



Chapitre de livre

2021

Published version

Public access

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Choice of law in international commercial contracts : Art. 2 ; Art. 3 ; Art. 6 ;
Art. 7 ; Art. 8 ; Art. 43 ; Art. 48

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How to cite

KADNER GRAZIANO, Thomas et al. Choice of law in international commercial contracts : Art. 2 ; Art. 3 ; Art. 6 ; Art. 7 ; Art. 8 ; Art. 43 ; Art. 48. In: Choice of law in international commercial contracts : global perspectives on the Hague principles. Kadner Graziano, Thomas ; Girsberger, Daniel ; Neels, Jan L. (Ed.). Oxford : Oxford University Press, 2021. (Oxford private international law series)

This publication URL: <https://archive-ouverte.unige.ch/unige:180025>

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Last deposit update in Archive ouverte UNIGE on 18.09.2024 09:02

Article 7—Severability

A. Introduction

1.339 Article 7 of the Hague Principles provides:

A choice of law cannot be contested solely on the ground that the contract to which it applies is not valid.

1.340 Article 7 of the Hague Principles establishes the principle of separability (or ‘severability’, which is used synonymously). According to this principle, the choice of law agreement and the main contract (whether this be a contract of sale, a construction contract, a joint venture contract, etc) are separate, autonomous contracts and their validity is to be analysed for each of the two agreements separately. This principle applies:

- if the choice of law was made in a document separate from the main contract and prior to, contemporaneously with, or subsequent to the contract, but also
- if the choice of law agreement is contained in a clause of the main contract or in standard forms submitted in contract negotiations (provided they have become part of the contract).

1.341 The invalidity of the main contract consequently does not necessarily void the choice of law agreement. Only if the reason for invalidity of the main contract also affects the choice of law

agreement will the latter also be void. If, on the other hand, the choice of law agreement is not affected by the reason invalidating the main contract, it may survive independent of the main contract and 'the claim of invalidity, non-existence or ineffectiveness of the main contract is assessed according to the applicable law chosen by the parties'.³¹⁷

B. Comparative overview

I. Jurisdictions recognizing the principle of separability for choice of law agreements

For choice of law agreements, only a minority of jurisdictions worldwide have so far recognized the principle of separability explicitly by statute, case law or by a dominant academic opinion. In these jurisdictions, an agreement on the choice of law is regarded as a separate and autonomous contract, and the validity of the choice of law agreement is analysed independently from that of the main contract.

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Angola and Mozambique [10.25]; Asian Principles of Private International Law (Article 3.6 is a faithful copy of Article 7 of the Hague Principle) [19.24]; China (Mainland) [21.28]; Dubai International Financial Centre (recognized for choice of court agreements, very likely to be recognized also for choice of law clauses) [22.34]–[22.35]; Japan [28.38]; Macau [31.15]; Singapore [35.35]; Taiwan (academic opinion) [38.31]–[38.33]; European Union [43.60]; Iceland [44.37]; Liechtenstein [45.35]; Russia [47.49]–[47.51]; Switzerland [48.45]; Turkey (according to the dominant academic opinion) [49.37]; Ukraine (dominant academic opinion) [50.38]; Organization of American States [53.55]; Argentina (dominant academic opinion) [54.50]; Panama (dominant academic opinion) [62.48]–[62.50]; Paraguay [63.33]; Uruguay [65.25].

II. Jurisdictions recognizing the principle of separability for arbitration or choice of court agreements, no authority regarding choice of law agreements available yet

In numerous other jurisdictions, the principle of separability has been broadly recognized for arbitration and/or choice of court agreements. However, there is no clear authority on separability with respect to choice of law agreements.

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OHADA (the issue is governed by laws of Member States) [9.25]; common law Africa (doctrine of separability has so far been recognized for arbitration and choice of court agreements, no authority for choice of law agreements) [11.18]; Mauritius (recognized for arbitration agreements, no authority for choice of law agreements but likely to be accepted (following French PIL where severability is a well-established principle)) [15.33]–[15.34]; Morocco (recognized for arbitration agreements, no authority for choice of law agreements but likely to be accepted) [16.34]–[16.36]; South Africa (accepted for arbitration agreements, no authority for choice of law agreements but would arguably be accepted) [17.25]–[17.26]; Tunisia (accepted for arbitration agreements, no authority for choice of law agreements) [18.44]; India (accepted for arbitration agreements, no authority for choice of law agreements) [24.19]–[24.20]; Indonesia [25.24]–[25.25]; Israel (the issue has only been raised in arbitration proceedings, with some court decisions applying the principle of severability, but not others) [27.55]–[27.56]; Lebanon [30.35]–[30.36]; Qatar (so far recognized for arbitration agreements) [34.25]; United Arab Emirates (recognized for arbitration agreements) [39.29]; Australia (no authority available but likely to be recognized) [41.21]; Bolivia [55.41]; Brazil [56.44]; Canada [67.26]–[67.27]; United States of America (so far recognized for arbitration and choice of court agreements) [68.25].

³¹⁷ See Commentary [7.1] ff.

- 1.344** In yet other jurisdictions, *no clear distinction* seems to be made between the main contract and its validity and the choice of law agreement.

See, eg, Vietnam [40.35]; Chile [57.49]–[57.50]; Colombia [58.37]–[58.39]; Costa Rica [59.39].

III. Potential circumstances invalidating the main contract and/or the choice of law agreement

- 1.345** As set out above, in jurisdictions recognizing the principle of separability, the invalidity of the main contract does not necessarily render the choice of law agreement void. The invalidity of the main contract only affects the choice of law agreement if both agreements suffer from the same defect, such as for example:

- the lack of one party's capacity to contract;
- duress;
- lesion;
- fraud; or
- mistake (regarding both agreements);
- or an agent's lack of authority to form both the contract and the choice of law agreement.

- 1.346** Conversely, where a mistake or misrepresentation relates only to the subject matter of the main contract, the choice of law agreement will not be affected and will be maintained.³¹⁸ The law designated by the parties in their choice of law agreement then determines in most³¹⁹ jurisdictions whether the choice of law agreement is valid, and—if this is the case—whether this is also the case for the main contract.³²⁰

See, eg, Singapore [35.35]; Taiwan [38.32]–[38.33]; European Union [43.60]; Iceland [44.38]; Switzerland [48.45]; Turkey [49.37]; Argentina [54.50]–[54.51].

- 1.347** As set out above, a choice of law clause may be made in a document separate from the main contract and prior to, contemporaneously with, or subsequent to the main contract. It may also be included in the main contract or in standard terms and conditions submitted during the contractual negotiations.³²¹ In the latter case it may be more likely for the main contract and the choice of law agreement to be affected by the same defect, such as lack of capacity or lack of an agent's authority.³²² Yet this will not always be the case and must be carefully analysed on a case-by-case basis.

C. Concluding remarks

- 1.348** The purpose of the principle of separability is to respect party autonomy and the contracting parties' consensus to the greatest extent possible. If the parties have purportedly agreed on a choice of law, there is no reason why their choice should not be respected. If this is the case, the validity of the choice of law agreement will first be analysed under the purportedly chosen law, see for example Article 6(1) of the Hague Principles.³²³ If the choice of law is valid under

³¹⁸ Very clear and concise the report, eg, on Singapore [35.35].

³¹⁹ Most but not all. In some jurisdictions the choice of law agreement is always subject to the *lex fori*, for example in South Caucasus [36.31]; Liechtenstein [45.29]; or United States of America [68.22].

³²⁰ For details, see paras 1.289 ff (Article 6 (1)(a)).

³²¹ For scenarios in which both parties submit conflicting choice of law clauses, see paras 1.306 ff and 1.322 ff (Article 6(1)(b)).

³²² Compare for example the report on Palestine [33.43]–[33.44].

³²³ For an overview, see paras 1.288 ff (Article 6).

this law, the main contract will then be analysed under the law designated by the parties. If the main contract is valid under this law, the contract will then be governed by the designated law. If, conversely, the main contract is void or voidable under the designated law, the law designated by the parties will then also govern the consequences of the defective main contract.

The national reports show that a certain number of jurisdictions have already recognized the principle of separability for choice of law agreements. In many other countries, separability has so far been recognized only for arbitration and/or choice of court agreements, but not yet for choice of law agreements. In those (numerous) jurisdictions, the Hague Principles could help to put the issue on the agenda and thereby contribute to maximizing party autonomy, transparency, and legal certainty regarding choice of law clauses.

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