consumers. Consumers are permitted to cancel a pre-dispute arbitration agreement except when they file a request for arbitration according to that consumer arbitration agreement.[191] This approach could be applied to provide jurisdictional protection for weak parties in the context of the choice of agreements as well. This would be similar to a "cooling-off period", which has been widely used in many forms of consumer rights legislation in that this would allow a consumer to unilaterally cancel a specific transaction.[192] This regulatory technique aims to strike the balance between the strong protection of weak parties and the respect for party autonomy in choice of forum.

However, the approach used in the Japanese Arbitration Act above entails the risks of legal uncertainty and abuse by opportunistic consumers. Unlike a typical cooling-off period, there would be no specific time frame for limiting the exercise of the right to withdraw from a consumer arbitration agreement. This could cause considerable uncertainty in business transactions and create additional expenses for commercial parties. This would also be unrealistic to set a time limit for exercising the right to withdraw in the context of the choice of court agreements since this would be unpredictable whether and when a dispute would arise. Ultimately, the burden of additional expenses and legal uncertainty might be shifted to consumers in the form of higher prices.[193]

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[191] *See* Article 3 of the supplementary provisions to the Japanese Arbitration Act.
[192] *See, e.g.,* Art. 9 of the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, the United States' Federal Trade Commission Rule Concerning Cooling-Off Period Made for Sales at Homes or at Certain Other Locations, 16 C.F.R. pt. 429 (2008), Japan's Act on Specified Commercial Transactions.
[193] *See* Oren Bar-Gill, "Consumer Transactions," 485.

(d) Special jurisdictional regimes

In many jurisdictions, special jurisdictional regimes for consumers and employees have been created for protecting their interests at the litigation stage. Notably, Japan and the European Union have provided rules of jurisdiction more favorable to their interests than those generally applicable. In principle, a choice of court agreement involving consumers or employees should be unenforceable except when it would be wholly beneficial to them or when the said agreement would be entered into after the dispute had occurred.[194] This approach could be justified by behavioral economics because consumers and employees would tend to suffer from their systematic cognitive biases and be vulnerable to abuse by stronger parties. Hence, this chapter has shown that the mere operation of market forces and soft paternalistic tools, such as disclosure regulation, could not effectively protect weak parties from their own behavioral patterns and misperception. Therefore, strong government intervention in the form of non-enforcement of a pre-dispute choice of court agreement would be necessary to provide effective jurisdictional protection for consumers and employees.

On the other hand, there would be some situations where such government intervention would be unnecessary and weak parties should be allowed to exercise their freedom in choosing jurisdictions that would suit their interests. The full exclusion of party autonomy in choice of court under these situations would rather preclude parties from enjoying the benefits of the choice of court agreements. For example, after the dispute had arisen, the issue in dispute and the risks of the choice of court agreement would become more salient. As such, consumers and employees could be expected to be able to gather more information and make their own decisions carefully. Furthermore, stronger parties could hardly exercise their superior bargaining power and economic status to compel the choice of court

[194] *See* Hartley, International Commercial Litigation, 194. *See also*, Nishitani, "International Jurisdiction of Japanese Courts in a Comparative Perspective," 267–69.

agreements.[195] Consequently, in this case, the cost of intervention in the form of non-enforcement would be likely to outweigh its benefits.

Another situation is when home-court advantages would be guaranteed for consumers and employees. For instance, if the agreed court was a court for their domiciles or the place of labor in the case of employees[196], it could be expected that they would be familiar with the language, legal system, and business practice of their home countries or places of work. Furthermore, they could save the extra cost of traveling, hiring foreign lawyers, and bringing witnesses and evidence to a foreign country. Therefore, the choice of court agreement under this circumstance would be less likely to adversely affect the interests of the consumers and employees.

The next situation would be when the choice of court agreement would operate entirely in the interests of the consumers and employees. Scenarios under this situation would include a non-exclusive choice of court agreement that would additionally permit consumers and employees to sue the other party in their home jurisdiction[197] and when the weak parties themselves invoke a choice of court agreement or bring an action pursuant to such an agreement.[198] These circumstances would be wholly in the weak parties' interests because they would either allow consumers and employees to take advantage of their home courts[199], or weak parties themselves would decide to use a choice of court agreement after the dispute had arisen without any interference from the other party.

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[195] *See e.g.* Satō （佐藤） and Kobayashi （小林）, *2011 Reform of the Code of Civil Procedure etc.: Legislation on International Jurisdiction [一問一答　平成 23 年　民事訴訟法等改正　国際裁判管轄法制の整備]*, 149–50.

[196] *See* Art. 3-7(5)(6) of the Japanese Code of Civil Procedure, Arts. 19(1), 23(1) of the Brussels I Regulation (Recast).

[197] *See* Art. 3-7(5)(i) and (6)(i) of the Japanese Code of Civil Procedure, Arts. 19(2), 23(2) of the Brussels I Regulation (Recast).

[198] *See* Art. 3-7(5)(ii) and (6)(ii) of the Japanese Code of Civil Procedure.

[199] *See e.g.* Special jurisdictional rules for consumers and employees under Art 3-4 of the Japanese Code of Civil Procedure and Sections 4-5 of the Brussels I Regulation (Recast).

In sum, this approach would appear to be better than the disclosure regulation and the right to withdraw because it could provide more effective jurisdictional protection for weak parties while preserving high legal certainty. It would also retain certain flexibility, as compared to the full exclusion of party autonomy in the choice of court since it would allow parties to avail themselves of the choice of court agreements in situations that would be wholly beneficial to weak parties. Furthermore, under this approach, the costs of intervention would not fall on the weak parties, but be placed on the business operators and employers who would be in the superior position for the prevention and diversification of the risks. For example, sellers would be in a better position than consumers to reduce the risk of litigation by producing better products and taking precautionary measures. They would also be equipped with more resources to participate in distant litigation. Therefore, economic efficiency would favor allocating risks of distant litigation to those who could best prevent and diversify the risks.[200] Nonetheless, this approach alone could still not amend the shortcomings of the heterogeneity in people's preferences and degrees of sophistication. However, this problem could be mitigated by reconsidering the scope of protection or the definition of the consumers and employees, which would be further examined below.

(ii) Scope of the protection

People's heterogeneity is a significant challenge in designing paternalistic rules. Consumers and employees would not necessarily have the same needs and degrees of sophistication. They could also vary in how they would react to cognitive biases. As a result, the demand for special jurisdictional rules and their actual effects could be different from one person to another. A one-size-fits-all paternalistic rule may not always effectively protect weak parties. The over-inclusive paternalistic rules may also result in a situation where strong parties would be protected even if they did not deserve the same level

[200] Lee Goldman, "My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts," *Northwestern University Law Review* 89 (1992): 723, 741.

of protection as the weak parties.[201] On the other hand, the underinclusive rules may leave some parties who are as weak as general consumers and employees unprotected. Therefore, the scope of the consumers and employees would need to be carefully delimited.

Firstly, the concept of a consumer, as defined in the Japanese Civil Procedure Code and the European legislation, may be too restrictive in some circumstances since only a natural person could be considered as a consumer.[202] Some non-profit organizations or private entities could act in a private capacity and obtain goods or services for purposes that would be outside their trade or profession. Some of them would also be in a weak position and less sophisticated than many individual investors who would be well-informed. As a result, some legal person would be left without any jurisdictional protection that they deserve. This would appear to be irrational to exclude the less sophisticated legal persons from the scope of protection while covering the more sophisticated individuals.[203] In fact, several forms of consumer protection legislation in many countries have extended their scope of protection to cover legal persons acting on a non-profit basis or whose acts do not aim for commercial and business purposes.[204]

Secondly, not all consumers and employees are equal in terms of bargaining power, information, and preferences. Thus, some jurisdictions have introduced the amount of claims and income thresholds for consumer transactions and employees, respectively in order to ensure that protective jurisdictional rules would not be overinclusive. For example, the English Arbitration Act allows a pre-

[201] *See* Rosenfeld, "Limits to Party Autonomy to Protect Weaker Parties in International Arbitration," 424.
[202] *See* Art. 3-4 (1) of the Japanese Code of Civil Procedure; Hélène Gaudemet-Tallon, *Compétence et Exécution Des Jugements En Europe: Règlement No 44-2001, Conventions de Bruxelles 1968, et de Lugano 1988 et 2007*, 290.
[203] *See* J. Toro, "Le Règlement Bruxelles I Bis et Son Impact (Très Limité) Au Plan Des Consommateurs," *Revue Européenne de Droit de la Consommation (REDC)* 1 (2014): 81–94.
[204] *See e.g.*, Art. 3 of the Spain's Royal Decree 1/2007 of 16 November, approving the consolidated text of the General Consumer and User Protection Act and Other Complementary Laws; Art 3 (k) of the Turkey's Act on Consumer Protection no. 6502; Art. 3 of the Thailand's Consumer Protection Act, B.E.2522 (1979).

dispute consumer arbitration only when it concerns claims below £5,000.[205] Likewise, Belgian law endorses a similar approach permitting an employment arbitration only when it involves high-ranking employees with significant management responsibilities or whose incomes would be above a certain threshold.[206] These regulations would presume that consumers in high-value transactions and high-ranking employees would be more informed or empowered, as compared to average weak parties.[207] This approach would not only prevent overprotective measures, but also allow those persons to maximize the benefits of the choice of court agreement by adjusting the scope of protection to further approximate the actual level of sophistication and bargaining power of each person.

In conclusion, the combination of special jurisdictional regimes and the proper adjustment of the scope of the protection of consumers and employees could provide effective jurisdictional protection for weak parties. The insights of behavioral economics have shown that this approach could best prevent cognitive biases, which could lead to behavioral market failure, and more accurately respond to the actual behavioral patterns and decision-making. Furthermore, this approach would help to increase economic efficiency by minimizing the sum of error and direct costs. On the one hand, it would offer the advantage of low "direct costs"[208] because this would specify concrete criteria for the determination of the weak parties and for the assessment of whether the choice of court agreements involving consumers and employees would be invalid. On the other hand, this would reduce the "error costs"[209] because this

[205] *See* Sections 89 and 91 of the Arbitration Act 1996 in conjunction with the Office of Fair Trading's Guidance for the Unfair Terms in Consumer Contracts Regulation 1999 para. 17.2. *See also,* the Unfair Arbitration Agreements (Specified Amount) Order 1999.
[206] *See* Art. 69 of the Belgian Employment Contracts Law of 3 July 1978.
[207] *See* Rosenfeld, "Limits to Party Autonomy to Protect Weaker Parties in International Arbitration," 424, 428.
[208] Direct costs refer to the costs of "operating the legal dispute-resolution machinery" such as judges', lawyers', and litigants' times. They are "the sum of the private and public expenditures in cases that are litigated, and is equal to the total of those expenditures in all cases multiplied by the fraction of cases litigated." *See* Richard A. Posner, "An Economic Approach to Legal Procedure and Judicial Administration," *Journal of Legal Studies* 2, no. 2 (June 1973): 400, 441.
[209] Error costs mean "the social costs generated when a judicial system fails to carry out the allocative or other social functions assigned to it." They are "the product of two factors, the probability of error and the cost if an error occurs." *See* Posner, "An Economic Approach to Legal Procedure and Judicial Administration," 400–01.

would preserve certain flexibility, which would allow for individual justice as provided in the exceptions and more refined definitions of consumers and employees.

5.3 Jurisdictional Protection of Non-typical Weak Parties: Public Policy Control

In general, in the jurisdictions that have special jurisdictional regimes for weak parties[210], only certain typical weak parties, such as consumers and employees are protected by protective rules limiting the effectiveness of the choice of court agreements. No other categories of weak parties, such as franchisees, distributors, or commercial agents are protected by these rules.[211] Furthermore, in some circumstances, even business entities, especially small businesses or local firms, may be in an economically weaker bargaining position if they conclude business-to-business contracts with giant corporations doing business on a global scale.[212] Although these weak parties could suffer from the inequality in economic status and bargaining power as well as cognitive biases in a similar manner with ordinary consumers or employees, they would not be afforded special jurisdictional rules in the context of the choice of court agreements. Instead, public policy or overriding mandatory rules would be used in these jurisdictions to protect these so-called non-typical weak parties in exceptional circumstances.

On the other hand, common law countries normally provide no special jurisdictional rules in favor of weak parties in the specific context of the choice of court agreements. In these jurisdictions, party autonomy in the choice of a court, even concerning consumer and employment contracts, would be widely respected. As such, instead of protecting weak parties through the private international law rules, common law jurisdictions would usually use general contract law principles, including those in the form

[210] For example, Japan and the European Union.
[211] Vesna Lazić, "Procedural Justice for 'Weaker Parties' in Cross-Border Litigation under the EU Regulatory Scheme," *Utrecht Law Review* 10, no. 4 (November 2014): 110–11.
[212] *See generally*, Wafa Janahi, "Party Autonomy and Small Business Protection in Cross-Border Commercial Contracts under EU Private International Law: A Critical Analysis of the Brussels I and Rome I Regulations" (PhD diss., University of Bristol, 2015).

of overriding mandatory rules and public policy, which would also be applicable to other kinds of contracts, so to protect weak parties in the context of the choice of court agreements.[213] These principles have also been applied to protect non-typical weak parties beyond the domain of consumers and employees. This section aims to analyze the use of public policy in various jurisdictions with regard to the protection of weak parties and offer a comprehensive framework for establishing jurisdictional protection for non-typical weak parties.

5.3.1 The United States

In the United States, there are no special jurisdictional rules for consumer and employment contracts as commonly seen in civil law jurisdictions. The rules that govern contracts in general usually regulate the choice of court agreements involving weak parties as well. However, limits on party autonomy in choice of court for the protection of weak parties are imposed in the form of public policy.[214] *The Bremen v. Zapata Off-Shore Co.*[215] was a leading case where the US Supreme Court introduced a principle of presumptive enforceability of exclusive choice of court agreements in international transactions. The Court held that "in the light of present-day commercial realities and expanding international trade, we conclude that the forum clause should control absent a strong showing that it should be set aside." This means that where the parties agreed to exclusively submit their dispute to the designated court, any other courts should decline jurisdiction to hear the case. The party resisting the enforcement of the choice of court agreement would bear the burden of proving that it should be set aside.[216]

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[213] Mary Keyes, "Optional Choice of Court Agreements in Private International Law: General Report," in *Optional Choice of Court Agreements in Private International Law*, ed. Mary Keyes (New York: Springer International Publishing, 2020), 35.
[214] Ronald A. Brand, *Transaction Planning Using Rules on Jurisdiction and the Recognition and Enforcement of Judgments*, PocketBooks of The Hague Academy of International Law (Maubeuge: Triangle Bleu, 2014), 260.
[215] *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).
[216] *See* Hannah L. Buxbaum, "The Interpretation and Effect of Permissive Forum Selection Clauses under U.S. Law Reports," *American Journal of Comparative Law* 66 (2018): 129.

In the *Bremen* decision, the Supreme Court also pointed out three exceptions where the presumption of enforceability could be overcome. The first exception was related to the reasonableness of the choice of court agreement under the circumstances. The choice of court agreement would be considered unreasonable, and thus unenforceable, if the trial in the chosen forum was "so gravely difficult and inconvenient that [the resisting party] will, for all practical purposes, be deprived of his day in court."[217] The second exception was concerned with public policy. The choice of court agreement would be unenforceable if its enforcement would violate "a strong public policy of the forum in which the suit is brought, whether declared by statute or by judicial decision."[218] The third exception was focused on the defects in the formation of the contract and other contract defenses under common law. The validity of the choice of court agreement could be challenged if it resulted from "fraud, undue influence," or the lack of free negotiations by the contracting parties.[219] This exception was not specifically developed in the context of the choice of court agreements. This also applied to all contracts in general.[220] Although the *Bremen* decision originally involved admiralty jurisdiction in the international context, federal and state courts have repeatedly adopted the *Bremen* approach in both domestic and international cases concerning the choice of court agreements.[221]

An empirical study of the state court decisions in the United States has shown that the average enforcement rate of the choice of court agreements in favor of foreign courts is 77%. The state courts refused to give effect to such agreements in 23% of cases. They generally cited the three exceptions laid

[217] *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) at 16, 18. *See also*, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).
[218] *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) at 15.
[219] Ibid at 12.
[220] John F. Coyle and Katherine C. Richardson, "Enforcing Outbound Forum Selection Clauses in State Court," *Indiana Law Journal* 96, no. 4 (Summer 2021): 1098 footnote 42.
[221] Buxbaum, "The Interpretation and Effect of Permissive Forum Selection Clauses under U.S. Law Reports," 130.

down in the *Bremen* decision to deny the enforceability. The most cited ground was a lack of reasonableness (12% of cases), followed by public policy (8%), and fraud (2%) (Figure 2).[222]

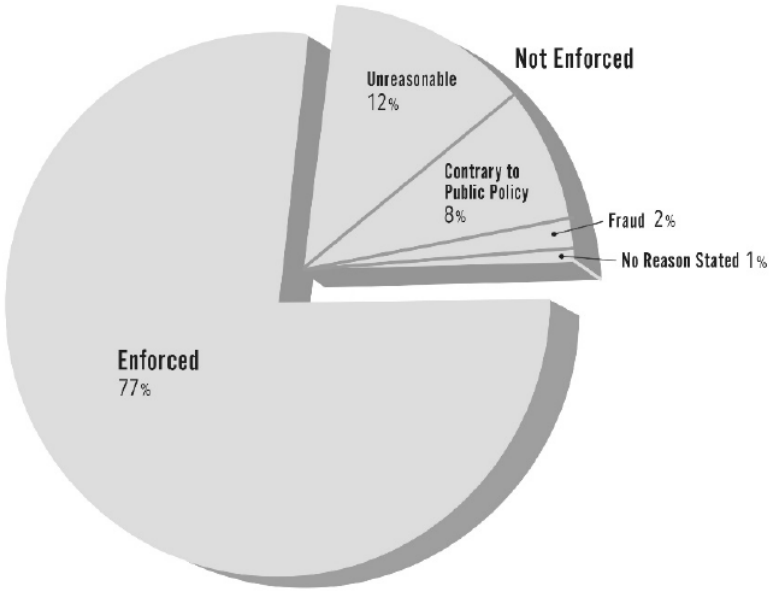

Figure 2: Outcomes in state cases addressing enforcement of forum selection clauses. Source: Enforcing Outbound Forum Selection Clauses in State Court (2021).

This section focuses on reasonableness and public policy exceptions, which have been specifically developed to provide jurisdictional protection in the context of the choice of court agreements.

(i) Reasonableness

The *Bremen* decision established general guidelines for refusing the enforceability of the choice of court agreement on the basis of reasonableness. First, it ruled that the choice of court agreement might be unreasonable if the trial in the designated forum would be "so gravely difficult and inconvenient" that

[222] Coyle and Richardson, John F. Coyle and Katherine C. Richardson, "Enforcing Outbound Forum Selection Clauses in State Court," 1103.

the resisting party would "for all practical purposes, be deprived of his day in court."[223] The "serious inconvenience" or the "remoteness" of the contractual forum would be an important factor in determining the reasonableness of the choice of court agreement.[224] Furthermore, the *Bremen* Court observed that the choice of court agreement might be unreasonable if it was affected by "overweening bargaining power."[225] Hence, the elements of unreasonableness under case law could be classified into three groups: (1) the party would be highly unlikely to secure relief in the chosen forum, (2) the chosen forum would have no material relationship to the parties or transactions, and (3) overweening bargaining power.

(a) Unlikeliness to obtain relief in the designated forum

Several state courts have cited the lack of reasonableness to refuse the enforcement of the choice of court agreements in situations where the resisting party would be unlikely to secure relief in the contractual forum. These situations could be further grouped into two categories: the serious inconvenience for litigating in the chosen forum and the smallness of claims. In determining the former category, the courts would often consider the financial ability of the resisting party, traveling expenses of the parties and witnesses, and the distance of the chosen forum. Moreover, the courts would generally not admit the claims of serious inconvenience if both of the contracting parties of the choice of court agreement were sophisticated corporate actors. This argument would appear to be successful only if the resisting party was either a natural person or a small business.[226] The mere physical inconvenience and additional costs for traveling would also not be sufficient to deny the choice of court agreement.[227]

[223] *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) at 18.
[224] Ibid at 17.
[225] Ibid at 12.
[226] Coyle and Richardson, John F. Coyle and Katherine C. Richardson, "Enforcing Outbound Forum Selection Clauses in State Court," 1132–33.
[227] *See* Bennett v. Appaloosa Horse Club, 35 P.3d 426, 431 (Ariz. Ct. App. 2001).

For example, in the Kentucky case of *Shafer Plaza VI, Ltd. v. Lang*, the court held that "[a]s small business owners, the time and expense of traveling to Texas to pursue their suit would essentially deprive the Langs of their day in court."[228] In addition, in determining the unreasonableness of the choice of court agreement, the Pennsylvanian court in *Fabian v. Steve Brady Inc.*, which involved a remote forum and unsophisticated party, held that "[c]onsidering the distance between Missouri and Pennsylvania, the plaintiff's limited financial means, and his inexperience with long-distance litigation, we are convinced that the trial of the parties' dispute in the State of Missouri would place the plaintiff at such a distinct disadvantage that he would probably have to default in the proceeding."[229]

The smallness of claims is occasionally used as a basis of the unreasonableness of the choice of court agreement in refusing the enforcement of the choice of court agreements. In particular, when the amount of money in the dispute is too small for the plaintiff to practically or economically pursue litigation in the chosen forum.[230] For instance, in the case involving the choice of court agreement in a cruise ship contract which required the party to bring an action in Florida on a small claim, the New York court observed that travel costs "could conceivably be greater than the actual claim" and considered such an agreement to be unreasonable.[231] Similarly, the California court ruled that "a forum selection clause that requires a consumer to travel 2,000 miles to recover a small sum is not reasonable."[232]

(b) No material relationship to parties or transactions

Some state courts evaluate the relationship between the chosen forum and the parties in determining the reasonableness of the choice of court agreement. For example, in *Farrell v. Capula Inv.*,

[228] *Shafer Plaza VI, Ltd. v. Lang*, No. 2007-CA-001391-MR, 2008 Ky. App. LEXIS 577, 4–5 (Oct. 31, 2008).
[229] *Fabian v. Steve Brady Inc.*, 49 Pa. D. & C.4th 242 (Ct. Com. Pl. 2000) at 255.
[230] Coyle and Richardson, John F. Coyle and Katherine C. Richardson, "Enforcing Outbound Forum Selection Clauses in State Court," 1129.
[231] *Sellers v. Carnival Cruise Line*, No. 873.SCK 2014 – 1, slip op. at 1 (N.Y. City Civ.Ct. Aug. 31, 2015).
[232] *Aral v. Earthlink, Inc*., 36 Cal. Rptr. 3d 229, 241–42 (Ct. App. 2005).

a New York court refused to enforce a choice of court agreement and designated a forum that had no material relationship to both parties and their employment agreement. It held that "[t]o be enforceable, a choice of forum clause must not be 'unreasonable.' To satisfy this 'reasonableness' standard, the forum must have 'some material relationship to the transaction.'"[233] Arkansas state courts have also adopted adopt a similar position stating that "Arkansas courts enforce forum-selection clauses, but only if there is a substantial connection between the contract and the forum state."[234]

In general, however, state courts often evaluate this close connection factor in conjunction with other factors, especially those concerning serious inconvenience. The contractual forum that has no reasonable relationship or close connection with the parties is likely to place more financial burdens on the parties and cause serious inconvenience than the forum with a material relationship.[235] As a Pennsylvania state court reasoned: "since all of the essential contacts, witnesses and circumstances of this case exist in [one county], it would cause the plaintiff unjustifiable and onerous expense to litigate this matter in a contractually created forum."[236] Nonetheless, it should be emphasized that not all choice of court agreements are invalidated solely on the basis of the lack of a close relationship to the parties.[237] However, if the designated forum has no reasonable connection and the trial at that forum would cause serious inconvenience, state courts would be likely to deem such choice of court agreements unreasonable.[238]

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[233] *Farrell v. Capula Inv.* US, LP, 69 Conn. L. Rptr. 486 (Super. Ct. 2019).
[234] *Williams v. Johnson Custom Homes*, 264 S.W.3d 569, 578 (Ark. Ct. App. 2007) (Griffen, J., dissenting).
[235] Coyle and Richardson, John F. Coyle and Katherine C. Richardson, "Enforcing Outbound Forum Selection Clauses in State Court," 1140–41.
[236] *Bauman v. Choice One Commc'ns.*, 56 Pa. D. & C.4th 518, 522–23 (Ct. Com. Pl. 2002).
[237] For cases that choice of court agreements were upheld, *see, e.g.*, *Espresso Disposition Corp. 1 v. Santana Sales & Mktg. Grp., Inc.*, 105 So. 3d 592, 595 (Fla. Dist. Ct. App. 2013); *Cal-State Bus. Prods. & Servs., Inc. v. Ricoh*, 16 Cal. Rptr. 2d 417, 426 (Ct. App. 1993).
[238] Coyle and Richardson, John F. Coyle and Katherine C. Richardson, "Enforcing Outbound Forum Selection Clauses in State Court," 1142.

(c) Overweening bargaining power

The *Bremen* decision suggested that a choice of court agreement resulting from "overweening bargaining power" might be deemed unreasonable.[239] The inequality in the bargaining power is often presented in the context of contracts of adhesion, which are usually offered to the party on a take-it-or-leave-it basis. Thus, it would be almost impossible for the weaker party to negotiate for a different term in such contracts. In *Long Beach Auto Auction, Inc. V. United Sec. All*., the Supreme Court of Mississippi refused to enforce a choice of court agreement concluded between the two commercial parties on the ground of overweening bargaining power. It held that:

> Here, the warranty was signed by two commercial parties via their respective representatives. Moreover, the form leaves no doubt regarding its substance, i.e., the presence of a forum selection clause. However, there are glaring distinctions between this case and Tel-Com, which this Court cannot ignore. Here, the system had been installed, the lease agreements concluded and binding, consideration passed with the deposit and first month's rent paid, all before the warranty was delivered. The window of opportunity to negotiate more favorable terms was already closed. Refusal to sign would leave the purchaser/lessor with no written express warranty. At this juncture, United possessed overweening bargaining power to effect its will regarding forum selection. Therefore, this Court conclusively finds the forum selection clause violates the first prong of the [Bremen] test.[240]

However, the inequality in bargaining power alone would rarely be used as a basis for invalidating the choice of court agreements. State courts generally cite other reasonableness factors in addition to the overweening bargaining power in the determination of the enforceability of such agreements.[241] For instance, the Iowa state court suggested that "our State does not void most contractual provisions simply based on a finding that the contract was one of adhesion . . . .Instead, our courts recognize that specified clauses in adhesive contracts may be subject to invalidation if it is proven that they are unconscionable, do not meet the reasonable expectations of the parties, or are otherwise legally

[239] *The Bremen v. Zapata Off-Shore Co*., 407 U.S. 1 (1972) at 12.
[240] *Long Beach Auto Auction, Inc. v. United Sec. All., Inc*., 936 So. 2d 351, 356 (Miss. 2006).
[241] Coyle and Richardson, John F. Coyle and Katherine C. Richardson, "Enforcing Outbound Forum Selection Clauses in State Court," 1143.

indefensible."[242] Similarly, in *Shafer Plaza VI, Ltd. v. Lang*, besides the overweening bargaining power in the context of contracts of adhesion, the Court of Appeals of Kentucky also cited the lack of reasonable relationship to the chosen forum, the "complicated eighteen-page" contract, and serious inconvenience in refusing to enforce a choice of court agreement.[243]

(ii) Public policy

The *Bremen* court established that a choice of court agreement might also be unenforceable if its enforcement would violate "a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."[244] Pursuant to the *Bremen* test, the state courts generally invoke public policy to strike down a choice of court agreements in two situations. First, the states have enacted statutes that specifically direct their courts not to enforce a choice of court agreement in favor of foreign courts. These special statues resemble protective jurisdictional rules in Japan and the European Union, thus aiming to protect weak parties in the context of the choice of court agreements. Second, state courts may refuse the enforcement of the choice of court agreement, which would result in the waiver of the nonwaivable rights under the state laws or constitutions.[245]

(a) Special statutes limiting the effectiveness of the choice of court agreements

A few states have enacted statutes that generally prohibit the choice of court agreements designating a court of another state or a foreign forum. For example, the North Carolina General Statutes provide that "any provision in a contract entered into in North Carolina that requires the prosecution of any action . . . that arises from the contract to be instituted or heard in another state is against public

[242] *Hotchkiss v. Int'l Profit Ass'n*., No. 0-932/09–1632, 2011 Iowa App. LEXIS 293, at 7–8 (Apr. 13, 2011).
[243] *Shafer Plaza VI, Ltd. v. Lang*, No. 2007-CA-001391-MR, 2008 Ky. App. LEXIS 577, at 4–5 (Oct 31, 2008).
[244] *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) at 15.
[245] Coyle and Richardson, John F. Coyle and Katherine C. Richardson, "Enforcing Outbound Forum Selection Clauses in State Court," 1104–05.

policy and is void and unenforceable."[246] However, since the *Bremen* decision established a principle of presumptive enforceability of the choice of court agreements, state statutes imposing general prohibitions on such agreements have become extremely rare.[247]

On the other hand, state legislatures in several states have enacted special statutes which have invalidated the choice of court agreements in favor of a foreign forum in certain types of contracts involving parties of unequal bargaining power. They have attempted to protect local residents and small businesses against trials in other states or foreign courts.[248] The most common types of contracts are franchise agreements[249] and construction contracts.[250] For example, Illinois's Franchise Disclosure Act provides that "[a]ny provision in a franchise agreement that designates jurisdiction or venue in a forum outside of this State is void."[251] Similarly, Section 13-8-3 of the Utah Code[252] invalidates a choice of court agreement contained in a construction contract that designates a forum in a state other than Utah. The Supreme Court of Utah justified this statute as follows:

> The primary purpose of section 13-8-3 is to prohibit out-of-state contractors, construction managers, or suppliers from haling a Utah resident into a foreign state's court when the work by the Utah resident is performed within the State of Utah. The statute furthers Utah's policy interest in providing its residents with a forum in which they can pursue their legal claims.[253]

[246] North Carolina General Statutes §22B-3 (2020).
[247] General statutory prohibitions on choice of court agreements designating a foreign forum have been repeatedly enforced in only two states–North Carolina and Idaho. *See* Coyle and Richardson, John F. Coyle and Katherine C. Richardson, "Enforcing Outbound Forum Selection Clauses in State Court," 1107.
[248] Hannah L. Buxbaum, "United States: The Interpretation and Effect of Permissive Forum Selection Clauses," in *Optional Choice of Court Agreements in Private International Law*, ed. Mary Keyes (New York: Springer International Publishing, 2020), 505–06.
[249] *See generally*, Maral Kilejian and Christianne Edlund, "Enforceability of Choice of Forum and Choice of Law Provisions," *Franchise Law Journal* 32, no. 2 (Fall 2012): 81–94.
[250] Coyle and Richardson, John F. Coyle and Katherine C. Richardson, "Enforcing Outbound Forum Selection Clauses in State Court," 1108–09.
[251] Illinois's Franchise Disclosure Act, 815 Ill. Comp. Stat. Ann. 705/4 (2020).
[252] Utah Code Ann. § 13-8-3(2) (2001).
[253] *Jacobsen Construction Co. v. Teton Builders*, 106 P.3d 719, 726 (Utah 2005).

Furthermore, in the context of nonbusiness contracts, all states have enacted statutes invalidating the choice of court agreements in consumer leases[254], pursuant to Section 2A-106 of the Uniform Commercial Code (U.C.C.), which provides that "[i]f the judicial forum chosen by the parties to a consumer lease is a forum that would not otherwise have jurisdiction over the lessee, the choice is not enforceable."[255] Some states have also passed legislation that prohibits the choice of court agreements in certain insurance contracts[256], employment agreements[257], consumer contracts[258], consumer credit agreements[259], as well as certain nonbusiness loans and home loans agreements[260]. These special statutes have aimed to provide jurisdictional protection for weak parties and ensure home-court advantages for the local residents.[261]

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[254] Coyle and Richardson, John F. Coyle and Katherine C. Richardson, "Enforcing Outbound Forum Selection Clauses in State Court," 1110.

[255] U.C.C. § 2A-106(2) (American Law Institution & Uniform Law Commission 2012).

[256] *See* Hawaii Revised Statutes § 431:10-221(a)(2):

> "No insurance contract delivered or issued for delivery in this State and covering subjects located, resident or to be performed in this State, shall contain any condition, stipulation or agreement . . . [d]epriving the courts of this State of the jurisdiction of action against the insurer."

[257] *See* California Labor Code § 925(a)-(b) (West 2021):

> "An employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would . . . [r]equire the employee to adjudicate outside of California a claim arising in California . . . . Any provision of a contract that violates [this rule] is voidable by the employee, and if a provision is rendered void at the request of the employee, the matter shall be adjudicated in California."

[258] *See* California Civil Procedure Code § 116.225 (West 2021):

> "An agreement entered into or renewed on or after January 1, 2003, establishing a forum outside of California for an action arising from an offer or provision of goods, services, property, or extensions of credit primarily for personal, family, or household purposes that is otherwise within the jurisdiction of a small claims court of this state is contrary to public policy and is void and unenforceable."

[259] *See* Uniform Consumer Credit Code § 1-201(8)(d) (Uniform Law Commission 1974).

[260] *See* Maine Consumer Credit Code Title 9-A, § 8-506(6)(I) (2020):

> "[A]ny provision of a residential mortgage loan agreement that allows a person to require a borrower to assert any claim or defense in a forum that is less convenient, more costly or more dilatory for the resolution of a dispute than a judicial forum established in this State where the borrower may otherwise properly bring a claim or defense or that limits in any way any claim or defense the borrower may have is unconscionable and void as a matter of law."

[261] Coyle and Richardson, John F. Coyle and Katherine C. Richardson, "Enforcing Outbound Forum Selection Clauses in State Court," 1111–12.

(b) Nonwaivable rights

In certain circumstances, state courts may refuse to enforce the choice of court agreements where the parties have agreed to exclusively submit their dispute to the courts of another state or foreign countries, and the forum courts believe that the chosen courts lack comparable legal regimes or tend to apply foreign laws, which would ultimately lead to the waiver of rights that the forum courts deem nonwaivable under their constitutions or laws. The concern over the circumvention of the nonwaivable rights would likely become more serious if the contracting parties used a choice of court agreement in combination with a choice of law clause.[262]

For example, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., the US Supreme Court suggested that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."[263] Similarly, in the context of franchise agreements, the New Jersey Court held that "[t]hat comprehensive legislative design for the protection of New Jersey franchisees would be severely undermined if forum-selection clauses in franchise agreements were to be generally enforced and ultimately were to become commonplace in franchise agreements. In such event, the inevitable result would be to limit severely the availability of New Jersey courts as a forum for the enforcement of franchisees' claims under the Act, a result that the Legislature assuredly would find intolerable."[264]

In order to refuse enforcement of the choice of court agreements, the courts must first determine whether the rights concerned are nonwaivable. Certain constitutional rights have long been considered nonwaivable. For instance, the US Supreme Court has repeatedly held that parties cannot agree to waive

[262] *See* Coyle and Richardson, John F. Coyle and Katherine C. Richardson, "Enforcing Outbound Forum Selection Clauses in State Court," 1113–14.
[263] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 637 n.19.
[264] *Kubis & Perszyk Assocs., Inc. v. Sun Microsystems, Inc*., 680 A.2d 618, 628 (N.J. 1996).

their rights under the First Amendment of the US Constitution.[265] Some states even enacted statutes specifically requiring their courts not to give effect to the choice of court agreements that designate foreign courts, and it could be reasonably anticipated that the chosen courts would apply any foreign law which would violate the fundamental rights under the constitutions.[266] For instance, the Arkansas Code provides:

> A contract or contractual provision, if severable, that provides for a jurisdiction for purposes of granting the courts … personal jurisdiction over the parties to adjudicate any disputes between parties arising from the contract mutually agreed upon violates the public policy of Arkansas and is void and unenforceable if the jurisdiction chosen includes any foreign law, legal code, or system, as applied to the dispute at issue, that does not grant the parties … fundamental rights, liberties, and privileges granted under the Arkansas Constitution or the United States Constitution…[267]

In addition, nonwaivable rights could be conferred by the statutes. Some states have enacted special provisions making clear that certain statutory rights could not be bargained away by parties. For example, the Colorado legislature established an anti-waiver provision in the Colorado Wage Act invalidating any agreement purporting to waive statutory rights under this Act.[268] As a result, in *Morris v. Towers Finance Corp.*, a Colorado court refused to enforce an exclusive choice of court agreement designating a non-Colorado forum because it was precluded by an anti-waiver provision in the Act.[269] In general, when a statute contains clear language indicating that certain rights are nonwaivable, the state courts would tend to overrule the choice of court agreement designating a court of another state or foreign countries if there was any reason to believe that the enforcement of the agreement would result in the waiver of such statutory rights.[270] However, when the courts believe that the contractual forum

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[265] *See* Jason Mazzone, "The Waiver Paradox," *Northwestern University Law Review* 97, no. 2 (2003): 801.
[266] Coyle and Richardson, John F. Coyle and Katherine C. Richardson, "Enforcing Outbound Forum Selection Clauses in State Court," 1115–16.
[267] Arkansas Code Annotated § 1-1-103(d)(1) (2020).
[268] Colorado Wage Act § 8-4-125, C.R.S. (1986 Repl. Vol. 3B):
> "Any agreement, written or oral, by any employee purporting to waive or to modify his rights in violation of this article shall be void."

[269] *Morris v. Towers Finance Corp*., 916 P.2d 678, 679 (Colo. App. 1996).
[270] Coyle and Richardson, John F. Coyle and Katherine C. Richardson, "Enforcing Outbound Forum Selection Clauses in State Court," 1117.

would apply nonwaivable rights conferred by the forum state, they may enforce a choice of court agreement designating that forum. For example, In *Melia v. Zenhire, Inc.*, a Massachusetts court upheld the choice of court agreement selecting a New York court as the place for litigation because it was persuaded that a New York court would apply Massachusetts law with respect to nonwaivable rights under the Massachusetts Wage and Hour Act.[271]

5.3.2 Japan

The Japanese Supreme Court set forth the guiding principles for public policy control with respect to the choice of court agreement in the *Chisadane* case in which two business operators disputed the validity of an international choice of court agreement[272]. It ruled that the effectiveness of the choice of court agreement might be denied if it was "extremely unreasonable and contrary to the law of public policy." The courts found violations of public policy and denied the effect of the choice of court agreements in several cases involving individual employment relations and consumer contracts.[273] The new amendment of the Japanese Code of Civil Procedure concerning international jurisdiction, which became effective on April 1, 2021, does not provide a specific provision for a public policy exception. However, it is generally understood that the above-mentioned *Chisadane* ruling would still be applicable to the choice of court agreements under the new regime.[274] Although the current scope of the application of the *Chisadane* test on public policy has been largely limited by Article 3-7 (5) and (6) of the Japanese Code of Civil Procedure, which explicitly provides special jurisdictional rules in consumer and individual civil labor disputes, the public policy test under *Chisadane* would still be valid for the choice

[271] *Melia v. Zenhire, Inc.*, 967 N.E.2d 580 (Mass. 2012).
[272] Japanese Supreme Court Judgment, November 28, 1975, 29 Minshu (10) 1554 [1975].
[273] *See, e.g.* Osaka High Court, Judgment, February 20, 2014, Hanrei Times [判例タイムズ] no. 1402 (2014), 370; Tokyo District Court, Judgment, November 14, 2012, Rodo Hanrei [労働判例] no. 1066 (2013), 5.
[274] Satō （佐藤） and Kobayashi （小林）, *2011 Reform of the Code of Civil Procedure etc.: Legislation on International Jurisdiction [一問一答　平成 23 年　民事訴訟法等改正　国際裁判管轄法制の整備]*, 140–41.

of court agreements involving weak parties other than consumers and employees, which might be unreasonable and contrary to the public policy of Japan.[275]

In the determination of the public policy test, the courts often evaluate factors, such as the particular circumstances in which the parties negotiated a choice of court agreement, the place where witnesses and evidence are located[276], the equality of the bargaining power, financial ability, information between the parties[277], the inconvenience and hurdles of the parties for litigating in the foreign forum, the foreign language ability, the understanding of foreign law, the reasonable connections with the chosen forum[278], the place of the transactions or performance of the obligations or torts[279], and the domicile of the parties.[280] For example, the Tokyo High Court cited the unique circumstances where an individual entered into a choice of court agreement with a financial corporation, including the significant imbalance of bargaining power, the serious inconvenience of the Japanese party for litigating in the US court due to the distance, language barrier, and foreign legal system, to invalidate a choice of court agreement designating a foreign forum on the basis of the public policy test.[281] Similarly, the Osaka High Court invalidated the exclusive choice of court agreement between two Japanese corporations, which designated the court of Bangkok as a place of litigation based on the public policy test due to the

[275] *See* Koji Takahashi, "Japan: Quest for Equilibrium and Certainty," in *Optional Choice of Court Agreements in Private International Law*, ed. Mary Keyes (New York: Springer, 2020), 264.
[276] *See, e.g.* Tokyo High Court, Judgment, November 17, 2014, Hanrei Times [判例タイムズ] no. 1409 (2015), 200.
[277] *See, e.g.* Tokyo District Court, Judgment, November 14, 2012, Rodo Hanrei [労働判例] no. 1066 (2013), 5; Tokyo District Court Judgment, April 19, 2013 LEX/DB 25512393.
[278] *See, e.g.* Tokyo High Court, Judgment, June 28, 2012 LEX/DB 25504140.
[279] *See, e.g.* Tokyo District Court, Interlocutory Judgment, September 13, 1998, Maritime Law Review [海事法研究会誌] no. 154, 89.
[280] Kazuhiro Tsuchida (土田和博), "An Exclusive Choice of Court Agreement in the International Case where the Antitrust Claim was Asserted: *Shimano v. Apple* Case (Tokyo High Court) [独占禁止法違反が主張された渉外事件における専属的国際裁判管轄の合意ー島野・アップル事件東京高判]," *Jurist* 1560 (July 2021): 102.
[281] Tokyo High Court, Judgment, November 17, 2014 Hanrei Times [判例タイムズ] no. 1409 (2015), 200.

serious inconvenience of the resisting party in litigating in Thailand, as well as the lack of reasonable relationships between the chosen forum and the contracting parties, the place of contract, the place of performance, or the investment in dispute.[282]

On the other hand, in the case where the plaintiff argued for the invalidity of the choice of court agreement designating the courts of Michigan on the basis of the public policy test, the Japanese court denied the plaintiff's claim based on the fact that there was no significant imbalance of bargaining power between the parties and the material relationship existed between the contract and the forum. The court found that the plaintiff was a big corporation whose scale was comparable to the defendant company, and it also operated businesses in the United States through its local subsidiaries. As a result, the plaintiff did not bear an excessive burden to litigate in the contractual forum. Furthermore, the State of Michigan had a close connection with the contract and most documentary evidence was located there. Consequently, the court held that the choice of court agreement conferring exclusive jurisdiction to the courts of Michigan under this circumstance was reasonable.[283] Therefore, it would appear that the public policy exception may be used to protect weak parties other than consumers and employees in Japan where the above-mentioned factors would exist in the contractual relationship between the parties of unequal bargaining power.

5.3.3 The Hague Convention on Choice of Court Agreements

The Hague Convention on Choice of Court Agreements provides a public policy exception which the non-chosen court may invoke to refuse enforcement of an exclusive choice of court agreement. Article 6 (c) of the Convention reads:

> 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 - giving effect to

[282] Osaka High Court, Judgment, February 20, 2014 Hanrei Times [判例タイムズ] no. 1402 (2014), 370.

[283] Tokyo District Court, Judgment, October 6, 2016 Kinyu-Shoji Hanrei [金融・商事判例] no. 1515, 42.

> the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;

When the enforcement of the choice of court agreement would lead to "manifest injustice" or would be "manifestly contrary to the public policy of the State of the court seised," the non-chosen court may disregard the validity of such an agreement. The Explanatory Report on the Hague Convention on Choice of Court Agreements describes the term "manifest injustice" that it "could cover the exceptional case where one of the parties would not get a fair trial in the foreign State, perhaps because of bias or corruption, or where there were other reasons specific to that party that would preclude him or her from bringing or defending proceedings in the chosen court." It also encompasses particular circumstances where the choice of court agreement would be negotiated and concluded. For example, if such an agreement was the product of fraud, its enforcement might be considered as a manifest injustice.[284]

On the other hand, the phrase "manifestly contrary to the public policy" refers to "basic norms or principles" of the state of the court seised, including its international public policy.[285] Article 6 (c) deliberately sets a high threshold and does not allow the non-chosen court of a contracting state to "disregard a choice of court agreement simply because it would not be binding under domestic law."[286] In *Motacus Constructions Ltd v. Paolo Castelli SpA*, an English case where the parties concluded an exclusive choice of court agreement in favor of the courts of Paris, the High Court of England and Wales suggested that the resisting party bear the burden of proving that giving effect to a choice of court agreement would lead to a "manifest injustice", or would be "manifestly contrary to the public policy",

[284] Hartley and Dogauchi, *Explanatory Report on Convention of 30 June 2005 on Choice of Court Agreements*, 821 para. 152.
[285] Ibid, 821 para. 153.
[286] Ibid, 821 para. 152, 153.

or both of the two limbs of the exception under Article 6(c). The Court also emphasized that this exception set a high standard of proof.[287]

5.3.4 European Union

In contrast, the Brussels I Regulation (Recast) does not offer an equivalent exception to public policy at the jurisdictional stage as provided in Article 6 (c) of the Hague Convention on Choice of Court Agreements as well as the Japanese and the United States case laws. It requires the member states to resort to public policy only at the final stage of recognition and enforcement of the judgments.[288] This is because the cornerstones of the Brussels regime are mutual trust among the member states, jurisdictional predictability, and the uniform treatment of the choice of court agreements. These foundations may be endangered if each court was empowered to invalidate the choice of court agreements based on its own public policy and overriding mandatory provision despite the objectives of the Regulation. Moreover, the public policy exception at the jurisdictional stage may be abusively used by the parties as delaying tactics or forum shopping, thus causing a costly and lengthy hurdle for the overall litigation.[289]

5.3.5 Legal Framework for the Jurisdictional Protection of Non-typical Weak Parties

On the one hand, not only consumers and employees, but also other weak parties, which are in an inferior position in terms of economic status, bargaining power, and information, would be susceptible to cognitive biases and abuse by counterparties. On the other hand, it would be unrealistic to define and list all kinds of weak parties with inferior bargaining power and lay down specific jurisdictional treatment for all of them. In this regard, public policy control would be a useful tool for providing comprehensive protection covering broader categories of the weak parties, while preserving

[287] *Motacus Constructions Ltd v. Paolo Castelli SpA* [2021] EWHC 356 (TCC).
[288] Matthias Weller, "Choice of Court Agreements under Brussels Ia and under the Hague Convention: Coherences and Clashes," *Journal of Private International Law* 13, no. 1 (2017): 107.
[289] Matteo M. Winkler, "Overriding Mandatory Provisions and Choice of Court Agreements," in *Research Handbook on the Brussels Ibis Regulation*, Research Handbooks in European Law Series, ed. Peter Mankowski (Cheltenham, UK ; Northampton, MA, USA: Edward Elgar Publishing, 2020), 358–59.

certain flexibility and autonomy in international commercial transactions. However, in the current world where the respect for the choice of court agreement is the fundamental principle in private international law and the cornerstone of cross-border transactions, the invalidation of the choice of court agreements based on public policy should be restricted only to exceptional circumstances. The threshold for invoking public policy should be very high, as indicated in the Hague Convention on Choice of Court Agreements[290], because the overbroad use of the exception of the public policy may disturb the legal predictability and certainty in international transactions, which would ultimately lead to a decrease in trade or higher transaction costs.[291]

In the context of the jurisdictional protection of the weak parties in the choice of court agreements, the exception of the public policy should be applied only when such agreements force structurally weak parties to litigate in the foreign forum that would impose excessive financial and procedural burdens upon them, which would be tantamount to the deprivation of access to justice or the denial of the right to be heard.[292] This fundamental right would be guaranteed in most jurisdictions, including Japan[293], the United States[294], the European Union[295], and international law[296]. Therefore, if

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[290] *See* Hartley and Dogauchi, *Explanatory Report on Convention of 30 June 2005 on Choice of Court Agreements*, 821 para. 152, 153.
[291] Jürgen Basedow, "Exclusive Choice-of-Court Agreements as a Derogation from Imperative Norms," in *Essays in Honour of Michael Bogdan*, ed. Patrik Lindskoug et al. (Lund: Juristförlaget, 2013), 31.
[292] *See* Karsten Thorn and Moritz Nickel, "The Effect of Overriding Mandatory Rules on the Arbitration Agreement," in *Conflict of Laws in International Commercial Arbitration*, ed. Franco Ferrari and Stefan Kröll (Huntington, NY: Juris, 2019), 113. *See also*, Richard Kreindler, "Standards of Procedural International Public Policy," in *International Arbitration and Public Policy*, ed. Devin Bray and Heather L Bray (Huntington, NY: JurisNet, 2015), 12. ("[T]he right to a reasonable opportunity to be heard and the right to equal treatment…are fundamental procedural rights that may not be violated.")
[293] *See* Article 32 of the Japanese Constitution.
[294] *See Baldwin v. Hale*, 68 U.S. 1 Wall. 223 (1863) ("Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.")
[295] *See* Article 6 (Right to a fair trial) of the Convention for the Protection of Human Rights and Fundamental Freedoms.
[296] *See* Universal Declaration of Human Rights Art. 8:

> "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

See also Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (New York: Oxford University Press, 2020).

the choice of court agreement deprived the right to be heard of the weak parties and was highly likely to prevent them from securing relief in the chosen forum, this effect may be denied on the basis of unreasonableness and violation of the procedural public policy of the forum.[297]

In order to determine whether the effect of the choice of court agreement in favor of a foreign court would be tantamount to the deprivation of the right to be heard of the weak parties, the factors that should be taken into consideration include:

> (1) the bargaining power, economic status, and sophistication of the parties;
> (2) the particular circumstances in which the parties negotiated the choice of court agreement;
> (3) the serious inconvenience for litigating in the chosen court;
> (4) the relationship between the chosen court and the disputes or the parties;
> (5) the amount of claims and the cost of the litigation in the chosen court; and
> (6) the importance of the protection of weak parties as weighed against party autonomy in choice of the court and the costs of the nonenforcement of the choice of court agreements.[298]

Further considerations of each factor are as follows:

Firstly, for the first factor, the courts should relatively compare the bargaining power, economic status, and sophistication of each contracting party. In particular, the courts should consider the nature, level of sophistication, and the capability of the parties in a particular circumstance; for example, whether the party has specific knowledge or expertise in the transaction in dispute, whether the party has the financial ability to pursue the litigation in the chosen form, and whether one party has superior market and bargaining powers, which could overwhelm the other party. In addition, weak parties need not necessarily be natural persons. A small local firm may also be considered to be in a weak position if it has limited financial means and limited experience with long-distance litigation, as compared to a large corporation counterparty with vast legal and financial resources.

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[297] *See* Karsten Thorn and Moritz Nickel, "The Effect of Overriding Mandatory Rules on the Arbitration Agreement," 138.
[298] *Cf.* Jürgen Basedow, "Exclusive Choice-of-Court Agreements as a Derogation from Imperative Norms," 22–23.

Secondly, with respect to the particular circumstances in which the parties entered into the choice of court agreement, considerations that should be taken into account would include whether the choice of court agreement had been individually negotiated[299], whether the agreement had been inserted as a part of an adhesion contract which would generally leave no choices for weak parties, whether the agreement was hidden in an online contract or complex and lengthy contract without sufficient notice[300], and whether the agreement was concluded before or after the dispute had arisen. This factor would be consistent with the international norms for international contracts, such as the UNIDROIT Principles of International Commercial Contract. The Principles provide an exception to deny the effectiveness of a surprising term in standard form agreements where the adhering party could not reasonably have expected in light of its "content, language, or presentation."[301]

Thirdly, in order to determine the serious inconvenience of the weak parties, the courts should evaluate the remoteness of the chosen court in terms of distance and the link with the parties, additional costs, and the time of the parties and witnesses for traveling to the chosen jurisdiction, the financial ability of the parties, as well as the language and legal barriers for the trial in the designated forum.

Fourthly, although the connection between the chosen forum and the transaction in the dispute or the parties would not generally be needed as a substantive validity requirement for the choice of court agreement because the parties may choose the jurisdiction based on neutrality, the lack of a reasonable

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[299] *See* Art. 3 of the Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.

[300] *See e.g. Swipe Ice Corp, Inc. v. UPS Mail Innovations, Inc.*, 2018 NY Slip Op 30178(U), ¶¶ 3-4 (Sup. Ct.) (A New York court refused to enforce a choice of court agreement contained in a contract "buried at the bottom of a webpage or tucked away in obscure corners of the website'' because "a reasonably prudent offeree would not be on notice of the terms that were buried at the bottom of the web page in a manner that did not encourage the [online] user to examine such terms and conditions."); *Stobaugh v. Norwegian Cruise Line Ltd.*, 5 S.W.3d 232, 236 (Tex. App. 1999); *Shafer Plaza VI, Ltd. v. Lang*, No. 2007-CA-001391-MR, 2008 Ky. App. LEXIS 577, at 4–5 (Oct 31, 2008).

[301] UNIDROIT Principles of International Commercial Contract 2016 Art. 2.1.20:

> "(1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party.
> (2) In determining whether a term is of such a character regard shall be had to its content, language and presentation."

relationship could indirectly affirm the serious inconvenience of the weak parties. This would be because the forum without any reasonable connection would tend to place more financial and procedural burdens on them rather than a forum that would have a material relationship.[302] Considerations to be taken into account in this context would include the location of the evidence and witnesses, place of transaction, contract, or performance, and the domicile of the parties.

Fifthly, the courts should consider the contested amount of claims in comparison with the costs of litigation in the chosen court. The expenses of attending the trial abroad, transporting the evidence and witnesses, as well as hiring local counsel may far exceed the actual amount that the weak parties could recover from the proceedings. Thus, if the cost of litigation was much greater than the claim, the choice of court agreement may economically or practically prevent the weak parties from pursuing litigation in the chosen forum.[303]

Finally, the last factor would involve the balancing test, which would require the courts to weigh the importance of the multiple interests, including those of the weak party and the other party, as well as ensure that the nonenforcement measure must be used only in exceptional cases where the need for protecting the weak party would manifestly trump any other legitimate interests. From the viewpoint of behavioral economics, judicial intervention in the form of the nonenforcement of the choice of court agreements should be allowed only when the benefits of intervention would be likely to outweigh the costs of intervening to protect the weak parties.[304] For example, the US Supreme Court in *Carnival Cruise Lines, Inc. v. Shute*[305], explained that the legitimate interests and benefits of the choice of court agreement between a cruise company and a passenger included: (1) the predictability concerning the place for litigation, (2) the reduction of the possibility of inefficient multijurisdictional litigation, and (3)

[302] *See* Coyle and Richardson, John F. Coyle and Katherine C. Richardson, "Enforcing Outbound Forum Selection Clauses in State Court," 1140–41.
[303] Ibid, 1129.
[304] *See* Figure 2.
[305] *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

the reduction of the transaction costs and price charged on consumers.[306] Therefore, the courts should determine whether the restraints on the right to be heard of weak parties imposed by a choice of court agreement would not be counterbalanced by other legitimate interests, and that the benefits of the nonenforcement would manifestly prevail its costs.

5.4 Conclusion

Behavioral economics is useful for designing regulatory tools which provide optimal protection for weak parties. The insights of the behavioral patterns and realistic model of human decision-making would help regulators to identify cognitive biases in a decision-making process and accurately predict people's reactions to particular interventions. Therefore, regulators could increase the efficiency of the regulatory measures and achieve the appropriate level of legal protection. In the context of the choice of court agreements, hard paternalism, such as mandatory rules, would appear to be the most effective approach for providing jurisdictional protection to the weak parties compared to soft paternalistic tools. This would also be consistent with legal policies and jurisdictional rules adopted in many countries, such as Japan and the European Union.

In particular, a choice of court agreement involving consumers or employees should be unenforceable except when it would be wholly beneficial to them or when the said agreement would be entered into after the dispute had occurred. The behavioral economic analysis has shown that these weak parties would tend to suffer from their systematic cognitive biases and be vulnerable to abuse by stronger parties. The mere operation of the market forces and soft paternalistic tools could not effectively protect them from their own systematic misperception. Consequently, strong government

[306] *See* Lee Goldman, "My Way and the Highway: The Law and Economics of Choice Of Forum Clauses in Consumer Form Contracts," *Northwestern University Law Review* 89 (1992): 724 (Goldman argued that "[n]either these nor several other possible costs of nonenforcement validly justify allocation of the burden of litigation in a distant forum to the consumer.").

intervention in the form of nonenforcement of a pre-dispute choice of court agreement would be necessary to provide effective jurisdictional protection. However, in the situations where the choice of court agreement would be wholly beneficial to the weak parties or when it was concluded after the dispute had arisen, the cost of government intervention in the form of nonenforcement would be likely to outweigh its benefits. Hence, consumers and employees could be expected to be in a stronger position to make an informed decision. Therefore, they could be allowed to exercise their freedom in choosing the jurisdictions and enjoying the benefits of the choice of court agreement to a certain extent.

On the other hand, people's heterogeneity would remain a significant challenge for lawmakers in designing special jurisdictional rules in favor of weak parties. Consumers and employees do not necessarily have the same preferences, needs, and degrees of sophistication. They also vary in how they react to cognitive biases and heuristics. As such, this reflects the reality that the demand for protective rules and their actual effects may be different from one person to another even though these weak parties could be broadly categorized into the same group. The overinclusive paternalistic rules may result in the situation where strong parties would also be protected even if they did not deserve the same level of protection as the weak parties, while the underinclusive rules may leave some parties who would be as weak as general consumers and employees unprotected. Therefore, regulators would need to carefully and flexibly delimit the scope of the weak parties who truly deserve protection. The more flexible definition of consumers and the introduction of certain thresholds, such as the amount of claims, and employees' incomes or responsibilities may help adjust the scope of jurisdictional protection to approximate the actual level of sophistication and bargaining power of each person. This approach would not only prevent overprotective measures, but also allow certain parties to maximize the benefits of the choice of court agreement.

In addition, weak parties who would be vulnerable to cognitive biases and superior bargaining power would not be limited to consumers and employees. Franchisees, distributors, commercial agents, or even small business enterprises may also be in an economically weak bargaining position in a similar

manner with ordinary consumers and employees. However, it would not be possible to exhaustively list and define all kinds of weak parties and create special jurisdictional rules for each of them. In this regard, for the sake of legal certainty, it would be reasonable to create special rules for the consumer and employment contracts, which would be the most common types of contractual relationships containing the structural imbalance of bargaining power across jurisdictions, and use the exception of the public policy to provide comprehensive protection for all other kinds of weak parties. This exception could also reduce error costs because this would preserve certain flexibility, which would allow for individual justice for actually weak parties who deserve special protection.

Nevertheless, the excessive use of public policy may impair the legal certainty of the choice of court agreements and contravene the principle of party autonomy. This would also impose high direct costs because this would require a complex assessment of whether the choice of court agreement would be invalid. Therefore, the exception of the public policy should be applied only when the choice of court agreement forces structurally weak parties to litigate in the foreign forum that would impose excessive financial and procedural burdens upon them, which would be tantamount to the deprivation of access to justice or the denial of the right to be heard. Furthermore, the standards for considering whether the choice of court agreement designating a foreign forum would deprive the right to be heard of weak parties would need to be precise enough to reduce the direct costs in the assessment process and preserve certain legal certainty. Although this approach would require some case-by-case reviews of the choice of court agreements and inject subjective components into the determination of the judges, it would be inevitable to provide comprehensive protection of weak parties and realize individual justice. Chapter IV will offer a new legal framework and statutory model for the international choice of court agreements as well as jurisdictional protection for weak parties in the specific context of Thailand.

Chapter VI: Regulatory Framework for the International Choice of Court Agreements in Thailand and Legal Reform

Chapters II and III analyzed the problems concerning the choice of court agreements in Thailand[1], and demonstrated several justifications for the adoption of party autonomy in choice of court, including the enhancement of the legal predictability and party expectations, the respect for individual rights, the facilitation of international trade and legal development, as well as the advancement of economic efficiency.[2] Furthermore, the widespread recognition of party autonomy has suggested that individuals hold a prominent position in contemporary private international law. Private parties have also become the center of the conflicts problem; thus, it would be natural and legitimate for them to be able to design their contractual relationships and choose the forum that would best suit their needs.[3] Therefore, Thailand's legal system should reflect the individual roles in private international law and accommodate the need for party autonomy in choice of forum.

If the argument that the choice of court agreements should be given effect in Thailand is convincing, then the next step would be to develop a legal framework for giving effect to such agreements. Although recent case law[4] has seemed to accept the use of the choice of court agreements in international cases, it has not delimited the scope and laid down the specific requirements for such agreements. Moreover, there is no clarity as to whether case law would accept all the exclusive, non-exclusive, and asymmetric choices of court agreements, or if it would be limited to a particular type of choice of court agreements.[5] As a result, the lack of a clear statutory framework has caused uncertainty

[1] *See* Chapter II Section 2.3.
[2] *See* Chapter III Section 3.2.
[3] *See* Chapter III Section 3.1.3.
[4] *See e.g.* Supreme Court Dika no. 3281/2562 (2019).
[5] Kittiwat Chunchaemsai, "Legal Considerations and Challenges Involved in Bringing the 2005 Hague Convention on Choice of Court Agreements into Force Within an Internal Legal System: A Case Study of Thailand," *Journal of Private International Law* 17, no. 1 (2021): 153.

as to the effects and enforceability of the choice of court agreements and could result in inconsistent decisions. This chapter will suggest a new legal framework for the international choice of court agreements and develop a reform proposal on the jurisdictional rules of Thailand.

To begin with, Section 6.1 will propose the precise rules on the obligations of Thai courts as the chosen courts and non-chosen courts. Then, Section 6.2 will introduce new formal and substantive validity requirements for the international choice of court agreements in Thailand. Section 6.3 will offer solutions for the jurisdictional protection of consumers, employees, and other weak parties in the choice of court agreements, as well as propose model laws for the reform of the Thai jurisdictional rules concerning the international choice of court agreements. Section 6.4 will suggest a framework for the Thai courts to assess the validity of the asymmetric choice of court agreements. Section 6.5 will offer a conclusion for this study. Finally, Section 6.6 will clarify the limitations of the study and suggest directions for future research based on the results of this study.

6.1 Obligations of Thai Courts Concerning the Choice of Court Agreements

Although the current trend of case law in Thailand appears to recognize the choice of court agreements in international settings, only the non-exclusive choice of court agreements have been examined by the Thai Supreme Court.[6] As a consequence, there is still some uncertainty as to whether Thai courts would give effect to the exclusive choice of agreements, especially when such agreements would be intended to oust the jurisdiction of the Thai courts against the jurisdictional rules under the CPC. There is a possibility that Thai courts might view such agreements as being contrary to the law concerning the public policy of Thailand and therefore void, according to Section 150 of the Civil and Commercial Code.[7] On the other hand, where Thai courts do not have jurisdiction, it would be also

[6] *See* Chapter II Section 2.2.1.
[7] The Civil and Commercial Code Section 150:

uncertain whether Thai courts would assert jurisdiction based on the choice of court agreements in favor of Thai courts.[8] Since Thailand is a civil law country, the uncertainty would tend to remain unless there was a statutory provision clarifying the jurisdictional effects of the international choice of court agreements.

Firstly, the CPC, as the main legislation laying down the jurisdictional rules for Thai courts in both domestic and international disputes, should be revised to provide clear rules on the jurisdiction of Thai courts as the court designated in the choice of court agreements. The rules may be similar to Article 5(1) of the Hague Convention on Choice of Court Agreements providing that "[t]he court or courts … designated in [a] … choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, … ." Since there is no jurisdiction based on the choice of court agreements provided in the CPC, it would be inevitable to introduce a new statutory provision recognizing this new ground of jurisdiction. Hence, the choice of court agreements as a new basis for jurisdiction should include both exclusive and non-exclusive ones in order to fully accommodate the needs of the parties. This provision would confirm the positive effects of the choice of court agreements allowing the parties to establish the jurisdiction of the court chosen by them even though the chosen court may not have had jurisdiction from the beginning. As a result, if the parties designated the Thai courts as the chosen forum in their choice of court agreement, the Thai courts would have jurisdiction based on such an agreement regardless of other jurisdictional rules, such as the domicile of the parties or the place of the cause of action.[9]

In addition, Article 5(2) of the Hague Convention on Choice of Court Agreements specifically prohibits the chosen court of a Contracting State from refusing to exercise its jurisdiction "on the ground

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"An act is void if its object is expressly prohibited by law, or is impossible, or contrary to public order or good morals."

[8] *See* Chunchaemsai, "Legal Considerations and Challenges Involved in Bringing the 2005 Hague Convention on Choice of Court Agreements into Force Within an Internal Legal System: A Case Study of Thailand," 155.

[9] *See e.g.* Section 4 of the CPC.

that the dispute should be decided in a court of another State."[10] However, such provision may not be necessary for the Thai legal system because the current CPC neither recognizes the *forum non conveniens* doctrine, nor provides *lis pendens* rules in international cases.[11] Therefore, if the jurisdiction of the Thai courts was established on the basis of a choice of court agreement, they would automatically exercise their jurisdiction.

Secondly, the CPC should clearly stipulate the obligations of Thai courts when they are not the chosen courts in an exclusive choice of court agreement. The negative effect of the exclusive choice of court agreements upon Thai courts could be controversial and open to interpretation due to the concerns over territorial sovereignty and the relationship with other personal and special jurisdictions.[12] Furthermore, the Thai Supreme Court has never explicitly enforced the exclusive choice of court agreements and suspended or dismissed proceedings in favor of foreign courts pursuant to such agreements.[13] As a consequence, a new statutory provision should expressly prescribe the negative effect of the choice of court agreements for the sake of legal certainty. For example, Article 6 of the Hague Convention on Choice of Court Agreements provides that "[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 the case falls within one of the exceptions provided in Article 6(a)-(e). This new provision on the obligations of a court not chosen would establish the negative effects of the exclusive choice of court agreements, which would prohibit the non-chosen court from hearing the dispute where the parties would agree to the exclusive jurisdiction of other foreign courts. As a result,

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[10] The Hague Convention on Choice of Court Agreements Article 5(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."

[11] *See* Chunchaemsai, "Legal Considerations and Challenges Involved in Bringing the 2005 Hague Convention on Choice of Court Agreements into Force Within an Internal Legal System: A Case Study of Thailand," 158–59. *See also*, Trevor Hartley and Masato Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements. Explanatory Report.* (Mortsel: Intersentia Uitgevers NV, 2013), 817 paras. 132–34.

[12] *See* Chapter III Section 3.2.2 (i)(b).

[13] *See* Chapter II Section 2.2.1 (ii).

Thai courts should suspend or dismiss proceedings if they are not the chosen court in an exclusive choice of court agreement. However, certain exceptions should be allowed to maintain justice and Thai public policy. This issue will be discussed in detail in Section 6.3.

6.2 Validity Rules for the International Choice of Court Agreements in Thailand

The choice of court agreements need to be both formally and substantively valid in order to be given effect. The clear standards for assessing the validity of the choice of court agreements would enhance the legal certainty and predictability of international transactions. This section aims to propose the rules on the formal and substantive validity of the choice of court agreements in Thailand as follows:

6.2.1 Formal Validity Rules

The introduction of mandatory rules regarding the formality of a choice of court agreement could increase legal certainty as to the form of the choice of court agreement and reduce unnecessary disputes concerning the existence and terms of the choice of court agreement. Evidentiary requirements, such as documentary evidence could ensure the accuracy and significantly reduce the hurdles for ascertaining the contents of the choice of court agreement than other types of evidence, including oral testimonies, which would tend to be more time-consuming and costlier. The formality requirements would also warn parties to pay greater attention to the agreement and its consequences before entering into a contract. Moreover, they would make sure that national courts would not impute a choice of court agreement to the parties unless they expressed their intention in accordance with certain formality rules.[14]

[14] *See* Chapter IV Section 4.1.

In general, many legal systems including Japan[15], the European Union[16], and the Hague Convention on Choice of Court Agreements[17] explicitly require a choice of court agreement to be concluded or documented in writing. This requirement would be consistent with the existing legislation of Thailand concerning dispute resolution clauses. For example, the Multimodal Transport Act, B.E. 2548 (2005) Section 65 provides that the parties to the multimodal transport contract may conclude a choice of court agreement by providing it in the multimodal transport bill of lading or contract of multimodal transport. It further states that "the parties may agree in writing to bring an action to any court which has jurisdiction over such case in accordance with the law of that country if such agreement is made after the claim has arisen." Additionally, the Arbitration Act, B.E. 2545 (2002)[18] and the Civil and Commercial Code[19] stipulate that an arbitration agreement and a settlement agreement must be evidenced in writing and signed by the parties. However, it should be noted that the choice of court agreements under the Multimodal Transport Act, B.E. 2548 (2005) would not be required to be signed by one or both parties unlike arbitration and settlement agreements. To require signatures in the choice of court agreements could be too rigid and inconsistent with the existing legal framework for the choice of court agreements. Therefore, it would be reasonable and justifiable to impose a similar writing requirement on the international choice of court agreements, in general, to maintain consistency with other legislation and enjoy the above-mentioned benefits.

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[15] *See* Article 3-7(2) of the Japanese Code of Civil Procedure.
[16] *See* Article 25 of the Brussels I Regulation (Recast).
[17] *See* Article 3 *c)* of the Hague Convention on Choice of Court Agreements.
[18] The Arbitration Act, B.E. 2545 (2002) Section 11 para. 2:
> "The arbitration agreement shall be in writing and signed by the parties. An arbitration clause constitutes an arbitration agreement if it is contained in an exchange between the parties by means of letters, facsimiles, telegrams, telex, data interchange with electronic signature, or other means which provide a record of the agreements, or in an exchange of statement of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other."

[19] The Civil and Commercial Code Section 851:
> "A settlement agreement is not enforceable by action unless there is some written evidence signed by the party liable or his agent."

In addition, electronic means are deemed equivalent to writing under the Electronic Transactions Act, B.E. 2544 (2001)[20], the Japanese Code of Civil Procedure[21], the Brussels I Regulation[22], and the Hague Convention on Choice of Court Agreements.[23] Hence, to increase legal certainty and avoid unnecessary problems of interpretation, there should be a statutory provision explicitly recognizing the choice of court agreements in the form of electronic records. Moreover, such electronic means should satisfy the requirements under Section 8 of the Electronic Transactions Act, B.E. 2544 (2001), which requires that the information must be "accessible and usable for subsequent reference without its meaning being altered."[24]

6.2.2 Substantive Validity Rules

The current private international law of Thailand does not contain a specific rule for the governing law of the choice of court agreements. There has also been no case law clarifying which law should govern the substantive validity of such agreements. In order to establish a legal framework for determining the substantive validity of the choice of court agreements in Thai courts, two interpretative rules should be introduced into the Thai legal system as follows:

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[20] The English translation of the Electronic Transactions Act, B.E. 2544 (2001) is available at http://web.krisdika.go.th/data/outsitedata/outsite21/file/ELECTRONIC_TRANSACTIONS_ACT,B.E._2544.pdf.

[21] *See* Article 3-7(3) of the Japanese Code of Civil Procedure.

[22] *See* Article 25 of the Brussels I Regulation (Recast).

[23] *See* Article 3 *c)* of the Hague Convention on Choice of Court Agreements.

[24] The Electronic Transactions Act, B.E. 2544 (2001) Section 8:

> "Subject to the provisions of section 9, in the case where the law requires that any transaction be made in writing or evidenced by writing or supported by a document which must be produced, if the information is generated in the form of a data message which is accessible and usable for subsequent reference without its meaning being altered, it shall be deemed that such information is already made in writing, evidenced by writing or supported by the produced document."

(i) The principle of severability

It is widely recognized that the substantive validity of the choice of court agreements should be assessed independently from that of the underlying contracts.[25] For the purpose of determining the validity, the choice of court agreements would be considered as the distinct agreements from the contracts of which they form part. The invalidity of the contracts would not necessarily render the choice of court agreements invalid. Similarly, the invalidation of the choice of court agreements would not affect the underlying main contracts.[26] The principle of severability is thus explicitly provided in the Brussels I Regulation (Recast)[27] and the Hague Convention on Choice of Court Agreements.[28] Likewise, it is recognized in the Thai Arbitration Act, B.E. 2545 (2002), which provides that "an arbitration clause, which forms part of a contract, shall be treated as an agreement independent of the main contract."[29]

The rationale for the principle of severability in the context of arbitration agreements would also apply to the choice of court agreements because they would need to survive for the purpose of determining which court could adjudicate the challenges to the validity of the underlying contract even in the case where the validity of the main contract would be contested.[30] If one party could argue that the

[25] *See e.g. Deutsche v. Asia Pacific Broadband* [2008] EWCA Civ 1091; *Preferred Capital, Inc. v. Associates in Urology*, 453 F.3d 718, 722 (2006); Article 25(5) of the Brussels I Regulation (Recast); Article 3 *d)* of the Hague Convention on Choice of Court Agreements; Koji Takahashi (高橋宏司), "Choice of Court Agreement [管轄合意]," in Selected Hundred Cases in Private International Law [国際私法判例百選], ed. Masato Dogauchi (道垣内正人) and Yasushi Nakashini (中西康), 3rd ed. (Tokyo: Yuhikaku, 2021), 164–65.

[26] *See* Hartley, Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention, 135–36.

[27] *See* Article 25(5) of the Brussels I Regulation (Recast).

[28] *See* Article 3 *d)* of the Hague Convention on Choice of Court Agreements.

[29] The Thai Arbitration Act, B.E. 2545 (2002) Section 24 para. 1:

> "The arbitral tribunal shall be competent to rule on its own jurisdiction, including the existence or validity of the arbitration agreement, the validity of the appointment of the arbitral tribunal, and issues of dispute falling within the scope of its authority. For that purpose, an arbitration clause, which forms part of a contract, shall be treated as an agreement independent of the main contract. A decision by the arbitral tribunal that the contract is null and void shall not affect the validity of the arbitration clause."

[30] *See generally*, Koji Takahashi (高橋宏司), "The Principle of Severability in Arbitration and Jurisdiction Agreements: Reconsidering the Process of Determining the Applicable Law [仲裁合意・管轄合意の独立性

invalidity of the main contract automatically invalidated a choice of court agreement, it would lead to the end of the mode of settlement selected by the parties and jeopardize the party autonomy in choice of court.[31] Therefore, the principle of severability with respect to the international choice of court agreements should be established. In this regard, Article 25(5) of the Brussels I Regulation (Recast) provides an appropriate model for the Thai legal system, which reads:

> An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.
>
> The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.

(ii) The *Lex Causae* approach

As discussed in Chapter IV Section 4.2.2, the *lex causae* approach would appear to be the most useful concept in determining the substantive validity of the choice of court agreements. Moreover, it is consistent with the existing private international law rules under the Act on Conflict of Laws B.E. 2481 (1938). Therefore, there would be no need to revise the Act on Conflict of Laws B.E. 2481 (1938) or establish a new specific provision in the CPC to adopt the *lex causae* approach. According to this approach, when the Thai court is the court seised, it would have to look to the Act on Conflict of Laws B.E. 2481 (1938) to decide what law should be applied to assess the validity of the choice of court agreements. The determination of the law applicable to the substantive validity of the choice of court agreement should be analyzed in the same way as the law applicable to the contractual obligations. The same conflict-of-laws rules would be applied to determine the law applicable to the choice of court agreement and that of the underlying contract, which would likely lead to the same applicable law. In particular, Section 13 paragraph 1 of the Act provides:

原則一準拠法決定プロセスにおける再検討]," *Journal of Civil and Commercial Law [民商法雑誌]* 147, no. 3 (2012): 256–84.

[31] *See* Chapter IV Section 4.2.1.

> The question as to what law is applicable in regard to the essential elements or effects of a contract is determined by the intention of the parties to it. If such intention, expressed or implied, cannot be ascertained, the law applicable is the law common to the parties when they are of the same nationality, or, if they are not of the same nationality, the law of the place where the contract has been made.

Firstly, the parties could explicitly or implicitly choose the law that they wished to govern their contract. They could also directly specify the governing law for their choice of court agreement.[32] In the absence of a specific agreement on the choice of law for the choice of court agreement, an express choice of law clause in the contract could be assumed to govern the choice of court agreement as well because the said agreement would also be a part of the contract, which the parties would have agreed that it should be governed by the designated legal system.[33] Thus, it would be natural to expect that their choice of law clause would apply to the whole contract, including a choice of court agreement.[34]

Secondly, when the parties have not chosen the law to govern their contract, or their intention could not be ascertained, the law common to the parties when they are of the same nationality (*lex patriae*) would be the law governing the substantive validity of the choice of court agreement. Moreover, if the parties did not have a common nationality, the applicable law would be the law of the place where the contract had been made (*lex loci contractus*). However, Section 8 of the Act on Conflict of Laws B.E. 2481 (1938) treats a foreign law as a matter of fact.[35] Therefore, if the applicable law to the choice of court agreement is a foreign law, it must be pleaded by the parties and "proved to the satisfaction" of

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[32] *See* Prasit Pivavatnapanich, *Commentary on Private International Law [Kam Athibai Khodmai Rawangprathed Panaek Khadeebukkon]*, 8th ed. (Bangkok: Thammasat University Press, 2018).
[33] Lord Collins of Mapesbury and Jonathan Harris, eds., Dicey, Morris & Collins on the Conflict of Laws, 15th ed. (London: Sweet & Maxwell, 2018), para. 12–109.
[34] *See Enka Insaat ve Sanayi AS (Respondent) v. OOO Insurance Company Chubb* (Appellant) [2020] UKSC 38, para. 43.
[35] The Act on Conflict of Laws B.E. 2481 (1938) Section 8:
> "Whenever the law of a foreign country which is to govern is not proved to the satisfaction of the Court, the internal law of [Thailand] shall apply."

the Thai courts. Otherwise, the internal law of Thailand could be applied to decide on the substantive validity.[36]

Finally, the law applicable to the choice of court agreements would be subject to public policy and the overriding mandatory rules of Thailand.[37] As provided in Section 5 of the Act on Conflict of Laws B.E. 2481 (1938), "[w]henever a law of a foreign country is to govern, it shall apply in so far as it is not contrary to the public order or good morals of [Thailand]." Hence, if the applicable foreign law, as ascertained pursuant to Section 13, is considered contrary to the public policy of Thailand, the internal law of Thailand would be applied instead to determine the substantive validity of the choice of court agreements. This would open up the possibility of the application of Thailand's overriding mandatory rules to protect weak parties, such as the Unfair Contract Terms Act, B.E. 2540 (1997), the Consumer Protection Act, B.E. 2522 (1979), the Labor Protection Act B.E. 2541 (1998), and the Labor Relations Act B.E. 2518 (1975).[38] For example, even when a foreign law governs the substantive validity of the choice of court agreements in consumer and standard form contracts, Thai courts may refuse to give effect to such an agreement if it rendered one party an unreasonably excessive advantage, pursuant to Section 4 of the Unfair Contract Terms Act, B.E. 2540 (1997).[39]

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[36] *See e.g.* Supreme Court Dika no. 3223/2525 (1983). *See also,* Chunchaemsai, "Legal Considerations and Challenges Involved in Bringing the 2005 Hague Convention on Choice of Court Agreements into Force Within an Internal Legal System: A Case Study of Thailand." 159.

[37] *See* Pivavatnapanich, *Commentary on Private International Law [Kam Athibai Khodmai Rawangprathed Panaek Khadeebukkon]*. Takahashi (高橋), "The Principle of Severability in Arbitration and Jurisdiction Agreements: Reconsidering the Process of Detemining the Applicable Law [仲裁合意・管轄合意の独立性原則ー準拠法決定プロセスにおける再検討]," 278.

[38] *See* Awnrumpa Waiyamuk, "Problems Concerning the Protection of Weaker Contracting Parties in Thai Conflict-of-Laws Rules [Punha Karn Khumkrong Kusanya Tii Onae Kwa Nai Lak Khodmai Kudgun Thai]," *Naresuan University Law Journal* 10, no. 1 (June 2017): 68–70.

[39] *See* Chapter II Section 2.1.2 (ii). *See also*, Supreme Court Dika no. 1583/2511 (1968) ("The agreement to apply Danish law to the dispute is valid so far as it is not contrary to the public order or good morals of Thailand. The statute of limitation is a law concerning public policy of Thailand. Therefore, the agreement or clause in the bill of lading which intends to apply the Danish statute of limitation to the dispute is not enforceable.")

6.2.3 Requirement for the Connection with a Particular Legal Relationship (Specificity requirement)

The choice of court agreements could significantly affect the parties' rights and access to justice because they could confer jurisdiction on the court that has no jurisdiction or oust the jurisdiction of the court that would otherwise have been competent. The conclusion of the choice of court agreement without careful consideration could result in the situation where parties could be taken by surprise to respond to unexpected legal actions in the courts where they have not intended to confer jurisdiction. In order to ensure predictability and raise awareness in concluding the choice of court agreements, the Japanese Code of Civil Procedure, for example, requires that the choice of court agreements must be "made regarding actions that are based on a specific legal relationship."[40] The Brussels I Regulation (Recast) and the Hague Convention on Choice of Court Agreements also lay down similar requirements by stipulating that the choice of court agreements must be made "for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship."[41]

Thailand should also introduce the requirement for the connection with a particular legal relationship in order to limit the scope of the choice of court agreement to the disputes arising from a specific legal relationship as specified by the parties and avoid unexpected situations where the parties might be taken by surprise to respond to all possible disputes, including those that would not be covered by their choice of court agreement.[42] This requirement would serve as an important safeguard to ensure a prudent decision and foreseeability for the parties in prescribing the scope of their choice of court agreement.[43]

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[40] *See* Art. 3-7(2) of the Japanese Code of Civil Procedure.
[41] *See* Art. 3 *a)* of the Hague Convention on Choice of Court Agreements; Art. 25 of the Brussels I Regulation (Recast).
[42] *See* Case C-214/89 *Powell Duffryn plc v. Wolfgang Petereit* [1992] ECR I-1745 para. 31.
[43] *See* Masato Dogauchi (道垣内正人), "The Validity of International Choice of Court Agreements: With Regard to the Tokyo District Court Interlocutory Judgment on February 15, 2016 [国際裁判管轄合意の有効性ー東京地裁平成28年2月15日中間判決をめぐって]," *NBL* 1077 (July 2016): 27–28.

6.2.4 Presumption in Favor of Exclusivity

In general, whether a choice of court agreement is exclusive or non-exclusive is a matter of interpretation on a case-by-case basis depending on the law governing the interpretation of the choice of court agreement and the terms used in the agreement.[44] Since the exclusive and non-exclusive choice of court agreements are significantly different in terms of legal effects on the parties and national courts, the characterization of the choice of court agreements is a highly important issue.[45] However, as discussed in Chapter V Section 4.2.4, distinguishing an exclusive from a non-exclusive choice of court agreements would not be an easy task. If the court treats this issue as a factual question, then it would have to ascertain the actual intention of the parties through the language used in the choice of court agreement and other evidence. In contrast, if the court treats this issue as a legal question, they would still have to conduct a complex choice of law analysis, including *renvoi*, to ascertain the law applicable to the interpretation of the choice of court agreements. Nonetheless, even if the applicable law could be ascertained, it may not provide a clear guideline for the distinction between these two types of choice of court agreements, such as Japanese law.[46] The legal uncertainty as to the type of choice of court agreement would result in extra expenses and time in the litigation.

Hence, to increase legal certainty in the interpretation of the choice of court agreement, the Brussels I Regulation (Recast)[47] and the Hague Convention on Choice of Court agreements[48] provide a similar legal presumption in favor of exclusivity. According to these instruments, the choice of court agreement is presumed to be exclusive unless the parties have agreed otherwise. The introduction of such presumption in international treaties implies the tendency of the use of the exclusive choice of court

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[44] *See* Tatsubumi Satō（佐藤達文）and Yasuhiko Kobayashi（小林康彦）, eds., *2011 Reform of the Code of Civil Procedure etc.: Legislation on International Jurisdiction [一問一答　平成23年　民事訴訟法等改正　国際裁判管轄法制の整備]*, 1st ed., Ichimon Ittō Series (Tokyo: Shōji Hōmu, 2012), 132.
[45] *See* Chapter III Section 3.3.2.
[46] Koji Takahashi, "Japan: Quests for Equilibrium and Certainty," in *Optional Choice of Court Agreements in Private International Law*, ed. Mary Keyes (New York: Springer International Publishing, 2020), 271–72 .
[47] *See* Article 25 of the Brussels I Regulation (Recast).
[48] *See* Article 3 *b)* of the Hague Convention on Choice of Court Agreements.

agreements at the international level. This approach would also be consistent with the general expectation of commercial parties, which would be likely to prefer to have their disputes resolved by the same tribunal.[49] Therefore, Thailand should also introduce the presumption in favor of exclusivity in the area of the choice of court agreements. Moreover, this presumption should be considered as a part of overriding mandatory rules, which would apply irrespective of the law applicable to the choice of court agreement in order to ensure legal certainty. However, such presumption ought to be rebuttable to secure a reasonable opportunity for the parties to prove their actual intention whether their agreement would be intended to be exclusive or non-exclusive. In the case where the parties would prefer a non-exclusive choice of court agreement, they could expressly specify it or present their evidence to establish that their agreement was intended to be non-exclusive.

6.3 Jurisdictional Protection of Weak Parties in the International Choice of Court Agreements in Thailand

One of the reasons for abolishing a statutory provision on the choice of court agreements in the CPC was the concern over the protection of weak parties in litigation, such as consumers.[50] In order to establish a new legal framework for the international choice of court agreements in Thailand, it would be important to strike a balance between maximizing the benefits of party autonomy in the choice of a court and safeguarding vulnerable parties who deserve special protection. Thus, the protective regime for weak parties would be an essential element for mitigating the concern over the use of the choice of court agreements.

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[49] *See e.g.*, *Fiona Trust v. Privalov* [2007] UKHL 40, [13]; *Maple Leaf Macro Volatility Master Fund v. Rouvroy* [2009] EWHC 257 (Comm), [199]; *Starlight Shipping Company v. Allianz Marine and Aviation Versicherungs* AG [2014] EWCA Civ 1010.

[50] *See* Vichai Ariyanuntaka, "Problems Respecting Jurisdiction and Recognition and Enforcement of Foreign Judgments and Arbitral Awards: A Thai Perspective," *Law Journal of the Thai Bar* 52, no. 3 (1996): 44.

Chapter V used the behavioral economic model to analyze the need and regulatory tools for providing optimal jurisdictional protection to weak parties. It also examined the protective jurisdictional rules in favor of consumers and employees, as well as public policy control for the protection of weak parties in general. This section will use the findings in Chapter V to propose new jurisdictional rules for the protection of weak parties in the international choice of court agreements in the specific context of Thailand. However, Thai laws do not have special jurisdictional regimes and procedures for weak parties other than consumers and employees. As such, the creation of the new categories of weak parties would involve substantial revisions and new additions to the current civil procedural laws, which might be extremely difficult to achieve in practice. Therefore, to maintain consistency with Thailand's existing legislation, such as the Consumer Case Procedure Act, B.E. 2551 (2008), the Act for the Establishment of and Procedure for Labor Court, B.E. 2522 (1979), and the Unfair Contract Terms Act, B.E. 2540 (1997), this section aims to propose protective jurisdictional rules in favor of the existing categories of weak parties, i.e., consumers and employees, and public policy control for the comprehensive protection of weak parties in general.

6.3.1 Jurisdictional Protection for Consumers in the International Choice of Court Agreements

(i) Protective jurisdictional rules in favor of consumers

In general, consumers tend to suffer from their systematic cognitive biases and be vulnerable to abuse by stronger parties. The mere operation of market forces and soft paternalistic tools, such as disclosure regulations cannot effectively protect weak parties from their own behavioral patterns and misperception. Hence, strong government intervention in the form of non-enforcement of the choice of court agreement is necessary to provide effective jurisdictional protection for consumers.[51] In principle, the choice of court agreement involving consumers should be unenforceable. On the other hand, there

[51] *See* Chapter V Section 5.2.5.

are some situations where such government intervention would be unnecessary, and consumers should be allowed to exercise their freedom in choosing the jurisdictions that suit their interests, such as when a choice of court agreement is wholly beneficial to consumers. The full exclusion of party autonomy in the choice of court under these situations would rather preclude parties from enjoying the benefits of the choice of court agreements, and the costs of the intervention would be likely to exceed its benefits. Consequently, Thailand should adopt a new set of protective jurisdictional rules in favor of consumers in the international choice of court agreements as follows:

Firstly, with regard to the pre-dispute choice of court agreements in consumer contracts, the Japanese Code of Civil Procedure[52] and the Brussels I Regulation (Recast)[53] allow consumers to enter into a choice of court agreement with business operators when the agreement guarantees home-court advantages for consumers. In particular, the agreed court must be the court of the country where the consumer was domiciled at the time the consumer contract was concluded. This approach is also consistent with Section 17 of the Consumer Case Procedure Act, B.E. 2551 (2008), which provides that in a case where a business operator is going to take legal action against a consumer in a consumer case, it must submit a complaint only to a court in which a consumer is domiciled.[54] Therefore, this protective framework under Section 17 should be maintained in the context of the international choice of court agreements as well. However, the domicile of the consumer should be limited to the domicile at the time of the conclusion of the contract rather than the domicile at the time when the plaintiff submitted a complaint.[55] This rule could ensure more legal predictability for both parties in consumer transactions

[52] *See* Article 3-7 (5) of the Japanese Code of Civil Procedure.
[53] *See* Article 19 of the Brussels I Regulation (Recast).
[54] The Consumer Case Procedure Act, B.E. 2551 (2008) Section 17:

> "In the case where a business operator is going to take a legal action against a consumer as a consumer case, and the former is entitled to submit a case to the court within the territorial jurisdiction of which the consumer is domiciled or to other court as well, the business operator shall submit the case only to the court within the territorial jurisdiction of which the consumer is domiciled."

[55] Section 17 of the Consumer Case Procedure Act, B.E. 2551 (2008) obligates a business operator to file an action against a consumer with the court where the consumer has a domicile at the time of the filing of such action. *See* Channarong Praneejitt, *Commentary on the Consumer Case Procedure Act, B.E. 2551 [Kham*

because they could anticipate the place of litigation when they enter into a contractual relationship.[56] Moreover, it would be unlikely to adversely affect the interests of consumers because they would tend to be more familiar with the legal system, business practice, and language of the country where they had domicile at the time of the conclusion of the contract, and it would not be too troublesome for consumers to respond to legal actions at their place of domicile.[57] As a consequence, the new protective jurisdictional rules of Thailand should allow the choice of court agreements in consumer contracts, which would designate the courts of the country where the consumer was domiciled at the time the consumer contract was concluded.

Secondly, when consumers themselves file an action with the chosen courts in accordance with the choice of court agreement, or they invoke the choice of court agreement when business operators file an action with the chosen court[58], such choice of court agreement should be given effect in Thailand because it would operate entirely in the interests of consumers and their desire. This rule would also be consistent with the Consumer Case Procedure Act, B.E. 2551 (2008), which permits consumers to request the court to transfer their case to another court having jurisdiction, pursuant to Section 6 of the CPC[59], besides the court for their domicile if the trial at the court seised is inconvenient or unfair for the

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Athibai Phraratchabanyat Withi Phicharana Khadi Phuboriphok Pho. So. 2551] (Bangkok: Office of the Judiciary, 2009), 68.

[56] *See* Naohiro Kitasaka （北坂尚洋）, "International Jurisdiction in Matters Concerning Consumer and Labor Disputes [消費者契約事件・労働関係事件の国際裁判管轄]" in *International Economic Law 2: Transactions, Property, and Procedure [国際経済法講座II 一取引・財産・手続]*, ed. Noboru Kashiwagi （柏木昇）, 1st ed. (Kyoto: Hōritsu Bunkasha, 2012), 180.

[57] Satō （佐藤） and Kobayashi （小林）, *2011 Reform of the Code of Civil Procedure etc.: Legislation on International Jurisdiction [一問一答　平成23年　民事訴訟法等改正　国際裁判管轄法制の整備]*, 145.

[58] *See* Art. 3-7 (5)(ii) of the Japanese Code of Civil Procedure.

[59] CPC Section 6 para. 1:

> "Prior to filing an affidavit, the defendant is entitled to file a motion in the Court where a plaint was submitted requesting the Court to transfer the case to another Court having territorial jurisdiction over such case. The motion shall identify the reason that it will be inconvenient if a trial is to be further proceeded in that Court or the defendant may not be granted justice, the Court may issue his order permitting such transfer if he deems appropriate."

consumers.[60] Therefore, if the consumers themselves wished to give effect to their choice of court agreements at the litigation stage by bringing an action with the chosen court in accordance with the agreement or invoking it, Thai law should recognize such autonomy because the choice of court agreements in such cases would appear to be wholly beneficial to consumers.

Thirdly, the special rule stated in parentheses in Article 3-7(5)(i) of the Japanese Code of Civil Procedure[61] stipulates that an exclusive choice of court agreement that designates specific courts to the exclusion of the jurisdiction of any other courts would be deemed a non-exclusive choice of court agreement. According to this rule, even if the exclusive choice of court agreement was validly formed, consumers and business operators could still bring proceedings in Japanese courts under other jurisdictional rules provided in the Code, such as Articles 3-2, 3-3, 3-4(1). This would aim to secure an opportunity for consumers to access the courts of the country where they have domicile.[62] This special rule should also be introduced into the Thai legal system because it would widen options for consumers to bring an action or defend themselves in Thailand where they would have home-court advantages. Furthermore, it would be consistent with Section 17 of the Consumer Case Procedure Act, B.E. 2551 (2008), which allows consumers to sue business operators before the courts for the business operator's domicile, the court for the place of the cause of action, or other competent Thai courts having jurisdiction according to the jurisdiction rules in the CPC.

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[60] Praneejitt, *Commentary on the Consumer Case Procedure Act, B.E. 2551 [Kham Athibai Phraratchabanyat Withi Phicharana Khadi Phuboriphok Pho. So. 2551]*, 70.

[61] The Japanese Code of Civil Procedure Article 3-7(5)(i):

> "if the agreement provides that an action may be filed with the courts of the country where the Consumer was domiciled at the time the Consumer Contract was concluded (except in the case set forth in the following item, any agreement that an action may be filed only with a court of such a country is deemed not to preclude the filing of an action with a court of any other country);"

[62] Satō （佐藤） and Kobayashi （小林）, *2011 Reform of the Code of Civil Procedure etc.: Legislation on International Jurisdiction [一問一答　平成23年　民事訴訟法等改正　国際裁判管轄法制の整備]*, 145–46.

Finally, the choice of court agreements that would be concluded after the dispute had occurred should be allowed in Thailand.[63] This would be because after the dispute had arisen, the issue in dispute and the risks of the choice of court agreement would become more salient. As such, consumers would be expected to be able to gather more information and make their own decisions carefully. Furthermore, stronger parties could hardly exercise their superior bargaining power to compel the choice of court agreements.[64]

(ii) Definition of consumers and the scope of protection

Under the Consumer Case Procedure Act, B.E. 2551 (2008)[65] and the Consumer Protection Act, B.E.2522 (1979), a consumer is defined as "a person who purchases or receives a service from a business operator or a person who receives an offer or a solicitation from a business operator for purchasing goods or receiving a service and includes a person who duly uses goods or receives a service from a business operator despite no payment of remuneration on his part."[66] The definition does not distinguish between active and passive consumers. As a result, it is generally understood that this covers both types of consumers, which would be consistent with the jurisdictional rules under the Japanese Code of Civil Procedure. This approach would be justifiable from the viewpoint of consumer protection since it would provide more safeguards for consumers, especially foreign consumers who briefly visit Thailand and have transactions with the local business operators.[67] Therefore, this framework should be maintained in the context of the international choice of court agreements as well.

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[63] *See* Article 3-7 (5) of the Japanese Code of Civil Procedure; Article 19 (1) of the Brussels I Regulation (Recast).
[64] *See* Satō （佐藤） and Kobayashi （小林）, *2011 Reform of the Code of Civil Procedure etc.: Legislation on International Jurisdiction [一問一答　平成23年　民事訴訟法等改正　国際裁判管轄法制の整備]*, 143.
[65] *See* Section 3 of the Consumer Case Procedure Act, B.E. 2551 (2008).
[66] *See* Section 2 of the Consumer Protection Act, B.E. 2522 (1979).
[67] *See* Chapter V Section 5.2.2(i)(b).

On the other hand, there might be a concern that the inclusion of active consumers could lead to an excessive jurisdiction of the Thai courts and undue burdens on the parties. In fact, this issue was raised in the Legislative Council of the Ministry of Justice of Japan during the drafting process for the new rules of international jurisdiction in consumer cases.[68] Eventually, it was opined that the special circumstances doctrine under Article 3-9 of the Japanese Code of Civil Procedure could be resorted to decline excessive jurisdiction and dismiss the cases which would unduly burden the defendant, especially the business operator.[69] Thus, the new jurisdictional rules of Japan did not exclude active consumers from the scope of jurisdictional protection. However, the above concerns would be less likely to be problematic in the context of the choice of court agreements. This would be because the parties, especially business operators, could avoid concluding a choice of court agreement with active consumers if they deemed that such an agreement would bring about undue burden. Additionally, Thai courts could use the public policy exception, as discussed below, to invalidate a choice of court agreement that would be extremely unreasonable and excessively burden one party. Furthermore, unlike the case of general and special jurisdiction, Thai courts would be expected to accommodate the need for party autonomy in choice of court. Therefore, the inclusion of active consumers in the case of the choice of court agreements would be unlikely to adversely affect the international jurisdiction system of Thailand despite the lack of comparable rules, such as the special circumstances doctrine and *forum non conveniens*.

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[68] *See* Masato Dogauchi（道垣内正人）, "Forthcoming Rules on International Jurisdiction [日本の新しい国際裁判管轄立法について]," *Japanese Yearbook of Private International Law* 12 (2010): 197–98. *See also,* "Complementary Explanation to the Interim Draft on the Legislation on International Jurisdiction [国際裁判管轄法制に関する中間試案の補足説明]" (Tokyo: Civil Affairs Bureau, Ministry of Justice of Japan, July 2009), 43–44 https://www1.doshisha.ac.jp/~tradelaw/UnpublishedWorks/ExplanatoryNoteOnBillOfJurisdictionAct.pdf.

[69] Dogauchi（道垣内）, "Forthcoming Rules on International Jurisdiction [日本の新しい国際裁判管轄立法について]," 198.

In addition, consumers under Thai law, include both natural and legal persons[70], contrary to the definitions in the Japanese Code of Civil Procedure[71] and the Brussels I Regulation (Recast)[72], which are limited to only natural person consumers. However, the definition which excludes legal persons from the scope of consumers may be too restrictive in certain circumstances. For example, some non-profit organizations or private entities may act in a private capacity and obtain goods or services for purposes that are outside their trade or profession. Consequently, the legal personality would not necessarily ensure that legal persons would be equipped with the capacity to make an informed judgment. Some legal persons, especially small enterprises, also may even be less sophisticated than individual consumers who would be well-informed, such as individual investors.[73] This would appear to be irrational to exclude the less sophisticated legal persons from the scope of protection while covering the more sophisticated individuals.[74] Therefore, the current definition of consumers under Thai law would be flexible enough to extend jurisdictional protection to some legal person consumers whose acts would not be aimed for commercial purposes and truly deserve special protection.

Nevertheless, the consumer's heterogeneity would be a significant challenge in designing the scope of protection. Consumers would not necessarily have the same needs and degrees of sophistication. They would also vary in how they would react to cognitive biases. As a result, the demand for special jurisdictional rules and their actual effects could be different from one person to another. The overinclusive paternalistic rules could result in a situation where well-informed consumers would also be protected even if they did not deserve the same level of protection as weak ones.[75]

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[70] Praneejitt, *Commentary on the Consumer Case Procedure Act, B.E. 2551 [Kham Athibai Phraratchabanyat Withi Phicharana Khadi Phuboriphok Pho. So. 2551]*, 7.
[71] Article 3-4 (1) of the Japanese Code of Civil Procedure.
[72] *See* Hélène Gaudemet-Tallon, *Compétence et Exécution Des Jugements En Europe: Règlement No 44-2001, Conventions de Bruxelles 1968, et de Lugano 1988 et 2007*, 4th ed. (Paris: L.G.D.J., 2010), 290.
[73] *See* Chapter V Section 5.2.5 (ii).
[74] *See* J. Toro, "Le Règlement Bruxelles I Bis et Son Impact (Très Limité) Au Plan Des Consommateurs," *Revue Européenne de Droit de La Consommation (REDC)* 1 (2014): 81–94.
[75] *See* Friedrich Rosenfeld, "Limits to Party Autonomy to Protect Weaker Parties in International Arbitration," in *Limits to Party Autonomy in International Commercial Arbitration*, ed. Franco Ferrari (New York: JurisNet, 2016), 424.

Furthermore, the rules could prevent such consumers from exercising their freedom in the choice of court as they desire. On the other hand, the underinclusive rules could leave some weak consumers unprotected. Since the definition of consumers under the current Thai legal system covers a large scope of consumers including legal persons and individuals without considering their needs and level of sophistication, some of them could be overprotected or their choices could be unduly restricted.

In this regard, Thai laws may restrict the scope of jurisdictional protection for certain consumers in the choice of court agreements by using the amount of the claim for a pecuniary remedy as a threshold for assuming that consumers in transactions who exceed a certain amount would be in relatively strong bargaining positions. This approach has been used in the English Arbitration Act, which invalidates pre-dispute consumer arbitration agreements regarding claims of £5000 or less.[76] It is based on the presumption that consumers in certain high-value transactions could be expected to be able to gather more information and make more prudent decisions. Although this amount of claim threshold may not fully reflect the sophistication of each consumer, it would still be useful to adjust the scope of jurisdictional protection as close as possible to the actual level of sophistication and bargaining power. Moreover, it could preserve the legal certainty for the parties when compared to the determination of the capability of the consumers on a case-by-case basis without any clear standards.

With respect to Thailand, the amount of a claim of 300,000 Thai Baht[77] may be used as a baseline for distinguishing consumer transactions. This amount has also been used as a standard for dividing small claim procedures and normal civil procedures under the CPC.[78] Moreover, if consumers

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[76] *See* Sections 89 and 91 of the English Arbitration Act 1996 in conjunction with the Office of Fair Trading's Guidance for the Unfair Terms in Consumer Contracts Regulation 1999 para. 17.2. *See also*, the Unfair Arbitration Agreements (Specified Amount) Order 1999.

[77] This amount is equivalent to 1,131,785.94 yen or 8,719.16 US dollars as of May 1, 2022.

[78] CPC Section 189:

> "Petty cases are:
> (1) the cases where relief applied for may be computed in value of money not exceeding forty thousand baht or not exceeding the sum as prescribed by the Royal Decree,"

Section 3 of the Royal Decree on Imposition of the Sum in the Petty cases, B.E. 2546 (2003) provides the sum as following:

in the high-value transactions are legal persons, it could be expected that they would tend to be less susceptible to cognitive biases and have a higher ability to make informed decisions compared to ordinary individual consumers. Therefore, the choice of court agreements concluded between a business operator and a legal person consumer, which is related to a claim for a pecuniary remedy that exceeds the amount of 300,000 Thai Baht, should be exceptionally given effect in Thailand. This approach would not only prevent overprotective measures, but also allow certain consumers to maximize the benefits of the choice of court agreement without jeopardizing the legal certainty.

6.3.2 Jurisdictional Protection for Employees in the International Choice of Court Agreements

(i) Protective jurisdictional rules in favor of employees

Employees are also regarded as weak parties under Thai laws. There is special legislation that has established specific procedures and special jurisdictional rules in favor of employees in labor disputes.[79] Therefore, similar to consumers, strong government intervention in the form of the non-enforcement of a choice of court agreement would be necessary to provide effective jurisdictional protection for employees as well.[80] In principle, the choice of court agreement involving employees should be unenforceable except in the situations where the choice of court agreement would be wholly beneficial to employees and the costs of the intervention would likely exceed its benefits. Accordingly, Thailand should adopt a new set of protective jurisdictional rules in favor of employees in the international choice of court agreements, which could be summarized as follows:

Firstly, where the choice of court agreement covering labor disputes was made at the time the labor contract was terminated and the employer and employee agreed to designate the courts of the

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"(1) the cases where relief applied for may be computed not exceeding three hundred thousand baht,"

[79] *See* Chapter II Section 2.1.2 (i)(b).

[80] *See* Chapter V Section 5.2.5.

country where the place that the labor was being provided at that time was located[81], the Thai legal system should exceptionally give effect to such agreement. This would be because when the labor contract ends, employers could no longer use their superior bargaining power to coerce employees. The country where the place that the labor was being provided is located at the time when a labor contract ends would also usually be the same country where employees have residences. Thus, it could be expected that they would be familiar with the legal system, business practice, and language of that country. Furthermore, the trial in the courts of such a country would be unlikely to surprise the parties because they could predict that their labor disputes may be resolved at the place where the employees provided their labor, and evidence concerning the disputes would be generally located in that place.[82] This approach would also be consistent with the special jurisdictional rules provided in Section 33 of the Act for the Establishment of and Procedure for Labor Court, B.E. 2522 (1979), which requires that a complaint with respect to labor disputes must be submitted to the labor court in which the employee provided the labor.[83]

Secondly, when employees themselves file an action with the chosen courts in accordance with the choice of court agreement, or they invoke the choice of court agreement when employers file an action with the chosen court[84], such choice of court agreement should be given effect in Thailand because it would operate entirely in the interests of the employees and their desire. This rule would also

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[81] *See* Article 3-7 (6) (i) of the Japanese Code of Civil Procedure.

[82] *See* Satō （佐藤） and Kobayashi （小林）, *2011 Reform of the Code of Civil Procedure etc.: Legislation on International Jurisdiction [一問一答　平成23年　民事訴訟法等改正　国際裁判管轄法制の整備]*, 151–52.

[83] The Act for the Establishment of and Procedure for Labor Court, B.E. 2522 (1979) Section 33:

> "A labor plaint shall be filed with the labor court within the territorial jurisdiction of which the cause of action arose. If the plaintiff intends to file the plaint with the labor court within the territorial jurisdiction of which the plaintiff or the defendant has domicile, the labor court may, when the plaintiff has proved that the trial in such labor court will be convenient, allow the plaintiff to file such plaint as requested.
>
> For the purpose of this Section, the place of work of the employees shall be deemed as the place where the cause of action arose."

[84] *See* Art. 3-7 (5)(ii) of the Japanese Code of Civil Procedure.

be consistent with the third paragraph of Section 33 of the Act for the Establishment of and Procedure for Labor Court, B.E. 2522 (1979), which would permit the employees to request the court to transfer their case to another labor court having jurisdiction.[85] Therefore, if the employees themselves wished to give effect to their choice of court agreements at the litigation stage by bringing an action with the chosen court in accordance with the agreement or invoking it, Thai law should recognize such autonomy because the choice of court agreements in such cases would appear to be wholly beneficial to the employees.

Thirdly, the special rule stated in parentheses in Article 3-7(6)(i) of the Japanese Code of Civil Procedure[86] stipulates that an exclusive choice of court agreement that designates specific courts to the exclusion of the jurisdiction of any other courts would be deemed a non-exclusive choice of court agreement. According to this rule, even if the exclusive choice of court agreement was validly formed, employees and employers could still bring proceedings in Japanese courts under other jurisdictional rules provided in the Code, such as Articles 3-2, 3-3, 3-4(2). This would aim to secure an opportunity for employees to access the courts of the country where they provided labor.[87] This special rule should also be introduced into the Thai legal system because it would widen options for employees to bring an action or defend themselves in Thailand where they would be familiar with the legal system and have

[85] The Act for the Establishment of and Procedure for Labor Court, B.E. 2522 (1979) Section 33 para. 3:
"At any stage of the trial but prior to judgment or order disposing of the case, a party may, citing appropriate reason and necessity thereto, request the labor court where the plaintiff has filed the plaint, to transfer the case to other competent labor court. If the labor court deems appropriate, it may grant such request. However, it shall not issue such order without prior consent of the other labor court. If such consent is not given, the former labor court may submit the matter to the Chief Justice of the Central Labor Court for his decision. Such decision shall be final."

[86] The Japanese Code of Civil Procedure Article 3-7(6)(i):
"if the agreement is made at the time a labor contract ends, and establishes that an action may be filed with the courts of the country where the place that the labor was being provided as of that time is located (except in the case set forth in the following item, an agreement that an action may be filed only with the courts of such a country is deemed not to preclude the filing of an action with the courts of any other country);"

[87] Satō （佐藤） and Kobayashi （小林）, *2011 Reform of the Code of Civil Procedure etc.: Legislation on International Jurisdiction [一問一答　平成23年　民事訴訟法等改正　国際裁判管轄法制の整備]*, 151–53.

home-court advantages. Furthermore, this would be consistent with Section 33 of the Act for the Establishment of and Procedure for the Labor Court, B.E. 2522 (1979), which would allow employees to sue employers before the courts in the domiciles of employees and employers.

Finally, the choice of court agreements that would be concluded after the dispute had occurred should be allowed in Thailand.[88] This would be because after the dispute had arisen, the issue in dispute and the risks of a choice of court agreement would become more salient. Thus, employees could be expected to be able to gather more information and make their own decisions carefully. Furthermore, stronger parties could hardly exercise their superior bargaining power to compel the choice of court agreements.[89]

(ii) Definition of labor disputes and the scope of protection

Similar to the context of consumers, employees would not necessarily have the same needs and degrees of sophistication. Some employees would be more informed and better equipped than others. Therefore, a special jurisdictional protection mechanism should reflect the heterogeneity in the employees' preferences and degrees of sophistication to avoid over-or under-protective regimes. In general, labor unions, which are formed by employees to protect their interests and improve employment standards through solidarity among employees, could be considered to have certain bargaining power. Therefore, they would be excluded from the scope of jurisdictional protection in several legal systems, including Japan and the European Union. In these jurisdictions, only individual employees would be protected by jurisdictional rules more favorable to their interests than the jurisdictional rules in general. For instance, Article 3-7 (6) of the Japanese Code of Civil Procedure covers only "individual civil labor

[88] *See* Article 3-7 (6) of the Japanese Code of Civil Procedure; Article 23 (1) of the Brussels I Regulation (Recast).
[89] *See* Satō （佐藤） and Kobayashi （小林）, *2011 Reform of the Code of Civil Procedure etc.: Legislation on International Jurisdiction [一問一答　平成23年　民事訴訟法等改正　国際裁判管轄法制の整備]*, 149.

disputes"[90] between an individual employee and that employee's employer. Article 20(1) of the Brussels I Regulation (Recast) also limits the scope of protection to "individual contracts of employment", excluding labor unions and collective labor disputes.[91] Accordingly, jurisdictional protection for employees in the international choice of court agreements under Thai laws should also be restricted to matters relating to individual labor disputes between individual employees and their employers.

Furthermore, certain high-ranking employees with high incomes could be expected to be sophisticated enough to gather information and make more prudent decisions than ordinary employees. Allowing these employees to exercise their freedom in the choice of court and take the benefits of the choice of court agreements would be unlikely to harm their interests. In fact, in the context of employment arbitration, Belgian law allows employees, who are entrusted with the daily management of the company and whose incomes pass a substantial threshold[92], to conclude a pre-dispute arbitration agreement with their employers.[93] Hence, the Thai legal system could also create an exception to allow certain sophisticated employees to choose any competent courts to meet their needs without any jurisdictional protection that could constrain their choices.

In this regard, the annual income threshold could be used to presume that certain employees whose incomes pass a high threshold would be well-informed and sophisticated enough to make an international choice of court agreements. Moreover, the annual income threshold would be relatively

[90] *See* Art. 3-4 (2) of the Japanese Code of Civil Procedure.
[91] *See* Aleš Galič, "International Jurisdiction over Individual Contracts of Employment," in *Transnational, European, and National Labour Relations: Flexicurity and New Economy*, ed. Gerald G. Sander, Vesna Tomljenović, and Nada Bodiroga-Vukobrat 1st ed. (New York: Springer International Publishing, 2018), 114, 116.
[92] The income threshold as of May 2021 is €71,523 gross per year. This amount is subject to indexation each year. *See* Nicolas Simon, "The Labour and Employment Disputes Review: Belgium," The Law Reviews, May 20, 2021, https://thelawreviews.co.uk/title/the-labour-and-employment-disputes-review/belgium#footnote-019-backlink. *See also*, Flip Petillion, Jan Janssen, and Diégo Noesen, "Arbitration Procedures and Practice in Belgium: Overview," Thomson Reuters Practical Law, accessed November 19, 2021, http://uk.practicallaw.thomsonreuters.com/w-013-9378?transitionType=Default&contextData=(sc.Default)&firstPage=true.
[93] *See* Art. 69 of the Belgian Employment Contracts Law of 3 July 1978.

easy to determine and provide more legal certainty than other criteria, such as the management responsibilities, which the current Thai labor law does not make the distinction between employees with significant management responsibilities and those who do not. Initially, the annual taxable income of two million Thai Baht[94] could be used as a threshold to assume that employees whose incomes exceeded two million Thai Baht would have certain bargaining power, which would allow them to maximize the use of party autonomy in the choice of a court. In fact, this threshold would also be used in income tax rates, where individuals whose taxable incomes exceeded two million Thai Baht would be subject to the second-highest income tax rate of 30%.[95]

6.3.3 Jurisdictional Protection for Other Weak Parties: Public Policy Control

As discussed in Chapter V Section 5.3, not only consumers and employees, but also other weak parties, such as franchisees, distributors, commercial agents, or even small business enterprises, who are in an inferior position in terms of economic status, bargaining power, and information, would be susceptible to cognitive biases and abuse by stronger counterparties. However, it would be unrealistic to exhaustively list and define all kinds of weak parties and lay down specific jurisdictional treatments for each of them. Moreover, Thai laws do not have special jurisdictional regimes for weak parties other than consumers and employees.[96] As such, the creation of new categories of weak parties would involve substantial revisions and new additions to the current civil procedural laws, which might be extremely difficult to achieve in practice.

In this regard, public policy control, as seen in Section 150 of the Civil and Commercial Code of Thailand, would be a useful tool for providing comprehensive protection covering broader categories of weak parties, while preserving certain flexibility and autonomy in international commercial

[94] This amount is equivalent to 7,573,121.95 yen or 58,241.12 US dollars as of May 1, 2022.
[95] "Tax Rates for Individual Income Taxes," The Revenue Department, accessed May 4, 2022, https://www.rd.go.th/59670.html.
[96] The Consumer Case Procedure Act, B.E. 2551 (2008) and the Act for the Establishment of and Procedure for Labor Court, B.E. 2522 (1979).

transactions. Several legal systems including Japan[97], the United States[98], and the Hague Convention on Choice of Court Agreement[99], also use the concept of public policy to provide a certain safeguard for weak parties in the context of the choice of court agreement. However, public policy is generally a vague concept, which is subject to interpretation on a case-by-case basis. The overbroad use of this public policy exception could disturb legal predictability and certainty in international transactions, thus ultimately leading to a decrease in trade or higher transaction costs. Therefore, the invalidation of the choice of court agreements based on public policy should be restricted only to exceptional circumstances.

In order to increase legal predictability and restrict the use of public policy control, a new statutory provision concerning the international choice of court agreements should lay down specific rules for the use of the exception of public policy. The new provision should clarify conditions for the invocation of public policy and illustrate factors to be considered in determining whether a particular choice of court agreement ought to be invalidated. Nonetheless, it would be impossible to thoroughly prescribe the scope and contents of the exception of public policy in detail due to the nature of public policy which would need to be essentially flexible in order to broadly cover many core state interests. Therefore, this section will also offer guidelines for Thai courts to consider the exception of public policy in addition to the model provision on public policy.

(i) Model Provision

A new rule concerning public policy could be provided as follows:

> The choice of court agreement shall be void if it is extremely unreasonable and manifestly contrary to public order or good morals of Thailand.

[97] *See* Chapter V Section 5.3.2.
[98] *See* Chapter V Section 5.3.1.
[99] *See* Art. 6(c) of the Hague Convention on Choice of Court Agreement.

> In making the determination as to whether the agreement would be extremely unreasonable and manifestly contrary to public order or good morals, regard should be given to all circumstances, including:
> (1) bargaining powers, economic standing, knowledge and understanding, as well as skills and expertise of the contractual parties;
> (2) the particular circumstances in which the contractual parties negotiated the choice of court agreement, the expectation of the contractual parties, previous practices, and ordinary usages applicable to that kind of transaction;
> (3) the serious inconvenience of litigating in the chosen courts, the amount of claims, and the cost of litigation in the chosen court;
> (4) the relationship between the chosen courts and the disputes or the parties;
> (5) all advantages and disadvantages on the contractual parties, as well as the assumption of far more onerous burdens on the part of one party when compared with those assumed by the other party.

The first paragraph would be consistent with the existing public policy regime under Section 150 of the Civil and Commercial Code, which would invalidate the act whose object would be contrary to public order or the good morals of Thailand. This approach was also adopted in Sections 40[100] and 44[101] of the Thai Arbitration Act, B.E. 2545 (2002), which has allowed Thai courts to set aside or refuse to enforce an arbitral award whose enforcement would be contrary to public policy or good morals. Furthermore, the Japanese and US laws use this framework to protect their state interests and weak parties.[102] The terms "extremely unreasonable" and "manifestly" would be deliberately inserted to set a high threshold for the application of the exception of public policy, which should be used only in exceptional circumstances.

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[100] The Thai Arbitration Act, B.E. 2545 (2002) Section 40 para. 3:
> "The Court shall set aside the award in in any of the following cases:
> (1) …
> (2) it is apparent to the Court that:
> (a) the award deals with the subject-matter which is not capable of settlement by arbitration under the law; or
> (b) the recognition or enforcement of the award shall be contrary to public order or good morals."

[101] The Thai Arbitration Act, B.E. 2545 (2002) Section 44:
> "The Court has the power to issue an order refusing enforcement of an arbitral award under section 43 if it is apparent to the Court that the award deals with the subject-matter which is not capable of settlement by arbitration under the law or the enforcement of the award shall be contrary to public order or good morals."

[102] *See e.g., Chisadane* case, Japanese Supreme Court Judgment, November 28, 1975, 29 Minshu (10) 1554 [1975]; *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

In the context of the protection of weak parties, to trigger the exception of public policy, Thai courts should consider whether giving effect to the international choice of court agreement would be tantamount to the deprivation of access to justice or the denial of the right to be heard of weak parties.[103] The right to access to justice and the right to be heard are guaranteed in the Constitution of the Kingdom of Thailand, B.E. 2560 (2017)[104] and international law.[105] They are generally deemed as nonwaivable rights. Therefore, if the choice of court agreement deprives the parties, especially those who would be vulnerable, of the right to be heard, or prevent them from having access to justice, its effect should be denied on the basis of public policy under the first paragraph.[106]

The second paragraph provides a non-exhaustive list of concrete factors for Thai courts to consider whether the choice of court agreement would deprive the right to be heard of weak parties and thus constitute a violation of the public policy of Thailand. The specific criteria for the assessment of the

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[103] *See* Karsten Thorn and Moritz Nickel, "The Effect of Overriding Mandatory Rules on the Arbitration Agreement," in *Conflict of Laws in International Commercial Arbitration*, ed. Franco Ferrari and Stefan Kröll (Huntington, NY: Juris, 2019), 113. *See also*, Richard Kreindler, "Standards of Procedural International Public Policy," in International Arbitration and Public Policy, ed. Devin Bray and Heather L Bray (Huntington, NY: JurisNet, 2015), 12. ("[T]he right to a reasonable opportunity to be heard and the right to equal treatment…are fundamental procedural rights that may not be violated.")

[104] *See* Constitution of the Kingdom of Thailand B.E. 2560 (2017) Art. 68:

> "The State should organise a management system of the justice process in every aspect to ensure efficiency, fairness and non-discrimination and shall ensure that the people have access to the justice process in a convenient and swift manner without delay and do not have to bear excessive expenses.
>
> The State should provide protective measures for State officials in the justice process to enable them to strictly perform duties without any interference or manipulation.
>
> The State should provide necessary and appropriate legal aid to indigent persons or underprivileged persons to access the justice process, including providing a lawyer thereto."

The English translation of the Constitution of the Kingdom of Thailand B.E. 2560 (2017) is available at https://constitutionnet.org/sites/default/files/2017-05/CONSTITUTION+OF+THE+KINGDOM+OF+THAILAND+(B.E.+2560+(2017)).pdf.

[105] *See* Universal Decraration of Human Rights Art. 8:

> "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

See also Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (New York: Oxford University Press, 2020).

[106] *See* Karsten Thorn and Moritz Nickel, "The Effect of Overriding Mandatory Rules on the Arbitration Agreement," 138.

choice of court agreements could enhance the legal certainty and lower the direct costs in the operation of the dispute resolution system.[107] Consequently, Thai courts and the parties could follow this guidance in the application of the exception of public policy. The list proposed in this paragraph has incorporated some factors provided in Section 10 of the Unfair Contract Terms Act, B.E. 2540 (1997), which requires Thai courts to take into account when determining the fairness and reasonableness of contractual terms.[108] In general, the choice of court agreements in favor of foreign courts should be invalidated under the exception of public policy if it is caused by the significant imbalance of the bargaining powers, and the weaker party would be highly unlikely to secure relief in the chosen forum.

(ii) Guidelines for Thai courts

Firstly, the factors in paragraph (1) are the criteria for the assessment of weak parties. Since it would be impractical to comprehensively define and categorize all kinds of weak parties other than consumers and employees, Thai courts should consider whether a particular party is a weak party on an individual basis through the comparison of the bargaining powers, economic standing, knowledge and understanding, as well as skills and expertise of each party. In particular, Thai courts should consider the nature, level of sophistication, and the capability of the party in a particular circumstance; for example, whether it has specific knowledge or expertise in the transaction in dispute, whether the party has the financial ability to pursue the litigation in the chosen form, and whether one party has a superior market

[107] *See* Richard A. Posner, "An Economic Approach to Legal Procedure and Judicial Administration," *Journal of Legal Studies* 2, no. 2 (June 1973): 400, 441.

[108] *See* The Unfair Contract Terms Act, B.E. 2540 (1997) Section 10:

> "In making the determination as to such extent of enforceability of a term as to satisfy the requirement of fairness and reasonableness in a particular case, regard shall be had to all circumstances, including:
> (1) good faith, bargaining powers, economic standing, knowledge and understanding, skills and expertise, expectation, previous practices, other alternatives and all advantages as well as disadvantages on the part of contractual parties in actual circumstances;
> (2) ordinary usages applicable to that kind of contract;
> (3) the time and place of the conclusion of the contract and of the performance thereunder;
> (4) the assumption of far more onerous burdens on the part of one party when compared with those assumed by the other party."

and bargaining powers which could overwhelm the other party. Moreover, weak parties need not necessarily be natural persons. A small or medium enterprise could also be considered to be in a weak position if it had limited financial means and experience with long-distance litigation when compared to a large corporation with vast legal and financial resources.

Secondly, Thai courts should consider the particular circumstances in which the parties entered into the choice of court agreement, such as whether the choice of court agreement has been individually negotiated[109], whether the agreement has been inserted as a part of an adhesion contract which would generally leave no choices for weak parties, whether the agreement was hidden in the online contract or a complex and lengthy contract without sufficient notice[110], and whether the agreement was concluded before or after the dispute had arisen. Furthermore, the expectation of the parties, previous practices, and ordinary usages applicable to that kind of transaction should be taken into consideration. If these factors pointed to the regular use of a choice of court agreement, they could weigh against the application of the exception of public policy.

Thirdly, Thai courts should consider whether there would be serious inconvenience for the parties to pursue the litigation in the chosen forum. Considerations that should be taken into account include the remoteness of the chosen court, additional costs and time of the parties and witnesses for traveling to the place of litigation, legal and language barriers, the amount of claims when compared to the costs of the litigation in the designated forum, as well as the financial ability of the parties. The expenses of attending the trial abroad as well as hiring local counsel may far exceed the actual amount

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[109] *See* Art. 3 of the Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.
[110] *See e.g. Swipe Ice Corp, Inc. v. UPS Mail Innovations, Inc.*, 2018 NY Slip Op 30178(U), ¶¶ 3-4 (Sup. Ct.) (A New York court refused to enforce a choice of court agreement contained in a contract "buried at the bottom of a webpage or tucked away in obscure corners of the website'' because "a reasonably prudent offeree would not be on notice of the terms that were buried at the bottom of the web page in a manner that did not encourage the [online] user to examine such terms and conditions."); *Stobaugh v. Norwegian Cruise Line Ltd.*, 5 S.W.3d 232, 236 (Tex. App. 1999); *Shafer Plaza VI, Ltd. v. Lang*, No. 2007-CA-001391-MR, 2008 Ky. App. LEXIS 577, at 4–5 (Oct 31, 2008). *See also*, Art. 2.1.20 of the UNIDROIT Principles of International Commercial Contract 2016.

that weak parties could recover from the proceedings. Thus, if the cost of litigation was much greater than the claim, the choice of court agreement could economically or practically prevent weak parties from pursuing litigation in the chosen forum.[111]

Fourthly, the relationship between the chosen courts and the disputes or the parties should also be taken into consideration although this would not be a decisive factor because the parties could select the forum based on the neutrality of the place of litigation and judges. However, the lack of a reasonable relationship could indirectly support the serious inconvenience of the parties because the forum without any reasonable connection would tend to place more financial and procedural burden on weak parties rather than the forum that would have a material relationship.[112] Considerations to be taken into account in this context would include the location of the evidence and witnesses, place of transaction, contract or performance, and the domiciles of the parties.

Finally, the last part under paragraph (5) is the balancing test, which requires Thai courts to weigh the multiple interests, including all the advantages and disadvantages for the contractual parties. This would ensure that the exception of public policy should be used for the protection of weak parties only in exceptional circumstances where the weaker party assumes far more onerous burdens than the other party, and the need for protecting such party would not be counterbalanced by any other legitimate interests. This would be consistent with the behavioral economic viewpoint that judicial intervention in the form of nonenforcement of the choice of court agreements should be allowed only when the benefits of intervention would be likely to outweigh the costs of intervening to protect weak parties.[113]

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[111] *See* John F. Coyle and Katherine C. Richardson, "Enforcing Outbound Forum Selection Clauses in State Court," *Indiana Law Journal* 96, no. 4 (Summer 2021): 1129.
[112] Ibid, 1140–41.
[113] *See* Figure 2 in Chapter V.

(iii) Exclusive choice of court agreements and overriding mandatory rules of Thailand

In addition to the protection of weak parties, the public policy exception could be used to deny the validity of an exclusive choice of court agreement in favor of a foreign court that circumvents overriding mandatory rules (*lois de police*) of Thailand. In general, when the parties designate a foreign court as an exclusive forum in their exclusive choice of court agreement, the jurisdiction of Thai courts would be ousted due to the negative effect of such an agreement. As a result, Thai courts could lose an opportunity to apply Thailand's overriding mandatory rules to the dispute in question. This would also leave open the possibility of evading the overriding mandatory rules of Thailand by using an exclusive choice of court agreement in favor of a foreign court.[114] Since certain regulatory goals intended to be achieved by the overriding mandatory rules of Thailand may not be implemented if the dispute was left to foreign courts, such exclusive choice of court agreement should be invalidated.[115]

According to Article 9 of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (hereafter referred to as the "Rome I Regulation"), overriding mandatory rules are defined as follows:

> Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

The CJEU also defined the overriding mandatory rules as provisions which "require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State."[116] Due to the crucial character of the overriding mandatory rules as expressions of

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[114] *See* Shiho Kato (加藤紫帆), "International Choice of Court Agreements and the Application of the Japanese Competition Law [国際的管轄合意と我が国独禁法の適用]," *Jurist* 1560 (July 2021): 16.
[115] *See* Jürgen Basedow, "Exclusive Choice-of-Court Agreements as a Derogation from Imperative Norms," in *Essays in Honour of Michael Bogdan*, ed. Patrik Lindskoug et al. (Lund: Juristförlaget, 2013), 27.
[116] C-369/96 and C-376/96 *Jean-Claude Arblade et al. v. Bernard Leloup et al.* (Joined Cases) [1999] EU:C: 1999:575 para. 30.

national and social interests, they would override the otherwise applicable law, as ascertained by the general choice-of-law rules, and would be applicable to any situation falling within their scope in the same manner as public law.[117]

Although the Act on Conflict of Laws B.E. 2481 (1938) of Thailand does not provide a specific provision for overriding mandatory rules, the Thai Supreme Court has adopted this concept in its decisions. For example, in the context of labor disputes under the Labor Relations Act B.E. 2518 (1975), the Supreme Court held that "when the labor dispute arises in Thailand, it must be litigated and enforced under Thai law, irrespective of the intention of the parties as to which law they wish to apply."[118] Some legislation also explicitly attributes an overriding mandatory character to certain provisions, thus indicating that they would be applied regardless of the choice of law by the parties or the applicable law.[119] For instance, the Carriage of Goods by Sea Act, B.E. 2534 (1991) Section 4 provides:

> This Act shall apply to carriage by sea from a place within the Kingdom to a place outside the Kingdom or from a place outside the Kingdom to a place within the Kingdom, unless it is provided in the Bill of Lading that the law of another country or international law shall apply, in which case such shall apply; however, even if there is such a provision, if it is apparent that one of the parties is a Thai national or a juristic person established under Thai law, this Act shall apply.

As a result, if one of the parties is a Thai national, Thai courts would apply this law directly irrespective of the applicable law under the Act on Conflict of Laws B.E. 2481 (1938).[120]

However, in most cases, there would be no clear indication, and the overriding mandatory character of a provision would be established by the courts. In this regard, in the determination of an

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[117] *See* Dogauchi (道垣内), "The Validity of International Choice of Court Agreements: With Regard to the Tokyo District Court Interlocutory Judgment on February 15, 2016 [国際裁判管轄合意の有効性ー東京地裁平成28年 2月15日中間判決をめぐって]," 30–31.
[118] *See* Supreme Court Dika no. 3223/2525 (1982).
[119] Pivavatnapanich, *Commentary on Private International Law [Kam Athibai Khodmai Rawangprathed Panaek Khadeebukkon],* 231.
[120] *See* Waiyamuk, "Problems Concerning the Protection of Weaker Contracting Parties in Thai Conflict-of-Laws Rules [Punha Karn Khumkrong Kusanya Tii Onae Kwa Nai Lak Khodmai Kudgun Thai]," 72–73.

overriding mandatory nature, Thai courts should consider whether a particular legal provision would be crucial for safeguarding Thailand's significant public interests, such as political, social, and economic organization, and if it should be applicable to any situation falling within its scope irrespective of the applicable law.[121] Moreover, the determination should be done on the basis of each provision rather than a particular law as a whole since one law could comprise various provisions with different natures and contain both overriding mandatory provisions and non-mandatory ones.[122] In Japan, for instance, certain core provisions of the Act on the Prohibition of Private Monopolization and Maintenance of Fair Trade, including Articles 25 and 26, are generally considered as overriding mandatory rules of Japan because they aim to protect free and fair trade, which are fundamental economic interests of Japan.[123]

In order to secure the application of Thailand's overriding mandatory rules, the effect of an exclusive choice of court agreement in favor of a foreign court that circumvents certain overriding mandatory rules should be denied. Such agreement could be regarded as extremely unreasonable and manifestly contrary to public order or the good morals of Thailand, as proposed in the first paragraph of the model provision on the exception of public policy.[124] Many scholars in Japan have also argued that an exclusive choice of court agreement that leads to the evasion or circumvention of the Japanese overriding mandatory provisions should be invalidated, as this would be contrary to the public policy of

[121] *See* Article 9 of the Rome I Regulation. *See also,* Yuko Nishitani (西谷祐子), "The Law Applicable to Consumer and Employment Contracts and Problems Concerning the Application of Overriding Mandatory Rules [消費者契約及び労働契約の準拠法と絶対的強行法規の適用問題]," *Japanese Yearbook of Private International Law* 9 (2007): 42.

[122] Koji Takahashi (高橋宏司), "The Application of Competition Law and an Exclusive Choice of Court Agreement Designating Foreign Courts [独占禁止法の適用と外国裁判所を指定する専属管轄合意]," Jurist 1518 (2018): 311.

[123] Ibid. *See also,* Dai Yokomizo (横溝大), "International Enforcement of the Competition Law by Private Actions : Development in Europe and Its Implications for Japan [私訴による競争法の国際的執行 : 欧州での議論動向と我が国への示唆]," *The Annual of the Japan Association of Economic Law* 34 (2013): 56, 61.

[124] *See* Chapter VI Section 6.3.3 (i) ("A choice of court agreement is void if it is extremely unreasonable and manifestly contrary to public order or good morals of Thailand.").

Japan.[125] However, as previously discussed, the overbroad use of the exception of public policy could disturb legal certainty in international transactions. The invalidation of the choice of court agreements based on public policy should be restricted only to exceptional circumstances. Therefore, to balance the significance of securing the application of overriding mandatory rules and legal certainty, Thai courts should consider the invocation of the public policy exception only in the following cases.

(a) An exclusive choice of court agreement that would purport to circumvent overriding mandatory rules

When it would be clear that the parties would intend to circumvent the overriding mandatory rules of Thailand by using an exclusive choice of court agreement designating a foreign court, such agreement should be invalidated under the exception of public policy.[126] In particular, this exception should be triggered in the cases where there would be objective reasons to presume that the parties would intend to evade the overriding mandatory rules of Thailand. For example, when the contractual relationship in question would be predominantly connected with Thailand and it falls within the scope of the application of the Thai overriding mandatory provisions, or when the parties would choose the court of a country where there would be no connection with their transactions and there would be no comparable regulation that would achieve the same regulatory goals protected by the Thai overriding mandatory rules.[127]

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[125] *See* Hiroyuki Tezuka, "Agreement of Jurisdiction (Including Cases of Jurisdiction by Appearance)," NBL 138 (2012): 133–40; Dogauchi (道垣内), "The Validity of International Choice of Court Agreements: With Regard to the Tokyo District Court Interlocutory Judgment on February 15, 2016 [国際裁判管轄合意の有効性ー東京地裁平成28年2月15日中間判決をめぐって]," 33.

[126] *See* Dai Yokomizo (横溝大), "Exclusive Choice of Court Agreements Designating a Foreign Court and Overriding Mandatory Rules [外国裁判所を指定する専属的管轄合意と強行的適用法規]," *Hosojiho [法曹時報]* 70, no. 11 (2018): 3009–3010.

[127] *See* Kato (加藤), "International Choice of Court Agreements and the Application of the Japanese Competition Law [国際的管轄合意と我が国独禁法の適用]," 18.

(b) An exclusive choice of court agreement that would lead to the circumvention of overriding mandatory rules regarding highly significant public interests

Where Thailand's overriding mandatory rules regarding highly significant public interests would be circumvented by the exercise of an exclusive choice of court agreement designating a foreign court, such an agreement could be invalidated under the exception of public policy.[128] In order to consider whether particular overriding mandatory rules would be highly significant so that the claim involving the application of these rules should be litigated only in Thai courts, the enquiry should ascertain whether Thailand is sufficiently serious about the implementation and enforcement of such overriding mandatory rules by the Thai courts.[129] In this regard, Yokomizo argued that when the claim in question involved the application of the overriding mandatory rules regarding highly significant public interests, which should have been intrinsically deemed as an exclusive jurisdiction of the forum court, an exclusive choice of court agreement in favor of foreign courts should be invalidated.[130] However, since the current Thai legal system does not explicitly recognize the concept of exclusive jurisdiction[131], Thai courts could rely on the legislative intent, the purpose of the overriding mandatory provisions in question, and the nature of the public interests concerned to determine the seriousness and the interest about the enforcement of the overriding mandatory rules.

6.3.4 Model for the Reform of Thai Laws

As discussed above, jurisdictional rules under the CPC, the Consumer Case Procedure Act, B.E. 2551 (2008), and the Act for the Establishment of and Procedure for the Labor Court, B.E. 2522 (1979)

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[128] *See* Dogauchi (道垣内), "The Validity of International Choice of Court Agreements: With Regard to the Tokyo District Court Interlocutory Judgment on February 15, 2016 [国際裁判管轄合意の有効性ー東京地裁平成28年2月15日中間判決をめぐって]," 33.
[129] Basedow, "Exclusive Choice-of-Court Agreements as a Derogation from Imperative Norms," 27.
[130] Yokomizo (横溝), "Exclusive Choice of Court Agreements Designating a Foreign Court and Overriding Mandatory Rules [外国裁判所を指定する専属的管轄合意と強行的適用法規]," 3009.
[131] *See* Chapter II Section 2.1.1 (xi).

should be amended to insert statutory provisions for the choice of court agreements and protective jurisdictional rules in favor of consumers and employees as follows:

(i) The CPC

New Section 4 *Septem* (Section 4/7):

(1) Parties may establish, by agreement in writing or by any other means of communication which renders information accessible and usable for subsequent reference without its meaning being altered, the country in which they are permitted to file an action with the courts.

(2) The choice of court agreement as referred to in the first paragraph is not valid unless it is made for the purpose of settling disputes which have arisen or which may arise in connection with a particular legal relationship.

(3) A choice of court agreement that designates the courts of one country or one or more specific courts of one country shall be deemed to be exclusive unless the parties have expressly provided otherwise.

(4) The courts designated in the choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, and courts in Thailand other than the chosen courts shall suspend or dismiss proceedings unless the agreement is null and void, pursuant to the conflict-of-laws rules.

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

(6) A choice of court agreement shall be void if it is extremely unreasonable and manifestly contrary to public order or good morals of Thailand.

In making the determination as to whether the agreement would be extremely unreasonable and manifestly contrary to public order or good morals, regard should be given to all circumstances, including:
(a) bargaining powers, economic standing, knowledge and understanding, as well as skills and expertise of the contractual parties;
(b) the particular circumstances in which the contractual parties negotiated the choice of court agreement, the expectation of the contractual parties, previous practices, and ordinary usages applicable to that kind of transaction;
(c) the serious inconvenience of litigating in the chosen courts, the amount of claims, and the cost of litigation in the chosen court;
(d) the relationship between the chosen courts and the disputes or the parties;
(e) all advantages and disadvantages on the contractual parties, as well as the assumption of far more onerous burdens on the part of one party when compared with those assumed by the other party.

(ii) The Consumer Case Procedure Act, B.E. 2551 (2008)

New Section 17/1:

Subject to Section 4 *Septem* of the CPC, a choice of court agreement, which covers consumer contract disputes, would be valid only in the following cases:

(1) if the agreement is entered into after the dispute has arisen;

(2) if the agreement provides that an action may be filed with the courts of the country where the consumer was domiciled at the time the consumer contract was concluded (in the case where the agreement is exclusive, it shall be deemed non-exclusive);

(3) if the consumer, in accordance with said agreement, has filed an action with the courts of the agreed-upon country, or if a business operator has filed an action with the Thai courts or with the courts of a foreign country and the consumer has invoked said agreement;

(4) if the consumer is a legal person and the action, filed in accordance with the said agreement, relates to a claim for a pecuniary remedy that exceeds the amount of 300,000 Thai Baht or exceeds the sum as prescribed by the Royal Decree.

(iii) The Act for the Establishment of and Procedure for Labor Court, B.E. 2522 (1979)

New Section 33/1:

Subject to Section 4 *Septem* of the CPC, a choice of court agreement, which covers individual civil labor dispute, would be valid only in the following cases:

(1) if the agreement is entered into after the dispute has arisen;

(2) if the agreement is made at the time a labor contract ends, and establishes that an action may be filed with the courts of the country where the place that the labor was being provided as of that time is located (in the case where the agreement is exclusive, it shall be deemed non-exclusive);

(3) if the employee, in accordance with said agreement, files an action with the courts of the agreed-upon country; or if the employer files an action with the Thai courts or with the courts of a foreign country and the employee invokes said agreement;

(4) if the agreement is made between the employer and the employee whose annual taxable income at the time the agreement was concluded exceeds two million Thai Baht or exceeds the sum as prescribed by the Royal Decree.

6.4 Framework for the Assessment of the Validity of the Asymmetric Choice of Court Agreements in Thailand

Although the positions toward the validity of the asymmetric choice of court agreements vary among jurisdictions, party autonomy in the choice of a court should not be simply ignored just because the agreements are asymmetrical, as they are still the products of party autonomy and fall within the scope of the contractual freedom of the parties.[132] Moreover, the Supreme Court of Thailand has confirmed the effectiveness of the international choice of court agreements where the agreements were asymmetrical in nature. The Court proclaimed that the parties to international business transactions could make a choice of court agreement to submit their disputes arising from such transactions to foreign courts, according to the international general principle of law, without questioning the asymmetric character of the agreements.[133] The Court simply held that:

> the parties could agree to submit the disputes arising from international commercial transactions to the Courts of Singapore, according to the international general principle of law. However, the Courts of Singapore did not have exclusive jurisdiction in this case because the choice of court agreement allowed the lender to bring proceedings in any other court of competent jurisdiction, pursuant to Article 36.1 of the loan agreement.[134]

However, the Supreme Court did not formulate the rules or standards for accessing the validity of the asymmetric choice of court agreements. Therefore, in order to facilitate the use of the choice of court agreements and increase the legal predictability, this section proposes a legal framework for Thai courts to evaluate the validity of the asymmetric choice of court agreements as follows.

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[132] For the principles of freedom of contract and party autonomy in choice of forum, *see* Peter Nygh, *Autonomy in International Contracts*, Oxford Monographs in Private International Law (Oxford : New York: Clarendon Press ; Oxford University Press, 1999), 1–30.

[133] *See e.g.* Supreme Court Dika no. 3281/2562 (2019) (The choice of court agreement provided that "Disputes arising from this Agreement shall be settled first in the sense of this Agreement by mutual arrangement. If such an arrangement cannot be reached, the place of jurisdiction for all possible disputes – also those resulting from legal documents, deeds, bill of exchange and cheques – is Bremen (the courts of the City of Bremen). ATLAS is, however, also entitled to the appropriate courts having jurisdiction over the registered office of the Agent."); Supreme Court Dika no. 3537/2546 (2003).

[134] Supreme Court Dika no. 3537/2546 (2003).

(i) Formal and substantive validity requirements

The starting point to determine the validity of the asymmetric choice of court agreements would be to ascertain the law applicable to the agreements. When the Thai court is seised, it should consider whether such agreements would be validly formed under the CPC and relevant laws such as the Consumer Case Procedure Act, B.E. 2551 (2008) and Act for the Establishment of and Procedure for Labor Court, B.E. 2522 (1979), as proposed in Section 6.3.4. Next, it should determine whether such choice of court agreements would be null and void under *lex causae*, as determined by conflict-of-laws rules of Thailand.[135] In particular, the Thai court should ascertain the law applicable to the substantive validity of the asymmetric choice of court agreements according to the Act on Conflict of Laws B.E. 2481 (1938), and determine whether the applicable law would permit such agreements.

(ii) Legal certainty and predictability

Legal certainty is one of the basic requirements for the international choice of court agreements to be enforceable. The new model law for the choice of court agreements also proposes the connection with a "particular legal relationship" requirement[136] to ensure the legal certainty and predictability as well as prevent any unexpected situations. The standard for determining the legal certainty of an asymmetric choice of court agreement with respect to the choice of forum should be whether the designated court could be objectively ascertainable. As discussed in Chapter IV Section 4.3.3 (ii), the asymmetric choice of court agreement which provides that one party may bring proceedings in the chosen court and "any other court of competent jurisdiction" should not be considered as contrary to the objectives of legal certainty and predictability requirement because the parties could still rely on ordinary jurisdictional rules, such as personal and subject-matter jurisdictions to anticipate the courts

[135] *See* Section 6.2.2 (ii) and Chapter IV Section 4.3.3.
[136] See New Section 4 *Septem* (2) of the CPC in Section 6.3.4.

where proceedings could be brought.[137] Consequently, the parties would be unlikely to be taken by surprise to respond to the proceedings in totally unforeseen fora.

On the other hand, the asymmetric choice of court agreement that unilaterally gives one party the power to bring proceedings in any court in the world as nominated by that party would be significantly different from the above-mentioned agreement because it would provide no objective criteria for determining the jurisdiction, including ordinary jurisdictional rules. The jurisdiction of the court would be known only after the party who possesses the choice has exercised its choice at the time of the litigation. Therefore, if the asymmetric choice of court agreement lacked an objective element that would help the parties to anticipate the possible courts, though it may be as vague as "any other court of competent jurisdiction," the agreement could be considered to be contrary to the legal certainty requirement because the designated court could not be objectively ascertainable.[138]

(iii) Fairness

The fact that one party would have more choices regarding the courts than the other party should not automatically affect the effectiveness of the asymmetric choice of court agreements, in particular when the asymmetric choice of court agreements would be concluded between two commercial parties which would stand on the same footing.[139] Moreover, if the parties were consumers or employees, they would be protected by special jurisdictional rules as proposed in Section 6.3.4(ii)(iii), which could mitigate concerns over fairness.

However, Thai courts would still have the room to protect the fairness between the parties through the use of public policy control. According to the proposed Section 4 *Septem* (6) of the CPC, if

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[137] *See* Mukarrum Ahmed, *The Nature and Enforcement of Choice of Court Agreements: A Comparative Study*, Studies in Private International Law (Oxford, UK ; Portland, Oregon: Hart Publishing, 2017), 70.
[138] *See* Shiho Kato (加藤紫帆), "The Validity of International Asymmetric Choice of Court Agreements [一方当事者に選択権を付与する国際的管轄合意の有効性]," in *The Globalization of Policy-Making Process [政策実現課程のグローバール化]*, ed. Yuki Asano (浅野有紀) et al., 1st ed. (Tokyo: Koubundou, 2019), 190.
[139] *See* Louise Merrett, "The Future Enforcement of Asymmetric Jurisdiction Agreements," *The International & Comparative Law Quarterly* 67 (January 2018): 44–45.

an asymmetric choice of court agreement was extremely unreasonable and manifestly contrary to public order or the good morals of Thailand, Thai courts could invalidate such an agreement based on the exception of public policy on a case-by-case basis.[140] Furthermore, Thai courts could refuse to give effect to such agreements in consumer and standard form contracts if they rendered one party an unreasonably excessive advantage, pursuant to Section 4 of the Unfair Contract Terms Act, B.E. 2540 (1997), which would be deemed as an overriding mandatory provision even when a foreign law would govern the substantive validity of the asymmetric choice of court agreements.[141] The special jurisdictional rules in favor of the weak parties and public policy control could help to ensure the fairness of the asymmetric choice of court agreement and allow the parties to maximize the benefits of their autonomy in the choice of court.

In addition, even when the asymmetric choice of court agreement was deemed valid, Thai courts could prevent the party who possesses an option to choose the jurisdiction from exercising this option under such an agreement based on the principle of good faith, where the enforcement of which would lead to injustice or unfair outcomes.[142] Although there has been no case law directly applying this principle to the context of the choice of court agreements, the Thai Supreme Court occasionally uses the principle to invalidate the right of the plaintiff to sue the defendant on the basis that the action was brought in bad faith against Section 5[143] of the Civil and Commercial Code of Thailand.[144] However, the principle of good faith should be used as a last resort to prevent injustice only in exceptional circumstances where the party possessing the option to select jurisdiction exercises its right in bad faith,

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[140] *See* Section 6.3.3.
[141] *See* Chapter IV Section 6.2.2 (ii).
[142] *See* Kazunori Ishiguro (石黒一憲), "The Validity of an Exclusive Choice of Court Agreement in the Bill of Lading Which Designated a Court in Amsterdam as an Exclusive Forum [アムステルダムの裁判所を国際的専属的合意管轄裁判所と定めた船荷証券上の合意管轄約款の有効性]," *Jurist* 616 (1976): 148–52.
[143] Civil and Commercial Code of Thailand Section 5:

> "Every person must, in the exercise of his rights and in the performance of his obligations, act in good faith."

[144] *See e.g.*, Supreme Court Dika no. 9757/2555 (2012); Supreme Court Dika no. 11482/2555 (2012); Supreme Court Dika no. 1738/2558 (2015).

which should not be allowed under the procedural due process or in a manner that would deprive the other party of access to justice.[145] Furthermore, since Section 6 of the Civil and Commercial Code of Thailand[146] presumes that every person is acting in good faith, the resisting party should bear the burden of proof that the option would be exercised in bad faith.

6.5 Conclusion

Thai law should be reformed to provide clear and precise statutory provisions for the international choice of court agreements in order to increase legal certainty in international transactions and avoid uncertainty as to the validity, effects, and formal and substantive requirements. The new legal framework should honor individual roles in private international law and accommodate the need for party autonomy in the choice of court so that the parties could arrange their contractual relationships and manage the litigation risks in a manner that would best suit their interests.

First of all, the CPC, as the basic law for the jurisdictional rules of Thai courts, should be revised to introduce new rules on the obligations of Thai courts with respect to the choice of court agreements, formal and substantive validity rules, the requirement for the connection with a particular legal relationship, and the rebuttable presumption in favor of exclusivity of the choice of court agreements.

Secondly, the introduction of the effective mechanism for the protection of weak parties in the choice of court agreements would also be essential to ensure the rationality of their decisions and reduce the risks of being exploited by stronger parties. Specifically, the Consumer Case Procedure Act, B.E. 2551 (2008) and the Act for the Establishment of and Procedure for Labor Court, B.E. 2522 (1979)

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[145] *See* Chapter IV Section 4.3.3 (iii).

[146] Civil and Commercial Code of Thailand Section 6:

"Every person is presumed to be acting in good faith."

should be amended to provide protective jurisdictional rules in favor of consumers and employees, respectively. In principle, a choice of court agreement involving consumers or employees should be unenforceable except when it is wholly beneficial or it is unlikely to pose risks to these weak parties. Furthermore, the scope of protection under the new rules should be carefully delimited to offer jurisdictional protection to those who truly deserve it. Due to the heterogeneity in people's preferences and degrees of sophistication, consumers and employees may not need the same one-size-fits-all paternalistic rule.

Thirdly, as for other weak parties, Thai courts could use the concept of public policy to invalidate a choice of court agreement whose effects would be tantamount to the deprivation of access to justice or the denial of the right to be heard of weak parties. However, in order to ensure legal predictability and certainty, the CPC should lay down specific rules for the use of the exception of public policy, which would clarify the conditions for the invocation of public policy and illustrate the factors to be considered in determining whether a particular choice of court agreement ought to be invalidated.

6.6 Limitations of the Study and Recommendations for Future Research

The research has mainly examined the laws and regulations for the international choice of court agreements in Japan, the European Union, the United States, and the Hague Convention on Choice of Court Agreements. It aimed to establish a regulatory framework for the choice of court agreements in civil and commercial matters in the international context, which have been widely used in cross-border transactions and consistent with the current case law of Thailand. The choice of court agreements in purely domestic relationships were excluded from the scope of the study. The considerations for the choice of court agreements in international transactions differed from those of purely domestic relationships and the 1991 amendment to the CPC explicitly excluded the latter. As a result, it was not possible to make generalizations about the choice of court agreements and directly apply the findings of

this research to establish the legal framework for the choice of court agreements in purely domestic relationships. However, party autonomy in the choice of a court is gaining more respect in practice, and it would also bring about benefits in purely domestic transactions as well. Future studies may expand the findings of this research and the proposed basic structure for the regulation of the international choice of court agreements, such as formality requirements, jurisdictional protection for weak parties, and public policy control to suggest a suitable regulatory framework for the choice of court agreements in purely domestic relationships in Thailand.

In addition, the concept of the exclusive jurisdiction of Thai courts was outside the purview of this research. Currently, Thai laws, including case law, do not provide any rules on exclusive jurisdiction. Thus, the establishment of exclusive jurisdiction would require further studies on the theoretical grounds of exclusive jurisdiction, state interests, and the procedural effects on each stage of litigation, including the jurisdictional stage, parallel litigations, and recognition and enforcement of foreign judgments, which would be beyond the main focus of this research. However, future studies could expand the result of this research to further investigate the limits on party autonomy in the choice of court based on the exclusive jurisdiction of Thai courts and the effects of exclusive jurisdiction on the international choice of court agreements.

Appendix A: Model Provisions for the Reform of Thai Laws

1. The CPC

New Section 4 *Septem* (Section 4/7):

(1) Parties may establish, by agreement in writing or by any other means of communication which renders information accessible and usable for subsequent reference without its meaning being altered, the country in which they are permitted to file an action with the courts.

(2) The choice of court agreement as referred to in the first paragraph is not valid unless it is made for the purpose of settling disputes which have arisen or which may arise in connection with a particular legal relationship.

(3) A choice of court agreement that designates the courts of one country or one or more specific courts of one country shall be deemed to be exclusive unless the parties have expressly provided otherwise.

(4) The courts designated in the choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, and courts in Thailand other than the chosen courts shall suspend or dismiss proceedings unless the agreement is null and void, pursuant to the conflict-of-laws rules.

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

(6) A choice of court agreement shall be void if it is extremely unreasonable and manifestly contrary to public order or good morals of Thailand.

In making the determination as to whether the agreement would be extremely unreasonable and manifestly contrary to public order or good morals, regard should be given to all circumstances, including:
(a) bargaining powers, economic standing, knowledge and understanding, as well as skills and expertise of the contractual parties;
(b) the particular circumstances in which the contractual parties negotiated the choice of court agreement, the expectation of the contractual parties, previous practices, and ordinary usages applicable to that kind of transaction;
(c) the serious inconvenience of litigating in the chosen courts, the amount of claims, and the cost of litigation in the chosen court;
(d) the relationship between the chosen courts and the disputes or the parties;
(e) all advantages and disadvantages on the contractual parties, as well as the assumption of far more onerous burdens on the part of one party when compared with those assumed by the other party.

2. The Consumer Case Procedure Act, B.E. 2551 (2008)

New Section 17/1:

Subject to Section 4 *Septem* of the CPC, a choice of court agreement, which covers consumer contract disputes, would be valid only in the following cases:

(1) if the agreement is entered into after the dispute has arisen;

(2) if the agreement provides that an action may be filed with the courts of the country where the consumer was domiciled at the time the consumer contract was concluded (in the case where the agreement is exclusive, it shall be deemed non-exclusive);

(3) if the consumer, in accordance with said agreement, has filed an action with the courts of the agreed-upon country, or if a business operator has filed an action with the Thai courts or with the courts of a foreign country and the consumer has invoked said agreement;

(4) if the consumer is a legal person and the action, filed in accordance with the said agreement, relates to a claim for a pecuniary remedy that exceeds the amount of 300,000 Thai Baht or exceeds the sum as prescribed by the Royal Decree.

3. The Act for the Establishment of and Procedure for Labor Court, B.E. 2522 (1979)

New Section 33/1:

Subject to Section 4 *Septem* of the CPC, a choice of court agreement, which covers individual civil labor dispute, would be valid only in the following cases:

(1) if the agreement is entered into after the dispute has arisen;

(2) if the agreement is made at the time a labor contract ends, and establishes that an action may be filed with the courts of the country where the place that the labor was being provided as of that time is located (in the case where the agreement is exclusive, it shall be deemed non-exclusive);

(3) if the employee, in accordance with said agreement, files an action with the courts of the agreed-upon country; or if the employer files an action with the Thai courts or with the courts of a foreign country and the employee invokes said agreement;

(4) if the agreement is made between the employer and the employee whose annual taxable income at the time the agreement was concluded exceeds two million Thai Baht or exceeds the sum as prescribed by the Royal Decree.

Appendix B: Japanese Code of Civil Procedure

(Jurisdiction over Actions Involving Consumer Contracts and Labor Relations)
Article 3-4 (1) An action involving a contract concluded between a Consumer (meaning an individual (except for an individual that becomes a party to a contract as a part of a business undertaking or for business purposes); the same applies hereinafter) and an Enterprise (meaning a corporation or any other association or foundation or an individual that becomes a party to a contract as a part of a business undertaking or for business purposes; the same applies hereinafter) (this excludes a labor contract; hereinafter referred to as a "Consumer Contract"), which is brought by the Consumer against the Enterprise, may be filed with the Japanese courts if the Consumer is domiciled in Japan at the time the action is filed or at the time the Consumer Contract is concluded.

(2) An action involving a dispute over a civil matter that arises between an individual worker and that worker's employer with regard to the existence or absence of a labor contract or any other particulars of their labor relations (hereinafter referred to as an "Individual Civil Labor Dispute"),which is brought by the worker against the employer, may be filed with the Japanese courts if the place where the labor is to be provided as per the labor contract to which the Individual Civil Labor Dispute pertains (or if such a place is not established, the location of the place of business that hired the worker) is within Japan.

(3) The provisions of the preceding Article do not apply to an action involving a Consumer Contract which is brought by an Enterprise against a Consumer, or an action involving Individual Civil Labor Dispute which is brought by an employer against a worker.

(Agreement on Jurisdiction)
Article 3-7(1) Parties may establish, by agreement, the country in which they are permitted to file an action with the courts.
(2) The agreement as referred to in the preceding paragraph is not valid unless it is made regarding actions that are based on a specific legal relationship, and executed by means of a paper document.
(3) If Electronic or Magnetic Records (meaning records used in computer data processing which are created in electronic form, magnetic form, or any other form that is otherwise impossible to perceive through the human senses alone; the same applies hereinafter) in which the content of the agreement is recorded are used to execute the agreement as referred to in paragraph (1), the agreement is deemed to have been executed by means of a paper document and the provisions of the preceding paragraph apply.
(4) An agreement that an action may be filed only with the courts of a foreign country may not be invoked if those courts are unable to exercise jurisdiction by law or in fact.
(5) An agreement as referred to in paragraph (1) which covers Consumer Contract disputes that may arise in the future is valid only in the following cases:

(i) if the agreement provides that an action may be filed with the courts of the country where the Consumer was domiciled at the time the Consumer Contract was concluded (except in the case set forth in the following item, any agreement that an action may be filed only with a court of such a country is deemed not to preclude the filing of an action with a court of any other country);
(ii) if the Consumer, in accordance with said agreement, has filed an action with the courts of the agreed-upon country, or if an Enterprise has filed an action with the Japanese courts or with the courts of a foreign country and the Consumer has invoked said agreement.

(6) An agreement as referred to in paragraph (1) which covers Individual Civil Labor Dispute that may arise in the future is valid only in the following cases:

(i) if the agreement is made at the time a labor contract ends, and establishes that an action may be filed with the courts of the country where the place that the labor was being provided as of that time is located (except in the case set forth in the following item, an agreement that an action may be filed only with the courts of such a country is deemed not to preclude the filing of an action with the courts of any other country);

(ii) if the worker, in accordance with said agreement, files an action with the courts of the agreed-upon country; or if the enterprise files an action with the Japanese courts or with the courts of a foreign country and the worker invokes said agreement.

SECTION 4

Jurisdiction over consumer contracts

Article 17

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7, if:

(a) it is a contract for the sale of goods on instalment credit terms;

(b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

2. Where a consumer enters into a contract with a party who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

3. This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

Article 18

1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.

2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.

3. This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 19

The provisions of this Section may be departed from only by an agreement:

(1) which is entered into after the dispute has arisen;

(2) which allows the consumer to bring proceedings in courts other than those indicated in this Section; or

(3) which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member

State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

SECTION 5

Jurisdiction over individual contracts of employment

Article 20

1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 6, point 5 of Article 7 and, in the case of proceedings brought against an employer, point 1 of Article 8.

2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 21

1. An employer domiciled in a Member State may be sued:

(a) in the courts of the Member State in which he is domiciled; or

(b) in another Member State:

(i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or

(ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

2. An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1.

Article 22

1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 23

The provisions of this Section may be departed from only by an agreement:
(1) which is entered into after the dispute has arisen; or
(2) which allows the employee to bring proceedings in courts other than those indicated in this Section.

SECTION 7

Prorogation of jurisdiction

Article 25

1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing;

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

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

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

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

5. An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.

Article 26

1. Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24.

2. In matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the defendant, the court shall, before assuming jurisdiction under paragraph 1, ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance.

Appendix D: The Hague Convention on Choice of Court Agreements

Article 3
Exclusive choice of court agreements
For the purposes of this Convention –
a) "exclusive choice of court agreement" means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts;
b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise;
c) an exclusive choice of court agreement must be concluded or documented –
    i) in writing; or
    ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference;
d) an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.

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.
(3) The preceding paragraphs shall not affect rules –
    a) on jurisdiction related to subject matter or to the value of the claim;
    b) on the internal allocation of jurisdiction among the courts of a Contracting State.
However, where the chosen court has discretion as to whether to transfer a case, due consideration should be given to the choice of the parties.

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;
b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;
c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;
d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or
e) the chosen court has decided not to hear the case.

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