

# DAMAGES FOR BREACH OF A CHOICE-OF-COURT AGREEMENT

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## I. Introduction

The idea of awarding damages for breach of a choice-of-court agreement is a brainchild of the common law system. It is not featured in the 2005 Hague Convention on Choice of Court Agreements nor has it been discussed by the draftsmen.<sup>1</sup> The remedy is at an early stage of development and there are as yet few in-depth scholarly analyses of the issue.<sup>2</sup> The present article will try to articulate and analyse a variety of issues surrounding this remedy,<sup>3</sup> such as those related to procedural law, substantive law, private international law, international comity, and comparative law. The materials for discussion will be largely drawn from the common law jurisdictions where this remedy has been tested and is evolving. But references are also made to the viewpoints of the civil law system, in particular Japanese law, as well as EU law.

## II. What Constitutes a Breach of a Choice-of-court Agreement?

At the outset, we must be in agreement as to what is meant by ‘a breach of a choice-of-court agreement’ since the courts of different countries may disagree whether there is a breach. More specifically, they may take different views with respect to the same choice-of-court agreement regarding whether it exists at all,<sup>4</sup> whether it is substantively and formally valid, whether it is exclusive or non-exclusive, what parties are bound by it,<sup>5</sup> what claims are subject to it,<sup>6</sup> and which

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<sup>1</sup> See the text of the Convention as well as HARTLEY T./DOGAUCHI M., ‘Explanatory Report on the 2005 Hague Convention on Choice of Court Agreements’ (2007).

<sup>2</sup> The commentaries making some reference to this remedy include: TAN D., ‘Enforcing International Arbitration Agreements in Federal Courts: Rethinking the Court’s Remedial Powers’, in: *Va. J. Int’l L.* 2007, p. 545 *et seq.*; DUTSON S., ‘Breach of an Arbitration or Exclusive Jurisdiction Clause: the Legal Remedies if it Continues’, in: *Arbitration International* 2000, p. 89 *et seq.*; KNIGHT C.J.S., ‘The Damage of Damages: Agreements on Jurisdiction and Choice of Law’, in: *Journal of Private International Law* 2008, p. 501 *et seq.* as well as other materials cited in this article.

<sup>3</sup> The topic of damages for breach of an arbitration agreement merits a separate analysis, although it shares many issues with the topic of the present article and is treated without distinction in some primary and secondary materials.

<sup>4</sup> *e.g.* whether a bill of lading contains a choice-of-court agreement through incorporation by reference from a charterparty.

<sup>5</sup> *e.g.* whether a choice-of-court agreement in a bill of lading is binding on the transferee of the bill.

<sup>6</sup> *e.g.* whether a claim in tort is covered.

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forum it specifies.<sup>7</sup> The divergence of opinion on those issues may arise as the courts of different countries may apply different laws to them<sup>8</sup>, or construe differently the same legal provisions, or rely on their forum-specific *ordre public* (public policy) to exclude the application of foreign laws, or apply different rules on the burden or standard of proof.<sup>9</sup>

For the purpose of the present article, there is a 'breach of a choice-of-court agreement' if in the eyes of the court before which a claim for damages is made,<sup>10</sup> there is a valid and exclusive choice-of-court agreement and it has been broken by the institution of an action in a non-chosen forum. It is irrelevant whether the court seised of the action takes the same view. Nor is it relevant if the plaintiff, when bringing the action, believed that the agreement was invalid or non-exclusive.<sup>11</sup>

It is not possible to conceive of a breach of a non-exclusive choice-of-court agreement since such an agreement only operates to increase options for the plaintiff. A choice-of-court agreement specifying two or more courts – for example, an agreement giving jurisdiction to the New York courts and the English courts – is an exclusive agreement for the purpose of the present analysis if it purports to exclude the jurisdiction of all other courts. An asymmetric choice-of-court agreement – for example, an agreement in a loan contract providing that the lender may bring an action against the borrower in the English courts or any other courts having jurisdiction, while the borrower may bring an action against the lender only in the English courts – is exclusive to the extent it operates to exclude the jurisdiction of non-chosen courts, *i.e.* in the example just given, to the extent it excludes the jurisdiction of non-English courts in an action against the lender.

Throughout this article, the phrases 'the forum first seised' and 'the court first seised' will be used as shorthand expressions to refer to the forum and the court seised of the action alleged by the defendant to have been brought in breach

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<sup>7</sup> *E.g.* which forum is specified by a choice-of-court agreement designating the principal place of business which, in the circumstances, could be localised in different countries.

<sup>8</sup> Thus, under some legal systems, a choice-of-court agreement in a consumer contract or an employment contract may be valid only if it is concluded after a dispute has arisen. It may also be that such an agreement is exclusive only when it is asserted against the consumer or employee.

<sup>9</sup> In some countries, the courts ascertain jurisdiction *ex officio* while in others, the burden of proof would be imposed on the parties.

<sup>10</sup> It is not necessarily the court chosen by the choice-of-court agreement since other courts may also have jurisdiction to hear the claim for damages.

<sup>11</sup> The court's finding may therefore sometimes come as a surprise to the parties. But such a result is by no means unique to the situation treated here. Rather, in theory, it could happen with respect to all legal issues. That is because the same set of facts may be given different legal meanings in different countries due to their different choice-of-law rules. Thus, for example, a party to a contract which he genuinely believed to be null and void in accordance with the law applicable to it in the country where he has conducted himself may be held liable, to his dismay, for failure to perform the obligations under that contract in another country where the same contract is deemed to be valid under a different law which, in accordance with the choice-of-law rules of that country, is the governing law.

of a choice-of-court agreement. This terminology is adopted in view of the fact that a subsequent claim for damages will often, though not invariably,<sup>12</sup> be brought before a court of another forum.

### **III. Categories of Cases**

The cases in which damages may be claimed for breach of a choice-of-court agreement may be divided into two categories. They will be illustrated below by reference to the leading English cases. The differences between those two categories lie in the response of the court first seised to the allegation that the action has been brought in breach of a choice-of-court agreement. The categorisation along this line will be useful since material differences arise between those two categories as regards, *inter alia*, the availability of the remedy of damages in the court first seised, the preclusion of the damages claim in another forum under the principles of *res judicata*, implications for international comity towards the court first seised, and the quantification of damages. Those issues will be discussed in the remainder of the present article.

#### **A. The First Category of Cases**

In this category of cases, unlike the second category, the court seised of an action finds that it has been brought in breach of a choice-of-court agreement and accordingly refuses to hear the case by either dismissing or staying its proceedings. The defendant may then make a claim for damages for the breach in order to recover from the plaintiff the costs he has incurred in disputing the jurisdiction. The practical importance of such a claim cannot be underestimated because the lawyers' fees which form the largest part of costs can be expensive.<sup>13</sup> If the defendant has

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<sup>12</sup> See Section VII below for the availability of the damages claim in the forum first seised.

<sup>13</sup> In *Union Discount Co v. Zoller* [2002] 1 W.L.R. 1517 para. 32, the English Court of Appeal, while conceding that the state's legal resources should be devoted to central rather than parasitic questions, noted that the amount of costs at stake could be much larger than the sums claimed on the merits. This reasoning can be contrasted with the decision of the Court of First Instance of the Republic and Canton of Geneva Judiciary on 2 May 2005 (C/1043/2005-15SP) *ASA Bull.* 2005, p. 728. In this case, the Swiss court was asked to issue an anti-arbitration injunction to restrain arbitration proceedings which the petitioner alleged to have been commenced in breach of a choice-of-court agreement. The petitioner contended that the breach would trigger huge attorneys' fees, a loss difficult to be made good. Under the applicable rules of the arbitration, each party was to bear its own attorneys' fees. The court, however, reasoned that the alleged loss would be insignificant since the arbitration would be short if the arbitral tribunal denied its jurisdiction. It therefore left the tribunal to decide on its jurisdiction under the principle of *compétence-compétence*.

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been allowed to recover some of his costs<sup>14</sup> from the plaintiff by a costs order, he will limit his damages claim to the remainder.

The leading case for this category is *Union Discount Co. v. Zoller*.<sup>15</sup> In that case, the English Court of Appeal held that the defendant to a New York action (an action which had been struck out as an action brought in breach of an English choice-of-court agreement) was entitled to recover, as damages for breach of the agreement, the costs incurred in disputing the jurisdiction of the New York court, which the New York court had not awarded under what is known as the 'American rule' of costs.<sup>16</sup>

Since such a damages claim seeks to compensate for the loss which would not be sustained but for the breach, there is no reason for it to be barred merely because the court chosen by the choice-of-court agreement would not, in general, allow a prevailing party to recover his costs from his opponent by a costs order. Thus in *Indosuez International Finance B.V. v. National Reserve Bank*,<sup>17</sup> the New York court held that allowing the recovery of costs incurred in Russia as damages would not contradict the American rule of costs.

#### **B. The Second Category of Cases**

In this category of cases, unlike the first, the court seised of an action, notwithstanding that the defendant alleges that it has been brought in breach of a choice-of-court agreement, decides to hear the case on the merits by refusing to dismiss or stay its proceedings. On the merits of the case, too, the court may rule in favour of the plaintiff. The court may also make a costs order either allowing the defendant to recover all or part of his costs from the plaintiff or allowing the plaintiff to do the same from the defendant.

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<sup>14</sup> A full recovery may not be awarded in respect of, for example, fees charged by foreign lawyers. In a case decided on 8 March 2005 by the German Federal Supreme Court (*Bundesgerichtshof*) (Case VIII ZB 55/04, [2005] I.L.Pr. 54), both parties claimed the costs of their respective English correspondence lawyers, whose fees, charged at an hourly rate, reached levels much higher than those payable under German rules to German lawyers for a similar service. The court, while acknowledging that the introduction of the English correspondence lawyers into the case was appropriate for the proper pursuit or defence of the case, held that the costs of foreign correspondence lawyers were to be reimbursed only up to the amount chargeable by German lawyers.

<sup>15</sup> [2002] 1 W.L.R. 1517 (CA) (The first instance decision is unreported).

<sup>16</sup> The costs rules vary depending on the forum. Thus in England, the winning party can generally, but not fully in all cases, recover the costs from his opponent whereas he cannot generally do so in the U.S. and in Japan. In Japan, Article 61 of the Code of Civil Procedure imposes costs on the losing party but the costs within the meaning of that provision cover only filing fees and not the lawyer's fees: Article 2 of the Act on Legal Costs [*Minji Hiyô Tou ni Kansuru Hôritsu*].

<sup>17</sup> 758 N.Y.S.2d 308 (N.Y. App. Div. 2003). To the same effect, see also *El Paso Natural Gas Co. v. TransAmerican Natural Gas Corp.*, 669 A.2d 36, 40 (Del.1995); *Cornerstone Brands, Inc. v. O'Steen* 2006 WL 2788414 (Del.Ch.).

The defendant may then make a claim for damages for breach of a choice-of-court agreement in order to recover from the plaintiff the costs which he has incurred in disputing the jurisdiction and the merits. If he has already been awarded by a costs order any part of his costs, he will limit his damages claim to the remainder of his costs. If, on the contrary, he has been compelled by a costs order to pay any part of the plaintiff's costs, he may seek to claw back the sum he has paid as well as to seek recovering his own costs from the plaintiff. In addition, he may seek to claw back any sum which he has been ordered to pay by a judgment on the merits.

In this category of cases, the court first seised, in deciding to hear the case on the merits, will generally find that there is no breach of a choice-of-court agreement. But there may be exceptional cases where the court finds that there is a breach of what it finds to be a valid agreement but nevertheless exercises whatever discretion it has to refuse to dismiss or stay its proceedings.<sup>18</sup> The court may do so, for example, where the time-bar applicable in the chosen forum has expired and the court finds that the plaintiff has not acted unreasonably in failing to bring an action in that forum within the time limit.<sup>19</sup> Other examples may arise where the action involves multiple parties, some of whom are not bound by the choice-of-court agreement. The court may in such cases decide to hear the case on the merits with respect also to the parties bound by the choice-of-court agreement, so that it can exercise jurisdiction over the entirety of the action. A court seised of an action brought by a consumer against a business party in breach of their choice-of-court agreement may also decide to hear the case on the merits, if the agreement is contained in an adhesion contract<sup>20</sup> or if the consumer would effectively have to give up litigating in the chosen forum because a class action or a similar procedure facilitating a large number of small claims is not available in that forum.<sup>21</sup>

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<sup>18</sup> *E.g.* The Eleftheria [1970] P. 94, in which it was established that the English courts had discretion not to stay proceedings where the plaintiff could show a strong case for suing in England in breach of a foreign choice-of-court agreement.

<sup>19</sup> See *e.g.* Baghlaif Al Safer Factory Co. v. Pakistan National Shipping Co., [1998] 2 Lloyd's Rep. 229, in which the English Court of Appeal held that where the plaintiff had acted reasonably in commencing proceedings in England and in allowing the time-bar to expire in the foreign forum chosen by his choice-of-court agreement, a stay of the English proceedings should only be granted on terms that the defendant waived the time bar in the foreign forum.

<sup>20</sup> SHANTAR N., 'Forum Selection Clauses: Damages in Lieu of Dismissal?', in: *Boston U.L. Rev.* 2002, pp. 1063, 1078 *et seq.*, suggests that in such cases the court might refuse to decline jurisdiction and consider awarding the business party damages in respect of the added costs of defending in the non-chosen forum, provided that consumers are able to show a sufficient likelihood of winning the case and their ability to pay the damages.

<sup>21</sup> In *America Online v. Booker* (781 So. 2d 423, Fla. Dist. Ct. App., 2001), America Online's terms of service agreement contained a choice-of-court agreement requiring its subscribers to bring all claims against it in Virginia where it had its principal place of business. But Booker and other subscribers brought an action and moved for a class certification in Florida since class actions were not available in Virginia.

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The leading case for this category is *Donohue v. Armco Inc.*<sup>22</sup> In that case, an application was made in England for an antisuit injunction restraining a New York action which was alleged to have been brought in breach of an English choice-of-court agreement. The House of Lords refused to grant the application after the respondent (*i.e.* the plaintiff of the New York action) made a concession that he would be liable in damages for breach of the choice-of-court agreement if the petitioner (*i.e.* the defendant of the New York action) were to incur greater cost or liability in New York than he would in England. Among the judges, Lord Hobhouse accepted this concession as well-founded albeit acknowledging that it involved complex problems.

## **IV. An Overview of the Case Law**

In England, where an action is brought in breach of a foreign choice-of-court agreement, the normal relief is the stay of proceedings. On the other hand, where an action is brought abroad in breach of an English choice-of-court agreement, the normal relief in England is an antisuit injunction.<sup>23</sup> In neither case has the remedy of damages for breach of a choice-of-court agreement been traditionally available. But some commentators have been suggesting for some time that in such cases it should be possible to award damages.<sup>24</sup> Around the turn of the millennium, in a few cases such as those seen in Section III above where an action was brought abroad in breach of an English choice-of-court agreement, the English courts have awarded damages in the first category of cases<sup>25</sup> and indicated the availability of the remedy in the second category.<sup>26</sup> In more recent cases, the English courts have shown more willingness to grant the remedy, to the point where it has been observed by one commentator that the remedy has gone from novelty to banality.<sup>27</sup> Thus, in *A/S D/S Svendborg v. Akar*,<sup>28</sup> the court held that the decision in the *Zoller*

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<sup>22</sup> [2002] 1 All ER 749 (HL) para. 48.

<sup>23</sup> *Continental Bank NA v. Aeakos SA* [1994] 1 W.L.R. 588, 598 (CA); *The Jay Bola* [1997] 2 Lloyd's Rep 79; *OT Africa Line Ltd v. Magic Sportswear Corp* [2005] EWCA Civ 710 para. 33.

<sup>24</sup> *E.g.* PEEL E., 'Exclusive jurisdiction agreements: purity and pragmatism in the conflict of laws', in: *L.M.C.L.Q.* 1998, pp. 182, 224-6; MALES S., 'International comity and antisuit injunctions', in: *L.M.C.L.Q.* 1998, pp. 543, 550; BRIGGS A./REES P., *Civil Jurisdiction and Judgements*, 2<sup>nd</sup> ed., London 1997, para. 4-22.

<sup>25</sup> *Union Discount Co Ltd v. Zoller* [2002] 1 W.L.R. 1517(CA).

<sup>26</sup> See *Donohue v. Armco Inc* [2002] 1 All ER 749 (HL).

<sup>27</sup> BRIGGS A., *The Agreements on Jurisdiction and Choice of Law*, Oxford 2008, para. 8.14. This book contains in its chapter 8 an inspirational discussion of the topic of the present article.

<sup>28</sup> [2003] EWHC 797 at para. 37.

case had confirmed the principle that reasonable costs incurred in an action brought in breach of a choice-of-court agreement could be recoverable as damages for that breach. In *A v. B (No. 2)*,<sup>29</sup> Colman J. said that he had not previously encountered the practice of awarding costs where there was a breach of a choice-of-court agreement but acknowledged *obiter* that there was some sensible foundation to do so. In *Sunrock Aircraft Corporation Ltd v. Scandinavian Airlines System Denmark-Norway-Sweden*,<sup>30</sup> the Court of Appeal held *obiter* that damages for breach of a choice-of-court agreement are an established remedy. In *National Westminster Bank Plc v. Rabobank Nederland (No. 3)*,<sup>31</sup> it was held, in broad language capable of covering the case of a breach of a choice-of-court agreement, that damages would be awarded for the costs incurred in restraining Californian proceedings<sup>32</sup> which had been brought in breach of an antisuit agreement, *i.e.* agreement not to bring any action.

A complete picture of the legal landscape in the United States is more difficult to present due to its federal system. Neither the Restatement (Second) of Conflicts of Law nor the Restatement (Third) of Foreign Relations Law of the American Law Institute deals with the subject. In a modern case<sup>33</sup> decided in 1990, *Wells v. Entre Computer Centers Inc.*,<sup>34</sup> the Court of Appeals for the Fourth Circuit denied the availability of damages for breach of a choice-of-court agreement for the simple reason that no supporting authority had been cited. More recently, the courts have started to award, or suggest the possibility of awarding, damages in the first category of cases. Thus, in *Omron Healthcare Inc. v. MacLaren Exports Ltd*,<sup>35</sup> an action was brought in Illinois in breach of an English choice-of-court agreement. The Court of Appeals for the Seventh Circuit, affirming the decision of the District Court to decline jurisdiction, suggested *obiter* that damages for breach of a choice-of-court agreement might have been awarded if the defendant had opted to claim them. In *Laboratory Corp. of America Inc. v. Upstate Testing Laboratory*

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<sup>29</sup> [2007] EWHC 54 (Comm) at para. 9. The case concerned a breach of an arbitration agreement but the language of the court's reasoning was broad enough to cover a choice-of-court agreement.

<sup>30</sup> [2007] EWCA Civ 882 at para. 37. The case was concerned with the breach of an expert determination clause.

<sup>31</sup> [2007] EWHC 1742 (Comm).

<sup>32</sup> Those proceedings had either been summarily dismissed on the merits or dismissed on the grounds of *forum non conveniens*.

<sup>33</sup> In an archaic case, *Nute v. Hamilton Mutual Insurance Co.* (72 Mass. 174 (1856)), the Supreme Judicial Court of Massachusetts gave a ruling which could be interpreted as accepting that damages were recoverable for breach of a choice-of-court agreement. But its value as a precedent for interstate or international cases is doubtful since in this case an action was brought before the court in the county of Essex in breach of a choice-of-court agreement choosing the court in the county of Suffolk, both of which were situated in the state of Massachusetts.

<sup>34</sup> 915 F.2d 1566 (4th Cir. 1990).

<sup>35</sup> 28 F.3d 600, 604 (7th Cir. 1994) para. 6.



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*Inc.*,<sup>36</sup> a District Court in Illinois held, citing the *Omron Healthcare* decision, that the defendant to the New York action, which had earlier been dismissed by the New York court, was entitled to recover damages for breach of a choice-of-court agreement in favour of the Illinois court. It made no reasoned analysis, and the law report does not mention the amount of damages awarded. In *Allendale Mutual Insurance Co. v. Excess Insurance Co. Ltd.*,<sup>37</sup> the District Court of New York awarded damages for breach of a choice-of-court agreement in favour of 'a court of competent jurisdiction within the United States of America.' It did so in respect of an action brought in England over which the English court had declined jurisdiction for breach of that agreement. The sum awarded was equivalent to the costs the defendants of the English action had incurred less the amount which had been awarded to them by the English court. The New York court declared that New York law allowed the recovery of damages for breach of a choice-of-court agreement by citing the *Laboratory Corp.* case although it did not explain why the latter case could be treated as an authority on New York law. In *Indosuez International Finance B.V. v. National Reserve Bank*,<sup>38</sup> an action was brought in Russia in breach of a choice-of-court agreement, though no further detail is clear from the report. The Appellate Division of the Supreme Court of New York<sup>39</sup> held that damages might be awarded for breach of a choice-of-court agreement by citing the *Allendale* case and the *Laboratory Corp.* case. There are other more recent decisions supporting the availability of the remedy.<sup>40</sup>

A recognition of the remedy can also be found in the recent case law of Australia.<sup>41</sup> This overview shows that the courts in the common law countries have started to embrace the remedy of damages for breach of a choice-of-court agreement. None of those courts, however, have undertaken a sufficiently comprehensive analysis to match the complexity of issues raised by this remedy and the reports of their decisions often leave the relevant facts unclear.

Thus far, there appears to be no case in which a damages claim was made for breach of a choice-of-court agreement in the intra-EU context<sup>42</sup> to which the

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<sup>36</sup> 967 F.Supp. 295 (ND Ill 1997).

<sup>37</sup> 992 F.Supp. 278, 286 (SD NY 1998).

<sup>38</sup> 758 N.Y.S.2d 308 (N.Y. App. Div. 2003).

<sup>39</sup> It is an intermediate appellate court in the State of New York, where the highest court is the Court of Appeals.

<sup>40</sup> *E.g.* *Masiongale Elec.-Mech., Inc. v. Constr. One, Inc.*, 102 Ohio St.3d 1 (Ohio 2004); *Ball v. Versar Inc.* 454 F.Supp.2d 783, 809 *obiter* (S.D. Ind., 2006).

<sup>41</sup> See *e.g.* *Incitec Ltd v. Alkimos Shipping Corp.* [2004] FCA 698; *Commonwealth Bank of Australia v. White* (No. 2 of 2004) [2004] VSC 268. The facts and decisions of those cases will be outlined in Section VII below.

<sup>42</sup> To the same effect, see *Through Transport Mutual Insurance Assn (Eurasia) Ltd v. New India Assurance Co Ltd* [2003] EWHC 3158 (Moore-Bick J.) para. 34; BRIGGS A., 'Antisuit Injunctions and Utopian Ideals', in: *L.Q.R.* 2004, pp. 529, 532; BLOBEL F./SPATH P., 'The Tale of Multilateral Trust and the European Law of Civil Procedure', in: *E.L. Rev.* 2005/ p. 528 as well as GROSS P., 'Antisuit injunctions and arbitration' in: *L.M.C.L.Q.* 2005, pp. 10-27 which, in discussing the breach of arbitration agreement, expresses the same view.

Brussels I Regulation<sup>43</sup> is applicable. But there is a good possibility that this ingenious remedy will be tested in that context<sup>44</sup> since it may be thought that it is the only effective relief left available after the decisions of the European Court of Justice (ECJ) in the cases of *Gasser*<sup>45</sup> and *Turner*.<sup>46</sup> As a result of the *Gasser* ruling, where actions are pending between the same parties on the same cause of action in two Member States, the court seised second must stay its proceedings until the court first seised has declined jurisdiction in accordance with the rules of the Brussels I Regulation which give precedence to the proceedings of the court first seised<sup>47</sup> even if it considers itself to have been chosen by an exclusive choice-of-court agreement. Much less can it issue an antisuit injunction to restrain the proceedings of the court first seised even if it considers them to be vexatious or oppressive, as the result of the *Turner* decision.<sup>48</sup> The EU law in this field has been honed by the ECJ as a tool for promoting mutual trust between the courts of different Member States. But remedial responses to wrongs between private parties are in general<sup>49</sup> beyond the reach of the ECJ. It follows that if a claim for damages for breach of a choice-of-court agreement is framed in contract or tort, the ECJ's power to tame the remedy may be limited.

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<sup>43</sup> Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] O.J. L 12/1.

<sup>44</sup> HESS B./PFEIFFER T./SCHLOSSER P., 'Report on the Application of Regulation Brussels I in the Member States', (Study JLS/C4/2005/03, September 2007) [462] alludes to this possibility.

<sup>45</sup> *Erich Gasser GmbH v. Misat Srl* (Case C-116/02) [2003] E.C.R. I-14693. This case was decided under the Brussels Convention, the predecessor of the Brussels I Regulation. But its ruling should be equally applicable under the Regulation.

<sup>46</sup> *Turner v. Grovit* (Case C-159/02) [2004] E.C.R. I-3565. This case, too, was decided under the Brussels Convention. Its ruling should be equally applicable under the Brussels I Regulation.

<sup>47</sup> Article 27 (formerly Article 21 of the Brussels Convention).

<sup>48</sup> In that case, the ECJ held that the courts of a Contracting State of the Brussels Convention had no power to issue an antisuit injunction to restrain proceedings in other Contracting States.

<sup>49</sup> In the field of substantive private law, it is only specific areas, such as those relating to consumer protection and products liability, that the EC legislator has adopted measures over which the ECJ has jurisdiction. The width of the legislative power depends on the interpretation of the word 'measure' in Article 95 (1) of the Treaty Establishing the European Community: *OJ C/2006/321E/1*.

## V. Is the Question Procedural or Substantive?

A choice-of-court agreement possesses procedural character. That is manifested in, for example, its exclusion from the scope of the Rome I Regulation.<sup>50</sup> When consulted on a draft text of that Regulation, the European Economic and Social Committee observed<sup>51</sup> that the exclusion of a choice-of-court agreement was based on the same reasoning as that of procedure issues.<sup>52</sup> This position is inherited from its predecessor, the Rome Convention,<sup>53</sup> which also excluded a choice-of-court agreement<sup>54</sup> on the same reasoning.<sup>55</sup>

It might be thought that all issues concerning a choice-of-court agreement have procedural character and are accordingly subject to the *lex fori*.<sup>56</sup> Caution, however, is due against excessive reliance on the *lex fori* since the foundation of the modern conflict of laws is the idea of equal treatment of foreign and domestic legal systems. Admittedly, the issues forming part of the administration of justice which impinge directly on the resources of the State should be characterised as procedural and accordingly be determined by the *lex fori*. But other issues should be characterised as substantive and accordingly be submitted to the normal choice-of-law process.

Thus, for example, the issue whether jurisdiction is conferred or excluded by a valid choice-of-court agreement should be characterised as procedural since it impinges directly on the judicial resources. On the other hand, the valid formation of a choice-of-court agreement, such as the effect of fraud or duress on validity, does not have to be characterised as such. Rather, just like the validity of an ordinary commercial contract, it should be characterised as substantive. Similarly, there is room to characterise as substantive the issues of whether, in what circumstances, and to what extent damages are recoverable for breach of a choice-of-court agreement. If so characterised, the answer to those issues will depend on the

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<sup>50</sup> 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: *OJ L/2008/177/6*.

<sup>51</sup> Para. 3.1.4 of the Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I): COM(2005) 650 final – 2005/0261 (COD).

<sup>52</sup> Article 1(3).

<sup>53</sup> The Convention of 19 June 1980 on the Law Applicable to Contractual Obligations: *OJ L/1980/266/1*.

<sup>54</sup> Art. 1(2)(d).

<sup>55</sup> See the comment on Article 1(2)(d) of GIULIANO M./LAGARDE P., 'Report on the Convention on the law applicable to contractual obligations' in: *OJ C/1980/282*.

<sup>56</sup> As once held by the Tokyo District Court in its judgment on 17 October 1967 (reported in 18-9/10 *Kaminshu* 100). It must be noted, though, that as is the case with other decisions of the lower courts, this pronouncement is not a definitive representation of Japanese law since it is not binding on other courts in future cases.

governing law of the damages claim, which will in turn depend on the legal basis, such as contract and tort, in which the claim is framed.

As regards the governing law, choice-of-law rules differ from country to country but there are some similarities between many of them. Thus, if a damages claim for breach of a choice-of-court agreement is framed in contract,<sup>57</sup> the governing law may be the law chosen by the party as the law governing that agreement, and where, as may often be the case, there is no effective choice, it may be the law applicable to the substantive contract to which the choice-of-court agreement is attached or it may be the law of the forum chosen by that agreement.<sup>58</sup> If the claim is framed in tort, the governing law may be: the law of the forum first seised in the capacity of the law of the place where the tortious act has been committed; or it may be the law of the forum chosen by the agreement in the capacity of the law of the place where the resulting damages have occurred;<sup>59</sup> or in the capacity of the law of the place with which the tort is most closely connected.<sup>60</sup>

## **VI. The Legal Basis of the Claim**

Whenever the defendant to an action considers that the court hearing the action has no jurisdiction, he may wish to claim damages to recover whatever the loss sustained in defending the action or incurred from the ensuing decisions. However, his claim has no chance of success unless it is supported by a cause of action.

In this regard, a breach of a choice-of-court agreement may be considered to be a breach of contract or a tort, and a claim for damages for the breach may accordingly be framed in contract or tort. Alternatively, the same financial purpose may be pursued by making a restitutionary claim. Whether such claims will succeed will depend on the governing law. This article will focus on the contractual basis of

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<sup>57</sup> The choice-of-law rules for substantive contracts may not be applicable. See *e.g.* Article 1(2)(e) of the Rome I Regulation.

<sup>58</sup> As apparently suggested in YEO N./TAN D., 'Damages for Breach of Exclusive Jurisdiction Clauses', in: WORTHINGTON S. (ed.) *Commercial Law and Commercial Practice*, Oxford and Portland Oregon 2003, Ch14, pp. 403, 404. Articles 5(1) and 6(a) of the 2005 Hague Convention on Choice of Court Agreements refer the validity of a choice-of-court agreement to the law specified by the choice-of-law rules of the forum chosen by the agreement: See HARTLEY T./DOGAUCHI M., 'Explanatory Report on the 2005 Hague Convention on Choice of Court Agreements', para. 125.

<sup>59</sup> See *e.g.* Article 4(1) of the Rome II Regulation (Regulation No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations: *OJ L/2007/199/40*). It must, however, be noted that whether a claim framed in tort for breach of a choice-of-court agreement falls within the purview of the Rome II Regulation is far from certain.

<sup>60</sup> See *e.g.* Article 4(3) of the Rome II Regulation.

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the claim<sup>61</sup> since the discussions in the common law jurisdictions generally presuppose that the breach of a choice-of-court agreement is a contractual question.<sup>62</sup>

Even if it is accepted that a choice-of-court agreement is a contract, it may be seen to be a contract of special character. Thus in Japan, agreements on procedural steps, such as a choice-of-court agreement, are called procedural contracts (*soshō keiyaku*) which include arbitration agreements, choice-of-law agreements, antisuit agreements, agreements to discontinue an action, agreements to desist from executing a judgment, agreements to abstain from disputing particular facts, and agreements to refrain from adducing particular evidence. Where there is a breach of, for example, an antisuit agreement or an agreement to discontinue an action, it is generally thought that the court may either bring the action to an end or specifically enforce the agreement. But no discussion is to be found over the possibility of awarding damages for breach of any of those procedural contracts. That is presumably due to the dearth of practice, at any rate to date, of seeking such a remedy. In theory, the possibility of a damages award may not be foreclosed.

A view which acknowledges the distinctive character of a choice-of-court agreement is to be found also in the scholarship of common law countries. Thus, it has been suggested that a choice-of-court agreement is not an ordinary contract creating an independently enforceable obligation and that the only way for the courts to give effect to it is to uphold or decline jurisdiction or to restrain proceedings in other countries.<sup>63</sup> The mainstream of the common law thinking, however, makes no dogmatic distinction in character between a choice-of-court agree-

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<sup>61</sup> However, a brief note on other possible legal bases is in order. The tort characterisation has not been paid much attention in the common law discourse. It may play a more prominent role in Japanese law since damages claims are usually characterised as such when they are granted generally in respect of procedural steps. Thus, the Japanese Supreme Court acknowledged that the institution of an action could be regarded as a tortious act where it was plainly unreasonable in view of the purpose of the judicial system. It calls for analysis, though, how this test can be applied to the case of a breach of a choice-of-court agreement. There is also the possibility of a restitutionary claim to recover the benefit which the plaintiff unjustly obtained at the expense of the defendant by bringing an action in breach of a choice-of-court agreement. But this possibility is hardly examined in the common law discourse.

<sup>62</sup> *E.g.* *Union Discount Co v. Zoller* [2002] 1 W.L.R. 1517 para. 19; *Donohue v. Armco Inc* [2002] 1 All ER 749 (HL) at paras. 36, 48. Also see *National Westminster Bank Plc v. Rabobank Nederland (No. 3)* [2007] EWHC 1742 (Comm) para. 20 (The costs incurred in restraining proceedings brought in breach of an antisuit agreement were held recoverable as damages for breach of a contract). Among the commentaries, see *e.g.* TAN D./YEO N., 'Breaking Promises to Litigate in a Particular Forum: Are Damages an Appropriate Remedy?', in: *L.M.C.L.Q.* 2003, p. 435; *cf.* THAM C.H., 'Damages for breach of English jurisdiction clauses: more than meets the eye', in: *L.M.C.L.Q.* 2004, p. 46, argues that contractual damages are difficult to justify and that a tortious claim may arguably be available as an alternative.

<sup>63</sup> *E.g.* HO L.C., 'Antisuit injunctions in cross-border insolvency: A restatement', in: *I.C.L.Q.* 2003, pp. 697, 707-708.

ment and substantive contracts and instead stresses their shared attribute, namely that both may be the product of a hard-fought negotiation.

Traditionally, however, the common law countries have been treating a breach of a choice-of-court agreement differently from a breach of an ordinary contract. Thus, the primary remedy available as of right for breach of an ordinary contract is damages whereas specific performance is only granted at the court's discretion where damages do not provide adequate relief. On the other hand, the usual remedy for breach of a choice-of-court agreement has not been the award of damages but a stay of proceedings or, where the action was brought abroad, the issuing of antisuit injunction.<sup>64</sup> An English court has attributed this difference not to any dogmatic characterisation of a choice-of-court agreement but to more practical reasons, namely, the difficulty of quantifying damages for its breach and the negative impact that damages award may have on international comity.<sup>65</sup> It should, however, be pointed out that the difficulty of quantification *per se* is not a good reason to deny the recoverability of damages.<sup>66</sup> Furthermore, as will be shown in Sections VIII and X below, the difficulty of quantification and the extent of implications for comity differ between different types of cases in which the claim is made.

In the types of cases where quantification and comity do not pose difficulties, the common law jurists would not be deterred from submitting the breach of a choice-of-court agreement to the normal contractual analysis. That would result in the award of damages if the governing law is a common law legal system because damages are recoverable as of right as the primary remedy and because liability for breach of contract is strict,<sup>67</sup> requiring neither negligence nor intent on the part of the defaulting party. The liability may, therefore, come as a surprise for the plaintiff of the action complained of if he has acted in genuine belief that the choice-of-court agreement is null and void or non-exclusive.<sup>68</sup> The chain of causation would not be severed<sup>69</sup> even in the second category of cases, *i.e.* where the court first seised has decided to hear the case on the merits, since that response of the court is none other than what the plaintiff petitioned for and accordingly is foreseeable to him.

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<sup>64</sup> See note 23 for authorities.

<sup>65</sup> *OT Africa Line Ltd v. Magic Sportswear Corp* [2005] 1 C.L.C. 923 para. 33 (CA).

<sup>66</sup> The Japanese Code of Civil Procedure provides in Article 248 that where the proof of the amount of damage is extremely difficult due to the nature of the damage, the court may make a reasonable estimate on the basis of the arguments made and evidence adduced in the hearing.

<sup>67</sup> See *e.g.* SMITH S., *Contract Theory*, Oxford 2004, p. 376, which considers justifications for strict liability.

<sup>68</sup> And there can be good reasons to believe so since the same choice-of-court agreement may have different effects depending on the governing law, as explained in Section II above.

<sup>69</sup> As a general rule, the chain of causation is severed if an unforeseeable act of a third party intervenes: *Stansbie v. Troman* [1948] 2 KB 48.

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In the civil law system, on the other hand, liability for breach of contract is traditionally fault-based.<sup>70</sup> Thus, under Japanese law, both jurisprudence and scholarship require negligence or intent as an essential ingredient for liability for breach of contract.<sup>71</sup> Accordingly, if a choice-of-court agreement were to be treated under the normal contractual principles, liability for its breach would not be established unless negligence or intent was proved on the part of the plaintiff bringing the action complained of. It follows that if the plaintiff was in genuine belief that the agreement was null and void and if he is found to be faultless in so believing, he may be exonerated. It would be possible to find negligence or intent in many cases belonging to the first category since the court first seised in that category of cases also acknowledges that there is a breach. Making such a finding, however, would be more difficult in some of the cases belonging to the second category where the court first seised does not acknowledge that there is a breach, though it might still be legitimate to hold that there was an intentional breach in such cases as where the plaintiff has flouted a plainly valid choice-of-court agreement by bringing an action before a remote court which would, to his knowledge, exercise an exorbitant jurisdiction and deny effect to any foreign choice-of-court agreement.

## **VI. Availability of the Remedy in the Forum First Seised**

For the defendant of an action which has been brought in breach of a choice-of-court agreement, it would be more convenient if he can obtain damages for the breach in the court before which the action has been brought (*i.e.* 'the court first seised' according to the terminology of this article) than going to another forum to claim them.

Whether that court has jurisdiction to hear such a damages claim depends on its jurisdictional rules. Thus, it may have jurisdiction in the cases where, for example, it is the court for the place where the plaintiff (*i.e.* the respondent to the damages claim) is domiciled or resident. It may also have jurisdiction where the plaintiff is deemed to have submitted to its jurisdiction by entering appearance, which he may well do since it is the court he chose to bring his action before in the first place.

Where the court has jurisdiction, the availability of the remedy of damages and the extent of recovery will depend on the applicable law. If the court treats the breach of a choice-of-court agreement as a procedural matter, it will apply the procedural rules of the forum as the *lex fori*. In general, there can be procedural

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<sup>70</sup> For a survey, see *e.g.* VON BAR, C./DROBNIG U., *The Interaction of Contract Law and Tort and Property Law in Europe: a Comparative Study*, München 2004, paras. 83-92.

<sup>71</sup> The defendant is considered to have the burden of proving the lack of intent and negligence.

rules, outside those pertaining to a costs order, which may be invoked to award damages in respect of losses caused by certain procedural steps.<sup>72</sup> It is therefore possible, at least in theory, to conceive of procedural rules for awarding damages for breach of a choice-of-court agreement. In practice, though, it is unlikely for any country to presently have such procedural rules since the concept of damages for breach of a choice-of-court agreement has not yet received wide recognition. If, on the other hand, the court treats the breach of a choice-of-court agreement as a substantive matter, the success or failure of a damages claim for the breach will depend on its governing law.

Other factors relevant to the availability of damages in the forum first seised will be examined below by reference to the two categories of cases described in Section III above.

#### A. The First Category of Cases

In the first category of cases, *i.e.* where the court first seised dismisses or stays its proceedings, the court may issue a costs order allowing the defendant to recover all or part of his costs from the plaintiff.<sup>73</sup> If the costs order has not fully compensated the defendant for his costs, whether he can claim the remainder as damages for breach of a choice-of-court agreement in the same forum is the question here.

In many jurisdictions, the damages claim will be barred by the rules of *res judicata*. For example, in the English case of *A v. B (No. 2)*,<sup>74</sup> Colman J. took the

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<sup>72</sup> Thus, in Japan, where a judgment is set aside or modified after it has been provisionally executed, there is a procedural rule rendering the plaintiff, *i.e.* the party who has applied for the provisional execution, liable to pay damages for the loss caused by the execution: Article 260(2) of *Minji Soshō Hō* [the Code of Civil Procedure].

<sup>73</sup> In so doing, the court may take into account the breach if to do so is permitted under its costs rules. In England, costs are in general borne by the losing party. But in practice, it is only 50 to 60 per cent of the total costs which are usually awarded under the measure known as the standard basis: BIRKS P. (ed.) *English Private Law*, vol. 2, Oxford 2000, para. 19.321 (by ANDREWS N.). Under that measure, the recoverable costs must be reasonably incurred and proportionate to the matter in question, with any doubt about the reasonableness being resolved in favour of the losing party (Civil Procedure Rules, Rule 44.4(2)). Depending on the losing party's procedural behaviour, however, the court may use the measure known as the indemnity basis, under which there is no requirement of proportionality and any doubt about reasonableness is resolved in favour of the winning party: Rule 44.4(3) of the Civil Procedure Rules. In *A v. B (No. 2)* [2007] EWHC 54 (Comm), an action had been brought in England in breach of a Swiss arbitration agreement, and it was held that in such a case, the indemnity basis should normally be used to assess the recoverable costs on the ground that the conduct of deriving an unjustifiable procedural advantage through deliberately ignoring such an agreement constituted the misuse of the judicial facilities. The language of the court's reasoning was wide enough to cover the case of a choice-of-court agreement. A similar suggestion has been made with respect to costs for applying for an antisuit injunction to restrain foreign proceedings brought in breach of a choice-of-court agreement: see YEO N./TAN D. (note 58), pp. 403, 413-414.

<sup>74</sup> [2007] EWHC 54 (Comm) at para. 9.



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view that in England, separate proceedings for damages could not be instituted because, when there was a breach of a choice-of-court agreement, the cause of action for the relief of staying proceedings and the cause of action for the relief of damages were normally the same.<sup>75</sup> In *Union Discount Co v. Zoller*,<sup>76</sup> the English court observed that the defendant to the New York action, after having disputed the jurisdiction of the New York court by relying on an English choice-of-court agreement, would not be able to claim damages for breach of the agreement in New York and therefore would have to come to England to do so.

#### **B. The Second Category of Cases**

It will be recalled that in the second category of cases, the court seised of an action alleged by the defendant to have been brought in breach of a choice-of-court agreement nevertheless decides to hear the case on the merits. In most of those cases, the court reaches that decision by finding that there is in fact no breach of an agreement and, therefore, a damages claim for the breach will fail.

Such a claim may, however, be successful in the cases where the court finds that there is a breach of a choice-of-court agreement but nevertheless decides to hear the case by refusing to dismiss or stay its proceedings under whatever discretion it has. Examples of those cases have been mentioned in Section III above. In such cases, as between the parties to a choice-of-court agreement, the court may award the defendant damages for breach of the agreement in respect of the costs incurred over and above the sum already awarded to him by its costs order. It is doubtful, however, that the court will go so far as to allow him to claw back any sum which it has ordered him to pay by its own judgment on the merits<sup>77</sup> since doing so would effectively negate its own decision to hear the case in the first place. To reject such a claw-back claim, the court may refuse to see the sum it has ordered the defendant to pay as a loss, or find it too remote from the breach, or come up with other theoretical bases available under the applicable law.

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<sup>75</sup> It is sometimes said that in England, costs incurred in defending an action, beyond the sum awarded by a costs order, are not recoverable as damages under the principle established in *Quartz Hill Consolidated Gold Mining Co v. Eyre* (1883) 11 QBD 674 (CA). YEO N./TAN D. (note 58), p. 414, further suggests that it should be immaterial whether or not the breach of a choice-of-court agreement has been asserted in the hearing on costs under the principle of *Henderson v. Henderson* ([1843] 2 Hare 100), under which a party is estopped from raising issues which could and should have been litigated in an earlier action. Upon a close reading of *Quartz Hill*, however, the case was only concerned with what the court called the 'extra costs,' *i.e.* the costs unnecessarily incurred by the successful party in defending the case, and their recovery was denied simply because they could not be properly considered to have been caused by the unjust litigation.

<sup>76</sup> [2002] 1 W.L.R. 1517 para. 28.

<sup>77</sup> YEO N./TAN D. (note 58), pp. 429-430, however, seem to suggest that such recovery should be allowed. They note that the costs, on the other hand, will not be recoverable in England under the *Quartz Hill* principle (see *supra*, note 75).

A couple of Australian cases illustrate the point on costs. In *Incitec Ltd v. Alkimos Shipping Corp*,<sup>78</sup> the Federal Court of Australia refused to stay its proceedings which had been brought in breach of an English choice-of-court agreement. It did so in order to avoid inconsistent decisions since the action also involved parties who were not bound by the agreement. The court alluded to the breach of a choice-of-court agreement in holding that it would hear the parties on costs, implying that the breach of a choice-of-court agreement would be taken into account in the application of the normal costs rules. By contrast, another Australian case, *Commonwealth Bank of Australia v. White (No. 2 of 2004)*<sup>79</sup> featured a damages claim to recover the costs over and above those recoverable under the normal costs rules. This case involved third party proceedings and the third party sought leave to file a counterclaim against the defendant in order to recover the costs as damages for breach of the English choice-of-court agreement which existed between them. The Supreme Court of Victoria granted leave, holding that it was arguable that if the third party succeeded in their defence on the merits,<sup>80</sup> they might have a claim for damages for breach of the choice-of-court agreement. The court took this view notwithstanding that it had earlier refused to stay the third party proceedings.

### VIII. Availability of the Remedy in Another Forum

Since, as seen above, the damages claim has a limited chance of success in the forum first seised, it will usually be brought in another forum. Whether other forums have jurisdiction to hear the claim depends on the jurisdictional rules of each forum. Thus, for example, the forum chosen by the choice-of-court agreement may have jurisdiction by virtue of being so chosen,<sup>81</sup> or in the capacity of the forum where the contract (*i.e.* the choice-of-court agreement) should have been performed if the claim is framed in contract, or in the capacity of the forum where harm is done to the interests of defending the action there if the claim is framed in tort. Also, the forum in which the defendant to the damages claim (*i.e.* the plaintiff of the action brought in breach of a choice-of-court agreement) is domiciled or resident may have jurisdiction.

Other questions which may arise when the damages claim is made in those forums include whether the jurisdictional battle should be arrested by the binding force of *res judicata* or under more general principles and whether awarding

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<sup>78</sup> [2004] FCA 698 para. 67.

<sup>79</sup> [2004] VSC 268.

<sup>80</sup> The court reasoned as if the third party's success in his defence on the merits were a prerequisite to his entitlement to damages. But that should be immaterial.

<sup>81</sup> To allow this logic, the choice-of-court agreement must cover within its scope a damages claim for its breach, an interpretation which is not without difficulty.

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damages would not offend international comity towards the court first seised. Those questions will be examined in turn below.

#### **A. Finality of the Settlement of a Jurisdictional Battle**

##### ***I. Pleas of res judicata***

Generally, the finality of the settlement of a dispute is achieved in the international arena only to the extent the decision is recognised as having the binding force of *res judicata* in other countries. Since a claim for damages for breach of a choice-of-court agreement could prolong the jurisdictional battle, it would be apposite to consider whether the decisions of the court first seised are recognised as having the *res judicata* force of precluding the damages claim in the other forum. This question can be rephrased in the context of specific types of cases. Thus, in the first category of cases, the question is whether the costs order which has awarded the defendant some of his costs will acquire a binding force of *res judicata* precluding his claim for damages to recover the remainder of his costs.<sup>82</sup> In the second category of cases, the questions are, apart from the same question as that for the first category, whether the costs order which has compelled the defendant to pay some of the plaintiff's costs will have the *res judicata* effect of precluding his claim for damages to claw back the sum he has been compelled to pay, and whether the judgment on the merits rendered against the defendant acquires the binding force of *res judicata* precluding his claim for damages to claw back the sum he has been compelled to pay. Where the defendant has claimed damages in the forum first seised rather than being content with a normal costs order, a further question arises whether the decision in the first forum may be presented as *res judicata* to preclude the defendant from making another damages claim to recover the remainder in another forum.

If the costs order or the judgment on the merits, as the case may be, satisfies the prerequisites for recognition,<sup>83</sup> it will be recognised as *res judicata* and preclude the damages claim.<sup>84</sup> Where the court first seised and the court hearing the damages claim are both situated in the EU Member States or in the Contracting States to the

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<sup>82</sup> This question did not arise for the English Court of Appeal in *Union Discount Co v. Zoller* ([2002] 1 W.L.R. 1517) since, as noted by the English court (para. 26), the New York court had made no decision on the costs.

<sup>83</sup> Such as the non-infringement of public policy and the sufficient service of the document instituting proceedings: see *e.g.* Article 34 of the Brussels I Regulation and Article 27 of the Lugano Convention.

<sup>84</sup> BRIGGS A. (note 27), para. 8.22, however, suggests that an application for costs is not to be seen as the prosecution of a cause of action in English law, with the result that a claim for damages in respect of the unrecovered costs is not barred under section 34 of the Civil Jurisdiction and Judgments Act 1982 which provides that a party who has obtained a favourable foreign judgment recognisable in England may not bring proceedings in England on the same cause of action.

Lugano Convention, the Brussels I Regulation and the Lugano Convention apply respectively. Under those regimes, as a general rule, no jurisdictional review is permitted<sup>85</sup> and the decisions of the first court are to that extent more likely to be recognised.<sup>86</sup> Under most other legal systems,<sup>87</sup> a jurisdictional review is a prerequisite for recognition. That requirement is unlikely to be satisfied in the present context, with the result that the damages claims are not precluded. That is because the claimant of the damages claim would usually choose to make the claim before a court which would affirm the breach of the choice-of-court agreement.

In many legal systems, a costs order will be subject to the same rules for recognition as a judgment on the merits.<sup>88</sup> In Japan, there is a case<sup>89</sup> in which the Supreme Court considered the enforcement of a costs order which a Hong Kong court had issued after rendering a judgment on the merits. It was held that whether the foreign court issuing a costs order had jurisdiction to do so from the Japanese viewpoint depended on whether it would have had jurisdiction over the merits of the case if the Japanese jurisdictional rules had been applicable. This ruling was based on the reasoning that the costs order was an offshoot of a judgment on the merits. From this ruling, it would follow that in the cases with which the present discussion is concerned, the costs order issued by the court first seized will not likely be recognised since the claimant of damages would usually choose to make the claim before a court which would affirm the breach of the choice-of-court agreement. The damages claim would therefore not likely be precluded.

Where the defendant to the action brought in breach of a choice-of-court agreement has made a damages claim in the forum first seized, the decision on that claim will acquire a binding force of *res judicata* precluding another damages claim to recover the remainder in another forum, provided that the decision is entitled to recognition in the latter forum. Among the prerequisites for recognition, the jurisdictional requirement will likely be satisfied since the defendant has submitted to the jurisdiction of the first court by making the damages claim there.

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<sup>85</sup> See Art 35(3) of the Brussels I Regulation, Art 28(4) of the Lugano Convention. Incidentally, the 2005 Hague Convention on Choice of Court Agreements in its Chapter III provides for the recognition of a judgment given by a court chosen by a choice-of-court agreement, but it is silent on the recognition of a judgment by a non-chosen court.

<sup>86</sup> Accord: JOSEPH D., *Jurisdiction and Arbitration Agreements and their Enforcement*, London 2006, p. 406.

<sup>87</sup> *E.g.* Article 118(1) of *Minji Soshô Hô* [the Japanese Code of Civil Procedure]. In England, s. 32 of the Civil Jurisdiction and Judgments Act 1982 specifically mentions a foreign judgment given in breach of a choice-of-court agreement and provides that such a judgment will not be recognised or enforced in England, except where the Brussels I Regulation applies.

<sup>88</sup> *E.g.* Article 32 of the Brussels I Regulation provides that the word ‘judgment’ embraces the determination of costs by an officer of the court. It would *a fortiori* cover the determination of costs by a court.

<sup>89</sup> The judgment of the Supreme Court on 28 April 1998 (Minshû, Vol. 52, No. 3, p. 853; translated into English in: *JAIL* 1999, p. 155).

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A separate somewhat taxing question arises in the second category of cases if the damages claim is brought in a third forum, *i.e.* a forum other than the forum first seised or the forum chosen by the choice-of-court agreement. In such a situation, if the judgment on the merits of the court first seised is entitled to recognition in the forum chosen by the agreement, should the claim be dismissed for that reason?<sup>90</sup> A negative answer would follow if it is thought that the court hearing the claim should not let itself be confused by others' viewpoints but should be guided solely by its own law. Then, the court may allow the claimant (*i.e.* the defendant in the forum first seised) to claw back the sum he has been compelled to pay by the court first seised. However, the plaintiff would have no chance to relitigate the case in the chosen forum since his action would be, *ex hypothesi*, dismissed by the binding force of *res judicata*. If such a consequence is considered to be unfair for the plaintiff, an affirmative answer should be supported.

## **2. General Principles of Procedure Law**

As we have seen just above, the decisions made in the forum first seised often do not acquire the binding force of *res judicata* precluding the damages claim made in another forum. As a matter of policy, however, a claim for damages for breach of a choice-of-court agreement should not be encouraged since it gives rise to the question where the action should have been brought after the court first seised has addressed a similar question of equal complexity, *i.e.* whether it has jurisdiction. It may, therefore, be thought that such a claim should be precluded by the general principles of procedure law, such as those of good faith and abuse of process.<sup>91</sup>

Thus, in England, the institution of an action which would bring the administration of justice into disrepute among right-thinking people is regarded as an abuse of process.<sup>92</sup> This concept was invoked in an international context in *House of Spring Gardens Ltd v. Waite*.<sup>93</sup> In that case, two of the three defendants who had lost in an Irish action brought a fresh action there to set aside the judgment on the ground of fraud, but the Irish court dismissed it. When the original Irish judgment was sought to be enforced in England, the English court held that it would be an abuse of process for the third defendant, who did not join the second Irish action, to try to block the execution by alleging fraud since he had been well aware of that action.

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<sup>90</sup> An analogous question, to which an analogous analysis can be applied, is whether the claim should be dismissed if the court specified by a choice-of-court agreement would find the agreement invalid or non-exclusive.

<sup>91</sup> For an examination of the use of such general concepts in the Japanese civil procedure, see TANIGUCHI Y., 'Good Faith and Abuse of Procedural Rights in Japanese Civil Procedure' in: *Tul. J. Int'l & Comp. L.* 2000, p. 167.

<sup>92</sup> *Hunter v. Chief Constable of the West Midlands Police* [1982] AC 529, 536.

<sup>93</sup> [1991] 1 QB 241, 254-5.

No case is to be found where the court has dismissed a damages claim for breach of a choice-of-court agreement as an abuse of process. Such general concepts tend to have an ill-defined scope of application. There is a view which considers it to be inappropriate to invoke such a general principle in order to deny or restrict what is considered to be a fundamental right to claim damages for breach of a choice-of-court agreement.<sup>94</sup> But it is a remedy no more fundamental than the normal relief of damages for breach of an ordinary contract. There may, therefore, be appropriate cases where resorting to such general concepts is apt in order to curb an attempt to jeopardise the finality of settlement of a jurisdictional dispute.

## **B. Comity towards the Court First Seised**

Even if the decisions of the court first seised do not have the effect of precluding a damages claim in another forum, it may be queried whether allowing such a claim would not be contrary to international comity towards the court first seised.

Comity is a complex concept; it does not imply an absolute obligation but requires deference to foreign interests. Due to the opaqueness of the concept, a clear line cannot be drawn to define an acceptable range of conduct. It would not, therefore, be possible to conclude unequivocally whether awarding damages for breach of a choice-of-court agreement offends international comity towards the court first seised.

What is not impossible, though, is to assess the degree of implications for international comity. The court seised with a damages claim may take that into account under whatever discretion it has on the exercise of jurisdiction over the claim or on the assessment of damages.<sup>95</sup> The court may also exclude the application of the foreign law governing the claim if it results in awarding damages in the circumstances where it has such a negative impact on comity as would be contrary to the *ordre public* of the forum.<sup>96</sup>

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<sup>94</sup> *E.g.* YEON./ TAN D. (note 58), p. 419.

<sup>95</sup> TAN D., 'Damages for Breach of Forum Selection Clauses, Principled Remedies, and Control of International Civil Litigation', in: *Tex. Int'l L.J.* 2005, pp. 623, at 658, suggests that awarding damages in the reliance measure will go some way towards alleviating affront to comity since the quantum of damages will in most cases be drastically less and more easily ascertainable than one assessed in the expectation measure. The reliance measure allows recovery of damages which have resulted from the reliance on a contract which later transpires to be invalid. In the present context, it protects the interest of reliance on a choice-of-court agreement in the belief that it is valid and exclusive.

<sup>96</sup> It might, however, be reasonable to think that international comity has no bearing on *ordre public*, a concept constituted by the fundamental principles underpinning the operation of a domestic legal system.

**1. The First Category of Cases**

It will be recalled that the damages award in this category of cases would allow the recovery of the costs incurred in disputing the jurisdiction of the court first seised over and above those already awarded by the costs order of that court. To the extent that the damages award disregards the upper ceiling on the awardable costs set by the court first seised, there is an implication for international comity. The degree of implication would be greater if the costs rules of the court first seised give the court discretion to take into account the circumstances of the case since that court would be best placed to evaluate the merit of the costs claim.<sup>97</sup> Having said this, implications for comity will not be significant in this category of cases since, *ex hypothesi*, the court first seised and the court hearing the damages claim are in agreement, unlike in the second category of cases, that the court first seised should dismiss or stay its proceedings on account of the breach of a choice-of-court agreement. Furthermore, the upper limit on awardable costs would not be a matter serious enough to impose a heavy strain on international comity.<sup>98</sup>

In *Union Discount Co v. Zoller*,<sup>99</sup> the English Court of Appeal acknowledged that there might be good policy reasons for each of the different approaches to costs that different countries have. It further accepted that it would infringe international comity if an English court were to seek indirectly to apply its own approach to litigation which had taken place in a foreign country. However the Court of Appeal concluded, noting that comity is a term of elastic content, that allowing recovery, as damages for breach of a choice-of-court agreement, of costs over and above those awarded in the forum first seised would not violate international comity. In so concluding, the Court of Appeal considered the reverse situation, *i.e.* where an English court had dismissed proceedings because of a foreign choice-of-court agreement, and the court chosen by the agreement awarded the defendant the costs over and above those awarded by the English court. It observed that such a result would not cause concern to England.<sup>100</sup>

It would not be necessary to alter this observation in the cases where the court first seised and the court hearing the damages claim are both in the EU

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<sup>97</sup> ANDREWS N., *English Civil Procedure*, Oxford 2003, para. 36.110, suggests that the English courts should show great restraint before supplementing foreign costs orders for this reason as well as for the reason that relitigating foreign costs matters can become an expensive and time-consuming satellite litigation.

<sup>98</sup> As indicated by the fact that in the situation where the enforcement is sought of a foreign court order awarding costs to the winning party, some courts which would not award costs to the winning party themselves displayed no objection to enforcing such a foreign costs order: *e.g.* the Japanese Supreme Court judgment on 28 April 1998 (note 89, *supra*) concerning a Hong Kong costs order; *Somportex v. Philadelphia Chewing Gum v. Brewster, Leeds & Co. and M.S. International* (453 F.2d 435 (3rd Cir. 1971)) concerning the enforcement of an English costs order in Pennsylvania.

<sup>99</sup> [2002] 1 W.L.R. 1517 (the English Court of Appeal).

<sup>100</sup> [2002] 1 W.L.R. 1517 paras. 21-22.

Member States. The rationale of the ECJ's decisions in *Gasser*<sup>101</sup> and *Turner*<sup>102</sup> is the respect which the courts of each Member State are supposed to accord to those of other Member States in the correct application of their common jurisdictional rules. This rationale would not be undermined if, after the court first seised has declined jurisdiction and awarded the defendant part of his costs, the court of another Member State supplements the recovery of the costs as a damages award, since the latter is not, by so doing, second-guessing the judgment of the court first seised on the correct application of their common jurisdictional rules.

## 2. *The Second Category of Cases*

It will be recalled that in the second category of cases, the court first seised decides to hear the case notwithstanding the allegation of a breach of a choice-of-court agreement. It follows that if the court of another forum awards damages for the breach, there would be a greater implication for international comity than in the first category of cases.

It does happen frequently, though, that the courts of different countries take different views on the same procedural step taken by a party without giving rise to a significant problem of international comity. Thus in a Japanese case,<sup>103</sup> a Panamanian company claimed damages in Japan against a Californian company, contending that the latter's application in California for a provisional attachment of its ship at a port in California constituted a tort. The California company maintained that it would be tantamount to a breach of international comity if the Japanese court were to judge the illegality of the application prior to the Californian appellate court's review of the lower court's decision to grant the application. The Japanese court did not rule on the point since it declined to hear the case on the ground, *inter alia*, of parallel litigation. It is submitted that even if the Japanese court had ruled that the application constituted a tort in the circumstances where the California appellate court had affirmed the decision to grant it, the ruling would not have had a serious impact on international comity. Such a simple divergence of views entails no more than the refusal to recognise or enforce the decision of a foreign court.

By comparison, awarding damages for breach of a choice-of-court agreement would have a more serious implication for international comity if, as in the second category of cases, it has the effect of negating the decision of the court first seised by allowing the sums awarded by that court to be clawed back. A greater restraint would therefore be warranted when awarding damages in the second category of cases.

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<sup>101</sup> *Erich Gasser GmbH v. Misat Srl* (Case C-116/02) [2003] E.C.R. I-14693.

<sup>102</sup> *Turner v. Grovit* (Case C-159/02) [2004] E.C.R. I-3565.

<sup>103</sup> Tokyo District Court judgment on 15 February 1984 (*Kaminshû* vol. 35, issues 1-4, p. 69).



### *Damages for Breach of a Choice-of-court Agreement*

An informative comparison can be made with the recovery allowed under what is known as clawback statutes since they also undo the effect of a foreign judgment. The 1980 United Kingdom Protection of Trading Interests Act, for example, provides that a foreign judgment awarding multiple damages is not recognised<sup>104</sup> in the United Kingdom<sup>105</sup> and moreover allows the defendant of the foreign action to recover from the plaintiff so much of the judgment as exceeds the compensatory part by bringing an action in the United Kingdom.<sup>106</sup> Since those provisions are effectively targeted at the judgments of the United States, the U.S. government protested to the U.K. government, contending that those provisions violated international comity as well as international law.<sup>107</sup>

In formulating the general principles of conflict of laws, it would be desirable to promote international comity by adopting a universalist approach. Such an approach is manifested in, *inter alia*, the equal treatment of domestic and foreign laws in the choice-of-law field and the common law principle of *forum non conveniens* which mandates a stay of proceedings where there is another forum clearly more appropriate. Nevertheless, it should at the same time be firmly kept in mind that such an idealistic approach could only be sustained if the court is equipped with means to confront the far-from-ideal reality of the world. Thus, the equal treatment of domestic and foreign laws could not be maintained unless there is an escape hatch to exclude the applicable foreign law which produces results contrary to the *ordre public* of the forum. Similarly, the courts in the common law countries, while subjecting themselves to the self-denying ordinance of the principle of *forum non conveniens*, keep in their armoury an antisuit injunction to restrain a vexatious or oppressive pursuit of foreign proceedings which is encountered from time to time in the merciless world of international litigation. By the same token, where a breach of a choice-of-court agreement bears the hallmarks of an unscrupulous behaviour, the court hearing a damages claim for the breach should not shrink from granting the remedy by citing international comity. Where, for example, the plaintiff blatantly flouts a plainly valid choice-of-court agreement by bringing an action before a remote court which would, to his knowledge, exercise an exorbitant jurisdiction and deny effect to any foreign choice-of-court agreement, the court hearing a damages claim for breach of the agreement should not let international comity stand in the way of granting the relief sought. In fact, the *modus operandi* of the court condoning such an opportunistic behaviour would not be worthy of being granted comity. The courts should not, therefore, shy away from its responsibility towards the aggrieved party who has such a sufficient contact with its forum as to warrant extending him a helping hand.

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<sup>104</sup> Clawback statutes are more widely known as blocking statutes because of their function of preventing recognition and enforcement.

<sup>105</sup> Article 5.

<sup>106</sup> Article 6.

<sup>107</sup> See 'United Kingdom: Protection of Trading Interests Act 1980 and Exchange of Diplomatic Notes Concerning the Act', in: *I.L.M.* 1982, p. 840.

## IX. Comparison with an Antisuit Injunction

Where proceedings are about to be brought or have been brought in violation of a choice-of-court agreement choosing the courts of a common law country, the defendant may be able to obtain an antisuit injunction from the chosen courts to restrain the plaintiff from instituting or continuing with the proceedings.<sup>108</sup> As an established remedy for breach of a choice-of-court agreement, an antisuit injunction offers a useful point of comparison with the remedy of damages. The two aspects on which a particularly informative comparison may be made are implications for international comity and effectiveness as remedy.

The compatibility of an antisuit injunction with international comity is often doubted especially by the civil law jurists. However, the English courts have tried to justify the injunction by pointing out that it is not issued against the court but against the plaintiff of the foreign proceedings.<sup>109</sup> A similar argument may be made<sup>110</sup> to play down any concern about the negative impact on comity which a damages award for breach of a choice-of-court agreement may have, by stressing that it is only a response to the plaintiff's conduct rather than a criticism of the foreign court. Awarding damages is indeed not incompatible with admitting that the foreign court's decision is correct under the law which it is supposed to apply in accordance with its own choice-of-law rules.<sup>111</sup>

It may further be thought that damages are less intrusive than an antisuit injunction<sup>112</sup> since they are not in general awarded until after the foreign court has ruled on its jurisdiction or the merits of the case, whereas an antisuit injunction, if obeyed by the respondent, does not let the foreign proceedings run their course. The opposite view, however, could just as easily be formed from the same fact since, unlike an antisuit injunction, damages undo the effect of the foreign decisions after a lot of time, costs and adrenalin have been spent to obtain them.

Another aspect in respect of which an informative comparison can be made with an antisuit injunction is the effectiveness as remedy. In *OT Africa Line Ltd v. Magic Sportswear Corp.*,<sup>113</sup> the English Court of Appeal observed that the remedy of damages was not as effective as an antisuit injunction for the reasons of negative impact on international comity and the difficulty of quantification. Whether those

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<sup>108</sup> *Donohue v. Armco Inc* [2002] 1 All ER 749 (HL).

<sup>109</sup> See *e.g.* *Castanho v. Brown Root LTD* [1981] AC 557, 572.

<sup>110</sup> See *e.g.* AMBROSE C., 'Can Antisuit injunctions Survive European Community Law?', in: *I.C.L.Q.* 2003, pp. 401, 415; BRIGGS A., 'Distinctive aspects of the conflict of laws in common law systems: Autonomy and agreement in the conflicts of laws', in: *Doshisha Law Review* 2005, para. 40.

<sup>111</sup> Accord: MERRETT L., 'The Enforcement of Jurisdiction Agreements within the Brussels Regime', in: *I.C.L.Q.* 2006, pp. 315, 321.

<sup>112</sup> On that basis, awarding damages was considered to be an 'ideal solution' in *Horn Linie GmbH & Co. v. Panamericana Formas E Impresos S.A., Ace Seguros S.A.* [2006] EWHC 373, para. 26.

<sup>113</sup> [2005] EWCA Civ 710.

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are valid points is considered elsewhere in this article.<sup>114</sup> Also, a point has been made<sup>115</sup> that since an antisuit injunction bites earlier in time than damages, it may provide a more effective remedy to cash-strapped parties, especially small businesses and individuals, who have difficulty finding resources to defend their action.

On the other hand, the versatility of the remedy of damages shows strength over the rigidity of an antisuit injunction in certain types of cases belonging to the second category. Thus, in a multi-party action involving parties some of whom are bound by a choice-of-court agreement, an antisuit injunction restraining only the proceedings between the parties bound by the agreement would negate the advantages of a multi-party action such as the avoidance of inconsistent decisions and the efficient administration of justice. On the other hand, the award of damages, if tailored to target only the costs between the parties bound by the agreement, could to that extent realise the financial interests embodied in the agreement while at the same time keeping intact the advantages of a multi-party action. Thus, in *Donahue v. Armco*,<sup>116</sup> the English court refused to issue an antisuit injunction against a New York action involving parties some of whom were bound by an English choice-of-court agreement. But damages were held to be recoverable for breach of the agreement as between the parties to the agreement. Similarly, where the foreign court finds a breach of a choice-of-court agreement but nevertheless decides to hear the case, as where the plaintiff has been time-barred from suing in the chosen forum but the court finds that he had not acted unreasonably in failing to sue within the time, it may not be appropriate or even possible to issue an antisuit injunction, not least because the foreign proceedings may not in such circumstances be seen as vexatious or oppressive. Nevertheless, there is room to award damages for breach of the choice-of-court agreement<sup>117</sup> to allow recovery of the unrecovered costs so that the financial purpose of the agreement is, if only partially, attained.

Damages may have another advantage over an antisuit injunction in respect of enforceability.<sup>118</sup> An antisuit injunction, being an *in personam* order, is not effective unless the respondent obeys it. If the respondent disobeys an injunction and is found guilty of contempt of court, he may be imprisoned or have his assets sequestered. Those sanctions, however, do not necessarily bring about the intended effect of the injunction. On the other hand, if the award of damages is not voluntarily complied with, its enforcement would realise its intended pecuniary effect, although it must be acknowledged that the enforceability of an award of damages for breach of a choice-of-court agreement outside the forum where it is rendered is at best uncertain and is probably doubtful.

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<sup>114</sup> See Sections VIII and X.

<sup>115</sup> See BAATZ Y., 'Who Decides On Jurisdiction Clauses?', in: *L.M.C.L.Q.* 2004, pp. 25, 28.

<sup>116</sup> [2002] 1 All ER 749 (HL).

<sup>117</sup> For a similar view, see PEEL E. (note 24), pp. 209, 211.

<sup>118</sup> BRIGGS A. (note 110), para. 36.

## X. Quantification of Damages

Although the English Court of Appeal in the *OT Africa Line* case<sup>119</sup> cited the difficulty of quantification of damages as one of the reasons for observing that the remedy of damages is not as effective as an antisuit injunction, upon a close analysis, the difficulty differs depending on the types of cases. Thus, as will be seen below, the items for which damages may be claimed are simpler in the first category of cases than the second category. Also, identifying the point in time at which the loss is deemed to have materialised will involve a greater difficulty in some of the cases belonging to the second category than other cases.

In the first category of cases, *i.e.* where the court first seised finds that the action has been brought in breach of a choice-of-court agreement and accordingly dismisses or stays its proceedings, the defendant may claim damages for the breach in respect of the costs incurred in disputing the jurisdiction over and above any sum already awarded to him by a costs order, if any, of the court first seised.

The recoverable sum may, however, be limited to the costs reasonably incurred under the applicable remoteness test. For example, if an antisuit injunction is sought unsuccessfully in a third forum, the cost of making the application may be found to be unreasonably incurred. The remoteness test will be the one applicable to substantive damages claims and will, therefore, be different from the measure applicable to the costs rules. Thus, in *National Westminster Bank Plc v. Rabobank Nederland (No. 3)*,<sup>120</sup> the English court refused to apply the standard basis, a normal measure for costs order under the English Civil Procedure Rules which requires the costs to be reasonably incurred and proportionate to the matter in issue, on the ground that it would be wrong to apply the measure for costs order when assessing damages for breach.<sup>121</sup> The court noted<sup>122</sup> that applying the costs rules would in effect impose on the defendant to foreign proceedings *ex post facto* a set of principles for the conduct of proceedings which, at the time of incurring the costs, he could not have assumed would have any bearing.

The plaintiff may request the court to deduce from the award of damages the sum equivalent to the costs which the defendant would have been ordered to bear in the forum chosen by the choice-of-court agreement should the plaintiff have sued there. However, the court may not accede to the request<sup>123</sup> unless the plaintiff proves the amount of the costs by actually bringing an action in the chosen forum. The reason is that it would not be hard on him to require a relitigation of the case given that in this category of cases the court first seised has dismissed or stayed its proceedings.

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<sup>119</sup> [2005] EWCA Civ 710.

<sup>120</sup> [2007] EWHC 1742 (Comm).

<sup>121</sup> In this case, an antisuit agreement (*i.e.* an agreement not to sue) was breached but the language of the decision was wide enough to cover the breach of a choice-of-court agreement.

<sup>122</sup> At para. 25.

<sup>123</sup> BRIGGS A. (note 27), para. 8.27, appears more sympathetic to such an argument.

### *Damages for Breach of a Choice-of-court Agreement*

In the second category of cases, the court first seised decides to hear the case on the merits notwithstanding that the defendant alleges that the action has been brought in breach of a choice-of-court agreement. On the merits of the case, too, the court may rule in favour of the plaintiff. The court may also make a costs order either allowing the defendant to recover all or part of his costs from the plaintiff or allowing the plaintiff to do the same from the defendant. Then, the defendant may make a claim, as a damages claim for breach of the agreement, to recover the costs left unrecovered as well as to claw back the sums which he has been compelled to pay to the plaintiff by a costs order or a judgment on the merits. The items for which damages may be sought are therefore more complicated in this category of cases than in the first category. In this category of cases, no court appears to have had a chance to ponder specific measures of damages.<sup>124</sup> If the plaintiff has managed to prove what costs order and judgment on the merits the court chosen by the agreement would render, the court hearing the damages claim may be open to deduct those sums, so that damages awarded would be the sum equivalent to the financial difference (1) between the costs order actually rendered by the court first seised and that which would be rendered by the chosen court and (2) between the judgment on the merits actually rendered by the court first seised and that which would be rendered by the chosen court. In making the proof, the plaintiff will have to identify factors which may lead to different decisions between those two forums, such as rules of evidence, choice-of-law rules, mandatory rules and the public policy of the forum.<sup>125</sup> If the plaintiff fails to make out the proof to the satisfaction of the court, he would not get the reduction and consequently may bring an action in the chosen forum to relitigate the case. If the court hearing the damages claim is the court chosen by the choice-of-court agreement, the plaintiff may, instead of trying to prove on a hypothetical basis what decisions that court would make on the costs and merits, opt for actually bringing an action to obtain decisions. However, unlike the first category of cases just examined, he could not necessarily be expected to take that step since, *ex hypothesi*, he may have already obtained a judgment in his favour in the forum first seised. Proof on a hypothetical basis may, therefore, be regarded as sufficient.

Damages can only be quantified when the loss has materialised. If the court is not satisfied that the loss has sufficiently materialised, it may stay proceedings or reject the claim as being premature. In the first category of cases, the loss in the form of costs incurred in disputing jurisdiction accrues as the proceedings unfold. In *National Westminster Bank Plc v. Rabobank Nederland (No. 3)*,<sup>126</sup> the English court held that the costs reasonably incurred up to the time of hearing could be recovered even if at some future point in time, the court seised of the action (a California court in that case) might make a costs order, observing that there would

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<sup>124</sup> In *Donohue v. Armco* ([2002] 1 All ER 749, the House of Lords did not consider quantification of damages since it only accepted a party's concession to pay damages for breach of a choice-of-court agreement.

<sup>125</sup> For a similar point, see *TAN D./YEO N.* (note 62), fn. 17.

<sup>126</sup> [2007] EWHC 1742 (Comm) at para. 3.

be no question of double recovery. The court did not clarify the basis of this observation, but it may have been thought that the avoidance of double recovery is simply a matter of proof of facts.

In the second category of cases, if the court first seised has ruled in favour of the plaintiff on the merits, the loss is represented by the sum the defendant is ordered to pay by the judgment on the merits as well as the costs he is ordered to bear. At what point in time should it be deemed to have materialised? This is no easy question. Should it be when a pre-judgment provisional measure has been issued to constrain his asset, or when a final judgment has been rendered against him, or when a final judgment has been provisionally executed pending appeals, or when a final judgment against him has become conclusive, or when a final and conclusive judgment has been executed or otherwise paid for? The answer depends in theory on the law governing the damages claim. It is submitted that a point before the provisional execution of a final judgment would not be reasonable.

## XI. Duty to Mitigate Loss

Where a party aggrieved by a wrong fails to minimise the loss or has contributed to the occurrence of the loss, the recoverable damages may be limited by the duty to mitigate loss or by a similar principle available under the applicable law.<sup>127</sup> Such principles may be pleaded as a defence to a claim for damages for breach of a choice-of-court agreement in a variety of contexts. As examined below, however, such defence is not likely to succeed.

Firstly, it may be argued that the defendant should have made efforts to restrain the proceedings brought against him in breach of a choice-of-court agreement by applying for an antisuit injunction in another forum so that he could be saved the costs and spared an unfavourable judgment on the merits. This argument will not be found persuasive<sup>128</sup> unless the circumstances are such that the chances that an antisuit injunction is actually granted and obeyed by the plaintiff are high.

Secondly, where the court first seised is obliged to ascertain its jurisdiction *ex officio*, it may be argued that the defendant should not have spent costs in disputing jurisdiction. This contention would be weak since the likelihood of the court declining jurisdiction would be higher if the defendant disputes jurisdiction by submitting evidence. Thus, in *Union Discount Co v. Zoller*,<sup>129</sup> the English court was unimpressed by the argument put forward by the defendant (*i.e.* the plaintiff of the New York action brought in breach of an English choice-of-court agreement) that the plaintiff should not have gone to New York to dispute jurisdiction.

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<sup>127</sup> *E.g.* the principle of comparative negligence as under Article 418 of *Minpô* [the Japanese Civil Code].

<sup>128</sup> See also YEO N./TAN D. (note 58), p. 423.

<sup>129</sup> [2002] 1 W.L.R. 1517 (CA) para. 33.

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Thirdly, in the second category of cases, after the court first seised has decided to hear the case on the merits, if the defendant omits to defend the case, it may be contended that he should have made an effort to obtain a favourable judgment.<sup>130</sup> This argument should be rejected since where the defendant alleges that the action against him has been brought in breach of a choice-of-court agreement, it does not make sense to expect him to defend the action.<sup>131</sup> If, on the contrary, the defendant opts to defend, he should not be deemed to have waived his right to claim damages.<sup>132</sup>

Fourthly, it may be argued that the damages claim should be made in the forum first seised<sup>133</sup> to avoid the loss which would arise from the claim being made and heard in another forum. This argument should be treated with caution because, as we have examined in Section VII above, the likelihood of the damages claim being granted in the forum first seised is often neither predictable nor high and because, if it is partially granted, a further recovery may be precluded in other fora where that decision is recognised as *res judicata*.

## **XII. Express Clause on Damages**

The whole raft of the relevant issues as set out in the present article makes it difficult to predict whether, in what circumstances, and to what extent the remedy of damages will be granted. To overcome this uncertainty, wise drafters may wish to agree in express terms that damages are recoverable for breach of their choice-of-court agreement. Such a clause may be attached to their choice-of-court agreement or may be agreed on as a separate contract. Drafters may possibly go further by identifying the items of loss for which damages are recoverable or go one more step further to agree on a specific sum as liquidated damages.

Some commentators have begun proposing model clauses. Thus, it has been suggested to include in an English choice-of-court agreement a clause promising payment of 'all such sums as shall represent the whole of the loss' caused by breach.<sup>134</sup> A suggestion has also been made to attach to a choice-of-court agreement choosing the Tokyo District Court a clause reading, 'In the event that either party institutes any legal proceedings in any court other than the Tokyo District Court, that party shall assume all of the costs incurred in having such proceedings dis-

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<sup>130</sup> An argument envisaged, though not necessarily supported, in BRIGGS A. (note 110), para. 29.

<sup>131</sup> Accord: YEO N./TAN D. (note 58), p 425.

<sup>132</sup> Accord: BRIGGS A. (note 27), para. 8.26.

<sup>133</sup> E.g. MERRETT L. (note 111), fn. 35.

<sup>134</sup> BRIGGS A. (note 27), p. 161 with a commentary at para. 5.51.

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missed or stayed, including but not limited to the other party's attorney's and paralegal fees.<sup>135</sup>

Such clauses will contribute to legal certainty since what the court is asked to do is simply to give effect to privately negotiated clauses and, therefore, the objections based on *res judicata* and international comity may be avoided. The precise extent to which such clauses can be given effect will depend on their governing law and may give rise to a dispute of its own. They are indeed not wholly immune from the risk of being struck out. Also, their scope may be disputed unless they are tightly drafted. Thus, with respect to the suggested clauses mentioned above, a dispute may arise as to whether they are wide enough to cover, for example, costs incurred in making an application in vain for an antisuit injunction; and again, if a specific sum is agreed upon as damages, it may come under scrutiny to see that it does not violate any rules against a penalty clause under the applicable law.

### **XIII. Dichotomy Between the Common Law and the Civil Law**

As apparent from the foregoing analysis, the legal system and thinking of the common law jurisdictions are instrumental in shaping the remedy of damages for breach of a choice-of-court agreement. The relevant differences from the civil law system can be summarised as follows.

Firstly, mainstream common law thinking makes no dogmatic distinction in character between a choice-of-court agreement and substantive contracts. This makes it possible to award damages for breach of a choice-of-court agreement just as in the case of a breach of an ordinary contract. The civil law thinking may be more inclined to see a distinct character in a choice-of-court agreement, which may lead to a different treatment of its breach. Thus, if a breach of a choice-of-court agreement is regarded as a procedural issue, it will be subject to procedural rules, which may not make the remedy of damages available. Even if a choice-of-court agreement is acknowledged to be a contract, it may be treated as a special species of contract for which no remedy of damages is considered to be available.

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<sup>135</sup> DOGAUCHI M., *Kokusai Keiyaku ni okeru Boilerplate jyôkô o meguru Jyakkan no Ryûiten* [Some Points to Note on Boilerplate Clauses in International Contracts] in: *NBL* 2008/874(5) p. 66. It modifies the language suggested by HAMABE Y./ANDERSON K., *Law School Jitsumuka Kyôju ni yoru Eibun Kokusaitorihiki Keiyakusho no Kakikata* [A Guidance on Writing International Business Contracts in English by a Law School Professor/Practitioner] Tokyo 2007, p. 197, which reads: In the event that either party institutes any legal proceedings in any court other than the Tokyo District Court, that party shall assume all of the costs incurred in transferring said proceedings to the Tokyo District Court, including but not limited to the other party's attorney's and paralegal fees.



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Secondly, the courts of common law countries generally have power to issue an antisuit injunction to restrain foreign proceedings brought in breach of a choice-of-court agreement. The courts of most civil law countries have no equivalent power. The value of damages may be felt to be greater when it operates in tandem with an antisuit injunction in a complementary fashion.<sup>136</sup> Furthermore, an antisuit injunction provides a benchmark to gauge effectiveness as a remedy and measure implications for international comity. Without it, the hurdle which the proponents for the remedy of damages have to surmount may be higher since a doubt over its effectiveness and a concern about its impact on comity may loom larger.

Thirdly, whereas liability for breach of contract is generally strict in the common law legal systems, it is fault-based in the civil law legal systems. It follows that in the latter systems, damages are not awarded for breach of a choice-of-court agreement unless the breach is intentional or negligent. That requirement would be difficult to be satisfied particularly in some of the second category of cases where the court first seised declines to find that there is a breach.

For those reasons, a damages claim for breach of a choice-of-court agreement is less likely to be successful in the civil law countries than in the common law countries and under the civil law legal systems than under the common law legal systems. Even if a court of a civil law country characterises the question as substantive and its choice-of-law rules point to a common law legal system which would grant a damages claim, the court may refuse to apply that law if it finds that the result of awarding damages would offend comity towards the court first seised and hence would be contrary to the *ordre public* of the forum.

The courts of common law countries, with an antisuit injunction in their armoury, are more willing than the civil law counterparts to take proactive control over the workings of international litigation provided that the case has a sufficient nexus to warrant their involvement.<sup>137</sup> This tendency will intensify with a new addition to their armoury if they shed any remaining diffidence in awarding damages for breach of a choice-of-court agreement. The upshot would then be a wider divide between the common law camp and the civil law camp in their attitude and approach to international litigation. This may accelerate the tendency among strategic drafters of favouring the common law courts in the selection of courts for their choice-of-court agreements. By selecting common law courts, they could buttress their choice-of-court agreement as they would then have the option of bringing a damages claim in the chosen common law forum, which would be more open to the idea of embracing such a claim than the civil law counterparts and because the governing law would then be likely to be the law of the chosen forum,

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<sup>136</sup> Thus, JOSEPH D. (note 86), p. 404, argues that if an antisuit injunction is available to prevent breach of a choice-of-court agreement, damages should be available to compensate for loss suffered consequent on breach.

<sup>137</sup> E.g. In *Airbus Industrie G.I.E. v. Patel* [1999] 1 AC 119, the House of Lords held that comity required that the English forum should have a sufficient connection with the matter in question to justify indirect interference with foreign proceedings by means of an antisuit injunction.

which is *ex hypothesi* a common law legal system, under which the claim would have a better chance of success than under the civil law counterparts.

#### **XIV. Conclusion**

The foregoing analysis has revealed that whether, in what circumstances, and to what extent damages may be awarded for breach of a choice-of-court agreement depend on a myriad of factors. Thus, the claimant may not have a good chance of success if the court treats the breach of a choice-of-court agreement as a procedural matter. If it is treated as a substantive matter, its success depends largely on the governing law of the claim. The governing law, in turn, depends on the legal basis in which the claim is framed. Where it is framed in contract and is governed by a civil law legal system, it may encounter difficulties in overcoming the fault-based system of contractual liability in certain cases. Furthermore, the court before which the claim is made must have jurisdiction, whether it is in the forum first seised, or the forum chosen by the choice-of-court agreement, or another forum. Where the claim is made in the forum first seised, it will not be successful if the court has earlier made irreconcilable decisions. There must be an end to the jurisdictional battle also in the cases where the claim is made in another forum. Thus, the decisions of the court first seised may be recognised as having the *res judicata* force of precluding the claim. Furthermore, it may be queried whether awarding damages would not be contrary to international comity towards the court first seised. Comity should, however, be put in the context of the far-from-ideal reality of international litigation. If a party is aggrieved by his opponent's unscrupulous litigational behaviour, the courts should not use comity as a pretext for renouncing its responsibility towards him if he has such a sufficient contact with the forum as to warrant extending to him a helping hand. In examining implications for international comity, a useful comparison may be made with an antisuit injunction, an established remedy in the common law countries for breach of a choice-of-court agreement. An antisuit injunction offers a useful point of comparison also in respect of effectiveness as a remedy. In both respects, the picture is mixed and, therefore, a choice should be wisely made between the two remedies to best fit the situation at hand. The effectiveness of the remedy of damages has been doubted due to the perceived difficulty of quantification. However, upon a close analysis, the difficulty differs depending on the type of cases. The duty to mitigate loss or similar concepts may be pleaded in defence in various contexts but will not be found persuasive in most cases. A practical solution to the uncertainty over the success of the damages claim would be an express clause on damages. It may, however, give rise to a dispute of its own.

Two threads run throughout the present analysis. They are the distinction between the first and second categories of cases described in Section III and the contrasts between the common law and civil law camps.

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As between the two categories of cases, the damages claim is more likely to succeed in the first category of cases, *i.e.* where the court first seised dismisses or stays its proceedings. The reasons include that negative implications for international comity are less serious, that the quantification of damages is less difficult, and that if the governing law adopts the system of fault-based liability, the requirement of negligence or intent in breaching the agreement will be met with less difficulty. In the second category of cases, *i.e.* where the court first seised decides to hear the case on the merits, the claim will face more obstacles. Nevertheless, practical justice demands that the law should be crafted and interpreted to allow the claim at least in the cases displaying an unscrupulous behaviour, for example, where the plaintiff has flouted a plainly valid choice-of-court agreement by bringing an action before a remote court which would, to his knowledge, exercise an exorbitant jurisdiction and deny effect to any foreign choice-of-court agreement.

The idea of awarding damages for breach of a choice-of-court agreement has its genesis in the common law system. Whether the seed growing in the common law field can be transplanted onto the civil law ground remains to be seen. The present article has identified some conceptual and normative hurdles to overcome. If the common law courts cast off any remaining hesitancy in granting this remedy, the divide between the common law and the civil law camps in their approach to international litigation will become wider, which may affect the strategy of drafters of choice-of-court agreements.

