



## Private International Law of Contractual and Non-Contractual Obligations

Prof. Martin Gebauer  
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### § 9 Choice of Court Agreements (Art. 25 Brussels I *bis*)

- General remarks and requirements of a valid Choice of court agreement
- Consent and substantive validity
- Formal validity
- Legal consequences and effects of a valid agreement

#### General remarks and requirements of a valid Choice of court agreement

- Prorogation and Derogation
- Sphere of application
  - Not any more necessary: Domicile of one party to the agreement in a Member State
  - Cross border relationship
  - Court(s) in a Member State

#### General remarks and requirements of a valid Choice of court agreement

- Examples regarding the Sphere of application
  - Example 5: A company from Bologna and a company from Istanbul conclude a choice of court agreement in favor of Turkish courts. The Turkish company brings an action in Bologna.

#### Consent and substantive validity

- Single problems of consent and the applicable law, examples
  - Defective consent (e.g. mistake, error, fraud)
  - Legal capacity
  - Representation
- Autonomous, European concept of consent or reference to some national law?

#### Art. 1 Rome I Regulation

- (2) The following shall be excluded from the scope of this Regulation:
- [...]
- e) arbitration agreements and agreements on the choice of court;

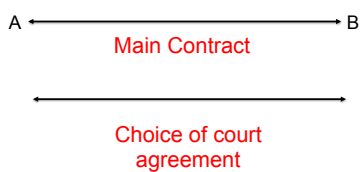
### Consent and substantive validity

- Relationship between the main contract and the choice of court agreement (regarding the applicable law)
- Doctrine of separability, Art. 25 (5)

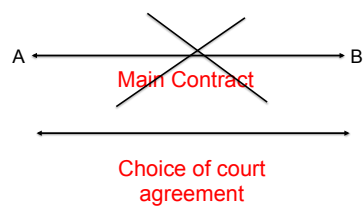
### Art. 25 Brussels I bis Regulation

- (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.

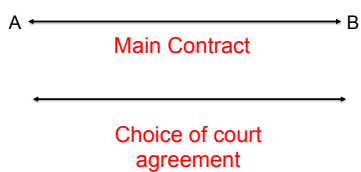
### Doctrine of separability



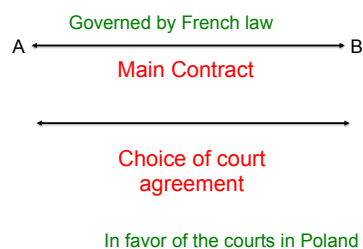
### Doctrine of separability



### Applicable law



### Applicable law



### Art. 25 Brussels I *bis* Regulation

(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. [...]

### Recital 20 of Brussels I *bis* Regulation

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.

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### Art. 25 Brussels I *bis* Regulation

[...]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.

### Formal validity

- Concluded in writing
- Evidenced in writing
- Bilaterally established practices
- General commercial usages

### Concluded in writing (lit. a)

- Separate papers are sufficient; different languages as well
- Problems arising from General terms and conditions
  - Not sufficient to simply attach a document
  - At least some express reference in the main text

#### Evidenced in writing (lit. a)

- It must be established that an oral contract was concluded, including the jurisdiction clause (ECJ, case 71/83, Tilly Russ (1984)).

#### Bilaterally established practices (lit. b)

- Confirmatory documents which are received without objection but referring to prior agreements

#### General commercial usages (lit c)

- Certain course of conduct which is generally and regularly followed by operators in the relevant branch
- Example: One of the parties remains silent in the letter of a commercial letter of confirmation containing a jurisdiction clause (ECJ, case C-106/95 (1997))

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