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Selected Forum Agreements in Western Europe

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Although selected forum agreements traditionally have been discussed in terms of whether they effectively "confer" or "oust" jurisdiction, the terms "confer" and "oust" are inappropriate unless they be clearly understood as shorthand expressions for what really occurs. When parties agree to "confer" exclusive jurisdiction on the courts of state "A," they agree merely to surrender their legal privileges to bring an action in any other state, and at the same time, they have agreed to surrender their privileges to object to the jurisdiction of state "A." If the agreement is enforced, it cannot truly be said that jurisdiction has been conferred or ousted by the parties. Jurisdiction is exercised or withheld only by force of the law that gives effect to the parties' agreement. If this analysis is accepted, it is still permissible to speak of the "conferring" or "ousting" of jurisdiction by contract so long as we do not allow this terminology to mislead us into thinking that parties can undermine or augment the powers of states or courts when they bargain away merely their own legal privileges.

The common law has no term of art to label an exclusive forum agreement. The civilians have two serviceable terms. Considered from the point of view of the state in which the parties have agreed to bring their litigation, it is called a prorogation agreement. From the viewpoint of the states in which the parties have agreed not to litigate, it is a derogation agreement. In the interest of international uniformity, these terms merit adoption.

Professor Lenhoff has thoroughly surveyed the law in various European states, and I have drawn heavily from his labor and wisdom in the following summary.[1]

The first question to be considered is that of contractual construction. If the parties have agreed to a clause that states merely: "The courts of Mexico shall have jurisdiction for disputes arising under this agreement," will the clause be construed to mean that the parties intended that an action could be brought in no other state?

The courts of France[2] and Germany[3] have indicated that the intention of the parties must be determined in the particular case without benefit of presumption.

A minority view, expressed at least in pre-war Poland and in the 1956 Draft Convention on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods,[4] applies a presumption that such a clause provides for an exclusive forum.

In contrast, Swiss[5] and Austrian[6] courts indulge in a presumption against

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[1] Lenhoff, "The Parties' Choice of Forum: 'Prorogation Agreements,'" 15 Rutgers L. Rev. (1961) 414.

[2] Banque d'Italie v. Ferrand, Cour de Cassation (Ch. civ.), May 2, 1928, [1928] Sirey Jurisprudence I. 281.

[3] S. N. v. N. V. Handel Maatschappij, Reichsgericht, Feb. 16, 1939, 169 Entscheidungen des Reichsgerichts in Zivilsachen 254.

[4] Art. 2 of the Draft Convention, 5 Am. J. Comp. L. (1956) 653.

[5] See cases cited by Lenhoff, *loc. cit. supra* note 1, at 473 n. 390 and Nussbaum, American-Swiss Private International Law (2nd ed. 1958) at 50.

[6] See cases cited by Lenhoff, *loc. cit. supra* note 1, at 467 n. 348.

the exclusive character of the forum named in the clause. The rule of construction applied is that a prorogation clause is not intended to affect the rights of the parties to sue in other states.

In Italian law, by analogy from the statutory rule governing intraterritorial agreements, a valid prorogation agreement does not prevent litigation in other than the chosen state unless the agreement specifically provides that the chosen forum is exclusive.[7]

Thus, on the preliminary question of construction of prorogation clauses, there is no European consensus.

The second question is whether, in the absence of additional contacts with the state, a prorogation clause is a sufficient basis for the exercise of jurisdiction.

In Italy, unless the action relates to immovable property outside Italy, the unequivocal answer is yes. Article 4(1) of the Code of Civil Procedure of 1942 classifies consent as one of the grounds upon which jurisdiction may rest. Such consent may be expressed in a contractual agreement entered into before or after a dispute arises. In addition, the parties may in their contract elect domicile in Italy. Such an election is an additional basis of jurisdiction.

Spain shares Italy's attitude of favor toward prorogation clauses.[8]

In France, in the usual case a prorogation clause is an effective basis for the exercise of jurisdiction. However, if there is no court in France that has territorial competence over the case, the prorogation clause is ineffective unless the lack of competence may be waived. In most cases a waiver is permissible. However, if the action involves immovable property outside France, or strong policy grounds are involved, no waiver is permitted.[9] Aside from the question of territorial competence, the traditional French view has been that some contact with France other than the mere consent of the parties must be present for jurisdiction to be exercised.[10] However, since 1948, the decisional[11] and doctrinal[12] current has been to uphold a prorogation agreement even in the absence of any other contact of the parties with France. The parties may also accomplish prorogation through the vehicle of a contractual election of domicile. Indeed, in view of the past history in France of disfavoring prorogation clauses, an elective domicile clause may perhaps be the most prudent device for contractual submission to French jurisdiction.[13]

Germany, like France, has not legislated on the international aspects of prorogation agreements. Nevertheless, it seems clear that, when the subject of the dispute is pecuniary, such agreements are valid in Germany; but if the subject matter is non-pecuniary, the agreement is ineffective. There is

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[7] Codice di Procedura Civile art. 29 (2) (1942).

[8] See 1 Guasp, Comentarios a la Ley de Enjuiciamento Civil (1943) 306; Pera Verdaguer, Jurisdicción y Competencia (2d ed. 1958) 252–54; Verplaetse, Derecho Internacional Privado (1954) 654.

[9] See 6 Niboyet, Traité de Droit International Privé Français (1949) No. 1720 (1), at 272.

[10] *Ibid.;* Lenhoff, *loc. cit. supra* note 1, at 476–79.

[11] Dame Patino v. Patino, Cour de Cassation, Ch. civ. (Sect. civ.), June 21, 1948, [1949] Sirey Jurisprudence I. 121 with note by Niboyet.

[12] See Batiffol, Traité Élémentaire de Droit International Privé (3rd ed. 1959) No. 695, at 773.

[13] But see 6 Niboyet, *op. cit. supra* note 9, at No. 1720 (1), at 272 (some additional contact with France required).

doctrinal dissension whether these rules derive from rules governing the territorial competence of courts or from rules governing the recognition of foreign judgments.[14] Nevertheless, both doctrinal roads seem to lead to the same conclusion.

In Austria,[15] the rules governing the international aspects of prorogation agreements must be determined by analogy from, or extension of, rules in wholly Austrian controversies governing the parties' freedom to choose a particular Austrian forum. Since wide freedom of choice is granted by Austrian law, prorogation agreements with international aspects are generally effective. The parties may not, however, effectively agree to bring their litigation to the "Austrian courts" generally. They must name a specific Austrian court. There are other unclear doctrinal limitations on the validity in Austria of prorogation agreements. These limitations are less restrictive than in Germany and reflect a concern for interference with the sovereign interests of other states. Nevertheless, the dominant view is that a prorogation agreement may even be the basis for an action relating to immovable property outside Austria. Legislation forbids, however, the determination of matrimonial disputes between aliens unless the country of which the husband is a national will recognize the judgment.

In Switzerland,[16] the validity of prorogation agreements is based on cantonal, rather than federal, law. In a number of cantons, the courts have discretion to entertain an action based on a prorogation agreement. In others, only a pecuniary dispute may be entertained solely on the basis of a prorogation clause. There are further limitations in some cantons; for example, in Zurich.

In the Netherlands, a prorogation agreement is ineffective. Jurisdiction is determined by statute under which the consent of the parties is irrelevant. The parties may accomplish prorogation indirectly, however, by the defendant's election of domicile in the Netherlands.[17]

In Europe, then, prorogation clauses find widespread recognition, particularly in pecuniary matters. However, when the derogation aspects of an exclusive forum clause are in issue, less favor is shown. Some states are unwilling to have their jurisdiction "ousted." Spain regards derogation agreements as ineffective.[18] Portugal limits their effectiveness to contracts between aliens that are to be performed abroad and involve no property in Portugal.[19]

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[14] See Riezler, Internationales Zivilprozessrecht (1949) 307 (rules of territorial competence); Pagenstecher, "Gerichtsbarkeit und internationale Zuständigkeit als selbständige Prozessvoraussetzungen," 11 Zeitschrift für ausl. und intern. Privatrecht (1937) 337, 414 (rules governing recognition of foreign judgments). For other authorities, see Lenhoff, *loc. cit. supra* note 1, at 483–85; Rosenberg, Lehrbuch des deutschen Zivilprozessrechts (9th ed. 1961) 146.

[15] See 1 Sperl, Lehrbuch des deutschen Zivilprozessrechts (1925) 145 *et seq.;* 1 Fasching, Kommentar zu den Zivilprozessgesetzen, J. N. § 104 (1959); Lenhoff, *loc. cit. supra* note 1, at 487–89.

[16] Guldener, Das internationale und interkantonale Zivilprozessrecht der Schweiz (1951, with 1959 supplement) 169 *et seq.;* 2 Schnitzer, Handbuch des internationalen Privatrechts (4th ed. 1958) 828 *et seq.;* Nussbaum, *op cit. supra* note 5, at 50; Lenhoff, *loc. cit. supra* note 1, at 489–90.

[17] Kollewijn, American-Dutch Private International Law (2d ed. 1961) 31; Kosters & Dubbink, Internationaal Burgerlijk Recht (1963) 723.

[18] See works cited *supra* note 8.

[19] See Taborda Ferreira, "La conception du droit international privé d'après la doctrine

The Netherlands adopts a sound view toward derogation agreements. The courts recognize that the parties have no power to modify the rules of jurisdiction. Nevertheless, the courts refuse to participate in a breach of contract. Consequently, they refuse to take cognizance of a case in violation of the parties' agreements.[20]

As a rule, a derogation agreement is an effective means of barring litigation in Austria, Belgium, France, Germany, Greece, and Switzerland.[21] There are limitations. Generally, such an agreement is invalid whenever the subject matter of the action relates to immovables within the state, or to matters closely related to the state's administrative processes as in actions to correct an entry in a domestic registry. Each state generally reserves the power to disregard such an agreement when matters of public policy or *ordre public* are involved. Based on specific statutory restrictions, in both France and Germany, derogation clauses in insurance contracts are believed to be ineffective.[22]

In Italy, the Code of Civil Procedure sets rigid limitations on the validity of derogation agreements. It provides that derogation of Italian jurisdiction is not permitted by contract except in a pecuniary (*obbligazione*) case between aliens or between an alien and a citizen who is neither a resident nor a domiciliary of Italy.[23]

There are certain additional rules of contract law that apply to exclusive forum agreements.

In Italy, such an agreement must be in writing, and, if the agreement is in a clause in a contract of adhesion, the clause must be separately signed by the other party,[24] and in any case it must relate to a particular dispute or to a particular pecuniary (*obbligazione*) relationship between the parties.[25]

In Germany, by analogy from rules governing arbitration, no derogation agreement is permitted in individual labor cases or in cases in which one party has taken advantage of his superior economic or social leverage.[26] A prorogation agreement need not be in writing, but it has been argued that a writing is essential to the enforcement of the derogation aspects of the agreement.[27]

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et la pratique au Portugal," 89 Recueil des Cours de l'Académie de droit international (1956) 603, 695 *et seq.*

[20] See Kollewijn, *op. cit. supra* note 17, at 31.

[21] See Lenhoff, *supra* note 1, at 419–23.

[22] See Lenhoff, *supra* note 1, at 424 n. 48.

[23] Codice di Procedura Civile art. 2 (1942). See Morelli, Diritto Processuale Civile Internazionale (2d ed. 1954) 172. *Cf.* Lenhoff, *supra* note 1, at 450 n. 241, where article 2 is unaccountably mistranslated. The article reads: "Italian jurisdiction cannot be derogated by contract in favor of a foreign jurisdiction or of arbitrators who render their decision abroad, except in cases relating to obligations between aliens or between an alien and a citizen *who neither resides in nor is domiciled in* the State [Italy] and where the derogation results from a written act." The italicized portion is omitted in Professor Lenhoff's translation and subsequent analysis.

[24] Codice Civile art. 1341 (2) (1942). The Sea Insurance Co. v. Ditta Hugo Trumpy, Corte di Cassazione (Sez. Un.), May 23, 1955, [1956] Giur. It. I, 1, 679, 39 Rivista di diritto internazionale (1956) 371. See Giuliano, La Giurisdizione Civile Italiana e lo Straniero (1961) 93.

[25] Codice di Procedura Civile art. 29 (1). A similar rule applies in most countries. See Lenhoff, *loc. cit. supra* note 1, at 443, n. 193 (France); at 487, n. 487 (Austria).

[26] See Lenhoff, *loc. cit. supra,* note 1, at 424, n. 50.

[27] *Id.* at 461–62.

In France, exclusive forum clauses in contracts of adhesion are usually said to be valid only when the adhering party has actual knowledge of the contents of the contract.[28] While French law does not require that the agreement be in writing, in many cases some documentary evidence of the existence of the agreement will be required.[29]

In Austria, the agreement need not be in writing, but documentary evidence of the agreement is required.[30]

Additional problems arise in connection with recognition of judgments. Suppose that two Italian citizens, on the basis of an agreement that purports to bar them from litigating anywhere but in the courts of New York, actually obtain judgment in New York. It is clear that, under Italian law, the agreement was invalid. Does it necessarily follow that the judgment may not be recognized? Italian doctrine overwhelmingly takes the view that the judgment may be recognized,[31] while Italy's Supreme Court has held consistently that the judgment may not be recognized.[32]

Furthermore, even in the absence of a selected forum agreement, if the foreign judgment is based on the defendant's tacit or express consent to the foreign exercise of jurisdiction, the Italian courts will refuse to recognize the judgment, unless the prerequisites to a valid derogation clause were present.[33]

If the parties have entered into an agreement purporting to confer exclusive jurisdiction on the courts of, say, New York and the New York court refuses to entertain the case, the interesting question arises whether the courts of another state, which ordinarily would regard the agreement as a bar to an action in its courts, will take cognizance of the ineffectiveness of the prorogation aspects of the agreement and thereby entertain the case. There is little authority on the question, but it indicates that justice can only be served by an affirmative answer.[34]

A similar question arises when a foreign judgment that has been obtained on the basis of a contractual exclusive forum cannot be recognized by a state whose jurisdiction has been derogated. Here, opinion is divided. The highest courts of Austria, Germany, and Switzerland, with the approval of leading scholars, have held that it is immaterial whether the foreign judgment will be recognized. If the derogation clause is otherwise valid, it will be effective. Decisions in Prussia and some cantons of Switzerland have been to the contrary.[35]

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[28] See Lenhoff, *loc. cit. supra* note 1, at 444.

[29] *Id.* at 444.

[30] See Lenhoff, *loc. cit. supra* note 1, at 465; 1 Fasching, *op. cit. supra* note 15.

[31] The authorities are collected by Pau, "Deroga convenzionale alla giurisdizione italiana e competenza internazionale del giudice straniero," 46 Rivista di diritto internazionale (1963) 576. See also Cappelletti and Perillo, Civil Procedure in Italy 14.07 (Publication forthcoming in 1964).

[32] E.g., Proc. Gen. della Repubblica di Trieste v. Zeriali e Kalpic, Corte di Cassazione (Sez. I), Sept. 18, 1961, no. 2026, 11 Giustizia civile I, 1525 (1961), with note by Iaccarino.

[33] See Cappelletti and Perillo, *op. cit. supra* note 31, at § 14.07, where it is noted that the restrictive rule followed by the Supreme Court has been developed in matrimonial cases, but carried over to other judgments.

[34] See Lenhoff, *loc. cit. supra* note 1, at 423, n. 44.

[35] See *Id.* at 423–24.

In France, if the foreign judgment obtained abroad is unsatisfied, a French proceeding may be commenced on the underlying cause of action despite the derogation clause.

Derogation Clauses in Latin-American Law

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The law of most Latin-American countries recognizes in principle the right of the parties to submit their disputes to any court which has jurisdiction in the civil law meaning of the word, that is, a court which is generally empowered by statute to decide the specific kind of law suit. Submission thus merely affects competence, which in the civil law determines the territorial distribution of cases among courts of the same type of jurisdiction. While this concept of competence differs from our idea of venue in several important respects, it is similar to it in that it is generally considered not to be a matter of public policy but rather a means of protection of the parties which may be freely waived.

The competence arising out of agreement, known as prorogation, is normally available not only within the same country but also on an international level. Some countries restrict the jurisdiction of their courts in regard to disputes between foreigners; others have special rules regarding real estate, personal status or estate matters. But on the whole, most Latin-American countries will permit their courts to hear commercial matters submitted to them, even if both parties are foreigners, especially if there is at least some connection of the subject matter with the country of the forum.

The statutory provisions and court decisions on prorogation are occasionally cited as authority for the validity of contractual clauses providing for an exclusive forum. This is true only to the extent that Latin-American courts will give effect to such clauses permitting their courts, with the above mentioned qualifications, to hear such matters. A judgment thus rendered may also be enforceable in another country, to the same degree as other foreign judgments, especially if the defendant appeared and litigated. It is much less certain, however, whether such clauses will be given their full effect through refusal by a court, which would have jurisdiction and be competent under its own law, to hear a case merely because the parties stipulated the exclusive jurisdiction of the courts of another country.

The present discussion will be limited to a review of this last point, that is, the derogation of jurisdiction aspect of exclusive jurisdiction clauses. No attempt will be made to cover all Latin-American countries, or even the more important among them. While general statements on the subject may occasionally be found in treatises and textbooks, they are not too reliable as a prophesy of what the courts will actually do in a given case.[1] Thus it appears most advisable to study, merely by way of illustration, the development in a few countries to see whether some important factors and tendencies can be found and some general conclusions reached.

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[1] Compare, for instance, the discussion of Argentinian law in 3 Goldschmidt, Sistema y Filosofia del Derecho Internacional Privado (2nd ed. 1954) 77–79, with the cases cited below.