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«Mediation to Foster European Wide Settlement of Disputes»

Chapter XII

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International and EU Perspective on Mediation: Private International Law Issues on Mediation in Civil and Commercial Matters

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1. Mediation in civil and commercial matters and private international law

Mediation in civil and commercial matters has been the subject of increasing number of studies in the last years¹; the intervention of the EU in such a field, in particular with the Directive 2008/52 (hereinafter Mediation Directive)², and the more recent ODR Regulation and the Directive on consumer ADR³, has contributed to raising awareness on mediation in all EU Member States, even those in which litigation was conceived as the most common path to solve disputes. Even though most aspects connected to mediation in civil and commercial cases have been deeply studied, private international law issues have

¹ In the legal literature, cf. *ex multis*, K.J. HOPT, F. STEFFEK (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, 2012; G. DE PALO, M.B. TREVOR (eds.), *EU Mediation Law and Practice*, Oxford, 2012, and N.M. ALEXANDER (ed.), *Global Trends in Mediation*, Alphen an den Rijn, 2006.

² Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, in *OJ L* 136, 24.5.2008, p. 3, on which see *ex multis* C. ESPLUGUES, J.L. IGLESIAS, G. PALAO (eds.), *Civil and Commercial Mediation in Europe. National Mediation Rules and Procedures*, Cambridge, 2012; C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*, Cambridge, 2014, and L. CARPANETO, *La Direttiva n. 2008/52 sulla mediazione civile e commerciale. Uno strumento a tutela della parte debole*, in I. QUEIROLO, A.M. BENEDETTI, L. CARPANETO (eds.), *La tutela dei soggetti deboli tra diritto internazionale, dell'Unione europea e diritto interno*, Rome, 2012, p. 547.

³ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), in *OJ L* 165, 18.6.2013, p. 1; Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, in *OJ L* 165, 18.6.2013, p. 63. On both the instruments, for a first reading, see S. DOMINELLI, *The EU Digital Agenda and Online Mediation*, in *this volume*, and A. BANASZEWSKA, *Recent Developments in Consumer Dispute Resolution Systems in the European Union*, in M.E. DE MAESTRI, S. DOMINELLI (eds.), *Party Autonomy in European Private (and) International Law, Tome II*, Roma, 2015, p. 33.

not been widely discussed⁴ and are most often not directly taken into consideration by domestic legislators⁵.

Before turning the attention to the issues of private international law, it is necessary to point out that, when analysing mediation proceedings, a number of different contracts exist, each of which has to be treated differently in the determination of the applicable law. In particular, at least four agreements can be identified.

Firstly, there is the agreement between the parties to go to mediation. This agreement, of course, will mostly – but not necessarily – be in writing and eventually incorporated into the contract, eventually by reference to general terms and conditions (contractual mediation clause). Secondly, a contract will be concluded between the disputing parties and the mediator, or the mediation centre if mediators cannot perform their activities outside the centre⁶. This, mostly likely, for the purposes of the applicable law will be qualified as a service contract. Thirdly, if the mediator works for a centre, the former will be bound to the first by an employment contract (or similar, if domestic laws allow individual mediators to work for more than one centre at the time, and thus different contracts might be more adequate). Fourthly, and lastly, the (possible) agreement reached by the parties during the procedure is also a contract, which, for the purposes of the applicable law, might have different forms (sales, service, or others)⁷.

For most of the abovementioned contracts, the issues of private international law will be operative in nature, rather than dogmatic and systematic. With regard to the last contract, there is indeed little doubt that the law applicable to the agreement by which the parties settle their dispute will be determined according to the Rome I Regulation⁸, if the content of the contract falls within the regulation's material scope of application. The problems here will mainly be on the qualification of the obligations enshrined within the agreement to determine i) which conflict of laws rule of the Rome I Regulation has to be applied if no choice of law is made by the parties, and ii) whether or not domestic rules of private international law do find residual application for contractual obligations excluded from the scope of application of the Rome I Regulation⁹.

⁴ In these very terms, A. VAN HOEK, J. KOCKEN, *The Netherlands*, in C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*, Cambridge, 2014, p. 443, at p. 448.

⁵ But for example in Greece. According to art. 2 (b), law 3898/2010, the agreement between the parties to recourse to mediation is to be governed by the substantive law that governs the contract it relates to. See in the legal literature, see V. KOURTIS, *Greece*, in C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*, Cambridge, 2014, p. 181, at p. 186 f.

⁶ This is for example the case of Italy, where mediation taken before individual mediators not working for centres, even though not constituting an illegal activity, bears the consequence that the agreement will not obtain tax reliefs, and the procedure will not be considered taken for the purposes of compulsory mediation. On this, see I. QUEIROLO, L. CARPANETO, S. DOMINELLI, *Italy*, in C. ESPLUGUES, J.L. IGLESIAS, G. PALAO (eds.), *Civil and Commercial Mediation in Europe. National Mediation Rules and Procedures*, Cambridge, 2012, p. 245, at p. 256 f.

⁷ On the different contracts that might be of relevance in mediation, see E.B. CRAWFORD, J.M. CARRUTHERS, *United Kingdom*, in C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*, Cambridge, 2014, p. 461, at p. 465 ff. Cf., N. ALEXANDER, *Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulatory Reform*, in K.J. HOPT, F. STEFFEK (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, 2012, p. 131, at p. 170 f.

⁸ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), in *OJ L 177*, 4.7.2008, p. 6.

⁹ This, of course, only where domestic systems do not extend the material scope of application of the Rome I Regulation beyond its original limits. Where in some EU Member States this solution is plain, in others it is not. For example, in Germany, there is no doubt that, after the entry into force of the Rome I Regulation and the repeal of art. 27 ff. EGBGB – *Einführungsgesetz zum Bürgerlichen Gesetzbuche* – the first is applicable beyond its material scope of application (with particular reference to the conflict of law provisions for the insurance contracts excluded from the scope of application of the Rome I Regulation, by its art. 1 (2) (j), see J. VON HEIN, *Art. 1 Rom I-VO*, in T. RAUSCHER (ed.), *Europäisches Zivilprozess- und Kollisionsrecht: Rom I-VO, Rom II-VO*, München, 2011, p. 54, at p. 81 f.; in general terms see J. VON HEIN, *Einleitung*, in *ibidem*, p. 17, at p. 30 f., and U.P. GRUBER, I. BACH, *Germany*, in C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*, Cambridge, 2014, p. 155, at p. 160 f.). On the contrary, in Italy, for example, the Italian law on private international law (law n. 218/1995), makes a *renvoi* to the 1980 Rome convention on the law applicable to contractual obligations (art. 57). Where the majority of the legal literature argues that such *renvoi* has now to be understood in favor of the Rome I Regulation (since the aim of the Italian legislator was to create a single system of private international law in contractual matters, and also in light of art. 24 (2) of the regulation, according to which «any reference to that Convention shall be understood as a reference to this Regulation»), some argue that such an interpretation should not be adopted (and is not imposed by art. 24 Rome I Regulation, which cannot affect domestic laws so as to amend them where EU law is not directly and immediately applicable *sua sponte*). This last interpretation seems to find some comfort in the case law of the Italian Supreme court (Cass. 21 October 2009, n. 22239, in *Rivista di diritto internazionale*, 2010, p. 108), which, in relation to a *renvoi* of the same law in favor of the 1968 Brussels Convention denied that reference to the Brussels I Regulation could have been made. On this issue, in the legal literature, see F. SALERNO, *Note introduttive I*, in F. SALERNO, P. FRANZINA (EDS.), *Regolamento CE n. 593/2008 del Parlamento europeo e del Consiglio del 17 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali (« Roma I »)*, in *Le nuove leggi civili commentate*, 2009, p. 521, at p. 533; F. SALERNO, *Le conseguenze del Regolamento «Roma I» sulla legge italiana di diritto internazionale privato*, in FONDAZIONE ITALIANA PER IL NOTARIATO (ed.), *Il nuovo diritto europeo dei contratti: dalla convenzione di Roma al regolamento «Roma I»*, Milano, 2007, p. 179 ff.; F. MARONGIU BONAIUTI, *Note introduttive II*, in F. SALERNO, P. FRANZINA (EDS.), *Regolamento CE n. 593/2008 del Parlamento europeo e del Consiglio del 17 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali (« Roma I »)*, in *Le nuove leggi civili commentate*, 2009, p. 534 ff., and F. GALGANO, F. MARRELLA, *Diritto e prassi del commercio internazionale*, Verona, 2010, p. 324.

Also the third mentioned type of contract that might come into play in the course of mediation (the eventual contract between the mediation centre and the mediator) presents less problems since, in most cases, such a contract will be a working contract or a service contract. Similarly, the second mentioned type of contract, the one between the parties and the mediation centre, will most likely be qualified as a service contract. In both cases, the application of the Rome I Regulation seems quite plain.

With regard to the first agreement, the one of the parties to mediate a dispute, the so called contractual mediation clause, the identification of the proper set of conflict of laws rules is more complex, and requires a careful study of the nature and use of mediation clauses in civil and commercial contracts.

2. Contractual agreements with procedural effects: on the inapplicability of the Rome I Regulation

According to its art. 1 (2) (e), the Rome I Regulation is not applicable to arbitration agreements and choice of court agreements¹⁰. By arbitration and choice of court clauses the parties agree not to seise jurisdictional bodies, or to seise some specific courts (or courts of a state), eventually conferring exclusive jurisdiction to such courts¹¹.

Arbitration agreements are in general suitable to determine a lack of jurisdiction of courts. Of course, should both the parties decide to disregard the arbitration clause, the court – eventually the one that has been prorogated – will hold jurisdiction. This follows from the idea that, even though arbitration has become equivalent to court's jurisdiction¹², the jurisdiction of the courts has to be challenged by the party invoking the arbitration agreement, usually at the time of appearance before the court¹³. Similarly, choice of court agreements, if the jurisdiction of the seised but not prorogated court is challenged, can limit the adjudicatory power of the seised court.

The contractual mediation clause can to some extent be compared to arbitration and choice of court clauses¹⁴. Should one argue that any obligation upon the parties not to seise a court does fall within the scope of application of art. 1 (2) (e) of the Rome I Regulation, than, by strict consequence, the determination of the law governing the contractual mediation clause is a matter of domestic law.

If choice of court agreements and contractual mediation clauses can be compared for the purposes of their exclusion of the Rome I Regulation, they can also be compared to determine the proper law governing the agreement. With regard to prorogation agreements, states have followed different approaches, and a comparison with the solutions adopted with regard to choice of court agreements might be helpful to determine the proper law that should govern the contractual mediation clause as well, should the Rome I Regulation be deemed not to be applicable.

2.1. The law applicable to contractual agreements with procedural effects: the experience of choice of court agreements

Formal requirements of choice of court agreements are uniformed throughout the European judicial space by the Brussels I *bis* Regulation¹⁵, which aims at guaranteeing that consensus has been reached¹⁶ and that

¹⁰ Cf. in the domestic case law BGH (DE) 08.05.2014 - III ZR 371/12, in *unalex*, DE-3087; Hoge Raad (NL) 09.11.2012 - 11/02937 - Andrey Yur'evich EN'KOV / Ingosstrakh Insurance Company, in *unalex*, NL-1099, and BGH (DE) 27.11.2008 - III ZB 59/07, in *unalex*, DE-2440.

¹¹ It is for the parties to decide whether such agreement is exclusive or not (Sheriff Court (SCO) (UK) 16.10.1991 - McCarthy / Abowall (Trading) Ltd., in *unalex*, UK-193, and Audiencia Provincial Barcelona (ES) 05.03.2009 - 54/2009, in *unalex*, ES-396). Where under the Brussels I Regulation courts had to determine the exclusive nature of the conferral in light of all the elements if no specific agreement on the exclusive nature was concluded between the parties, now, under art. 25 of the Brussels I *bis* Regulation, the agreement is presumed to be exclusive, if not otherwise provided by the parties.

¹² Cassazione civ., sez. un., ord., 25 ottobre 2013, n. 24153 in *Corriere Giuridico*, 2014, 1, p. 84.

¹³ Cf. S.M. CARBONE, I. QUEIROLO, *Art. 4. Accettazione e deroga della giurisdizione italiana*, in F. PREITE, A. GAZZANTI PUGLIESE DI COTRONE (eds.), *Atti notarili. Diritto comunitario e internazionale. Vol. I, Diritto internazionale privato*, Padova, 2011, p. 482, at p. 500.

¹⁴ I. QUEIROLO, C. GAMBINO, Italy, in C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*, Cambridge, 2014, p. 221, at p. 226.

¹⁵ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in *OJ L* 351, 20.12.2012, p. 1, art. 25.

¹⁶ I. QUEIROLO, *Evolutionary Trends in Choice of Court Agreements: from the Lotus Case to the Brussels I-bis Regulation*, in I. QUEIROLO, B. HEIDERHOFF (eds.), *Party Autonomy in European Private (and) International Law, Tome I*, Rome, 2015, p. 83, at p. 95 ff., where further references in the legal literature. In the case law, cf. ECJ 19 June 1984, *Partenreederei ms. Tilly Russ and Ernest Russ v NV Haven- & Vervoerbedrijf Nova and NV Goeminne Hout*, Case 71/83, in *Reports*, 1984, 2417, par. 16; ECJ 16 March 1999, *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA*, Case C-159/97, in *Reports*, 1999, I-1597, par. 34; ECJ 9 December 2003, *Erich Gasser GmbH v MISAT Srl*, Case C-116/02, in *Reports*, 2003, I-14693, par. 50, and ECJ 24 June 1981, *Elefanten Schuh GmbH v Pierre Jacqmain*,

choice of court agreements are deemed formally valid in all EU Member States. Still, the substantive validity of choice of court agreements is not directly regulated by the Brussels I *bis* Regulation.

Before the entry into force of the Brussels I *bis* Regulation, no statutory indication was given on the law applicable to choice of court agreements. Under the Brussels I Regulation¹⁷ it has been argued that the court seised should have determined the validity of the clause based on i) the *lex fori*; ii) the law of the prorogated (but not seised) forum, or iii) the *lex causae*, i.e. the law specifically applicable to the jurisdiction agreement, determined in accordance with the pertinent conflict of laws rules of the seised court¹⁸.

For the purpose of the present study, it has to be noted that the recourse to one of the abovementioned laws depends on the qualification of the choice of court agreement, a topic that was not directly dealt with by the European Court of Justice. The application of the *lex fori* to choice of court agreements implies that the agreements at hand are mere procedural acts, subject to the law of the forum¹⁹. The idea that choice of court agreements are procedural in nature and should not be dealt with by the Rome I Regulation seems to be supported by the European Economic and Social Committee, who similarly addresses choice of court agreements and evidence and procedure issues²⁰. However, the legal literature has correctly warned that not all issues connected to choice of court clauses are procedural in nature: only «*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*»²¹. Hence, issues on the validity and possible additional formal requirements should be treated differently, even where contracts, or contractual clauses, have “*spurious*” procedural effects.

The rejection of the applicability of the *lex fori* to determine the validity of the choice of court agreement could induce to think that the solution adopted by some states²² has driven the reform of EU law. Nonetheless, the EU did not fully accept that choice of court agreements are governed by the law that is applicable according to the domestic conflict of laws rules of the seised court, and choice of court agreements have to be autonomously evaluated. This means that the law of the contract does not automatically govern the choice of court agreement²³.

Where it comes to choice of court agreements, it seems difficult to fully embrace the idea that such clauses are only contractual in nature, and thus completely subject to the domestic contractual conflict of laws rules. The procedural effects of the agreement are difficult to disregard completely, but so is party autonomy. Where the first solution sets aside the intrinsic contractual nature of choice of court clauses, the second does not take into consideration their undeniable procedural effects. In this sense, the combination of both the elements (party autonomy, which has led the parties to prorogate a court, and procedural effects) has led to the adoption of the third criterion: the application of the substantive law of

Case 150/80, in *Reports*, 1981, 1671, par. 25. In the most recent case law of the Court, see ECJ 21 May 2015, *Jaouad El Majdoub v CarsOnTheWeb.Deutschland GmbH*, Case C-322/14, not published yet, para. 26 ff., where the Court argued that the method of accepting the general terms and conditions of a contract for sale by click-wrapping, which contains an agreement conferring jurisdiction, constitutes a communication by electronic means which provides a durable record of the agreement, within the meaning of the Brussels I Regulation if such method makes it possible to print and save the text of those terms and conditions before the conclusion of the contract. For a comment on such decisions, see J. HOFFMANN, “*Button-click*” *Confirmation and Cross Border Contract Conclusion*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2015, p. 193.

¹⁷ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in *OJ L* 12, 16.1.2001, p. 1.

¹⁸ I. QUEIROLO, *Gli accordi di proroga sulla competenza giurisdizionale. Tra diritto comunitario e diritto interno*, Padova, 2000, p. 200 ff. In the case law, see OGH (AT) 11.12.2002 - 7 Ob 256/02, in *unalex*, AT-42: «[i]f, within the content of Article 17 Brussels Convention, it must be examined whether consent was clearly and expressly given, the national law applicable according to the private international law of the *lex fori* may only be applied insofar as the formal requirements themselves do not contain substantive criteria for consent».

¹⁹ General Report Study JLS/C4/2005/03 on the Application of Regulation Brussels I in the Member States presented by Prof. Dr. Burkhard Hess, Prof. Dr. Thomas Pfeiffer and Prof. Dr. Peter Schlosser, para. 377. On the application of the *lex fori* to mere procedural matters, see R. MONACO, *Manuale di diritto internazionale pubblico e privato*, Torino, 1949, p. 623 ff.

²⁰ 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), in *OJ C* 318, 23.12.2006, p. 56, point. 3.1.4 («[t]he exclusion of arbitration agreements and agreements on the choice of court (Article 1(2)(e)) has to do with the fact that these matters are covered by international civil procedural law, as they can be better dealt with in this context and to some extent are also regulated in agreements whose applicability extends beyond the EU. The same arguments apply to evidence and procedure issues [...]»).

²¹ Cf. K. TAKAHASHI, *Damages for Breach of Choice-of-court Agreement*, in *Yearbook of Private International Law*, 2011, p. 57, at p. 67.

²² General Report Study JLS/C4/2005/03 on the Application of Regulation Brussels I in the Member States, cit., para. 377; cf. in the case law Bundesgericht (CH) 23.11.2001 - 4C.245/2001/rnd, in *unalex*, CH-262; OGH (AT) 29.08.2000 - 1 Ob 149/00v, in *unalex*, AT-117; OLG Saarbrücken (DE) 02.10.1991 - 5 U 21/91, in *unalex*, DE-198 and LG Hamburg (DE) 10.06.1974 - 62 O 165/73, in *unalex*, DE-739.

²³ Such assessment is autonomous from the contract; this means that the law applicable to the contract and the law applicable to the choice of court clause might be different. On this, see I. QUEIROLO, *Choice of Court Agreements in the New Brussels I-bis Regulation: A Critical Appraisal*, in *Yearbook of Private International Law*, 2013/2014, p. 113, at p. 122 f.

the prorogated (but not seised) court. The Hague Convention of 30 June 2005 on Choice of Court Agreements has thus developed the rule that the validity of the clause should be assessed in light of the substantive law of the prorogated court²⁴. This solution does give weight to the contractual party autonomy, in that the *lex fori* of the seised but non-prorogated court is not applied, and to the procedural aspects of the agreement, since the connection between the clause and the prorogated jurisdiction justifies the application of the law of this state.

This solution, in comparison with the application of the *lex causae*, is functional to the protection of the agreement: the outcome on the validity of the clause depends on the applicable law, which, for a given agreement, is going to be the same (the law of the prorogated jurisdiction), regardless of the conflict of law provisions of the seised court.

The Brussels I *bis* Regulation has changed this scenario, adopting a fourth solution: the Regulation entails a “sort” of uniform conflict of laws rule according to which the validity of choice of court agreements are governed by the law of the Member State whose courts are prorogated²⁵. Still, to this solution, which would be coherent with the 2005 Hague Convention, the Regulation also specifies that the conflict of laws rules of this state have to be applied²⁶, *renvoi* included. This means that, at least, all different courts are called to apply the same conflict of laws rules (of the prorogated court²⁷).

2.2. The law applicable to contractual mediation clauses in light of domestic conflict of laws rules

Following the above, if one considers that the Rome I Regulation is not applicable to mediation clauses – even though such exclusion or application does not seem straightforward²⁸ in as much it has to be understood whether the reference to arbitration and choice of court proceedings in art. 1 (2) (e) only limits the material scope of application, or whether it interprets the notion of “civil and commercial matters” by excluding such clauses interpreting them as mere procedural acts – one could argue that the solutions which are valid for choice of court agreements should also be followed in relation to mediation clauses. This would lead to the conclusion that the validity of the mediation agreement is not determined in accordance to the law identified by the Rome I Regulation.

However, as for the rules to identify the law governing the validity of mediation clauses, the abovementioned rule of the Brussels I *bis* Regulation does not seem applicable to mediation clauses, since this is specifically devoted to prorogation clauses. Nonetheless, the exclusion of the applicability of the Rome I Regulation to mediation clauses rests upon the consideration that its art. 1 (2) (e) is also applicable to mediation clauses since the different agreements can be compared. In other words, even though their (significant) differences, the different clauses have common features; in particular, contractual mediation clauses impose procedural pre-trial obligations upon the parties.

Case law and extended legal doctrines on domestic conflict of laws rules applicable to contractual mediation clauses are, as mentioned, scarce²⁹. However, in accordance with domestic provisions, domestic courts of the different Member States might determine *both the substantive and formal* validity in accordance to the i) *lex fori*; ii) the *lex causae*; iii) the substantive law of the prorogated (but not seised) forum; iv) the law – provisions of private international law included – of the prorogated (but not seised) forum. Where possible, it seems that domestic courts should follow this latter interpretation. If mediation and choice of court agreements are both excluded from the scope of application of the Rome I Regulation

²⁴ Art. 5 (1) «[t]he court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State». See in the legal literature R.A. BRAND, P.M. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements. Commentary and Documents*, Cambridge, 2008, p. 42 f.

²⁵ Brussels I *bis* Regulation, art. 28.

²⁶ *Ibidem*, recital 20: «[w]here a question arises as to whether a choice-of-court agreement in favour of a court or the courts of a Member State is null and void as to its substantive validity, that question should be decided in accordance with the law of the Member State of the court or courts designated in the agreement, including the conflict-of-laws rules of that Member State». On the normative value of recitals in EU law, see I. QUEIROLO, S. DOMINELLI, *Statutory Certificates e immunità statale del registro italiano navale*, in *Il diritto marittimo*, 2013, p. 152, at p. 172, where further references in the legal literature and in the case law.

²⁷ C. HEINZE, *Choice of Court Agreements, Coordination of Proceedings and Provisional Measures in the Reform of the Brussels I Regulation*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2011, p. 581 ff.

²⁸ I. QUEIROLO, C. GAMBINO, *Italy*, cit., p. 227 f.

²⁹ A. VAN HOEK, J. KOCKEN, *The Netherlands*, cit., p. 448.

because of their shared features, such features should induce to adopt the solutions envisaged in the Brussels I *bis* Regulation for choice of court agreements also to mediation clauses.

3. Contractual agreements with procedural effects: on the applicability of the Rome I Regulation

Where there is no doubt that contractual mediation clauses, and arbitration and choice of court agreements share some common features, since all pose an obligation upon the parties to seise or not to seise court, it is also true that there are evident and significant ontological differences that cannot simply be left aside.

In the first place, one could argue that the contractual elements of mediation clauses outweigh the procedural ones. In this sense, in comparison to arbitration and prorogation agreements, mediation clauses are not able to influence the jurisdiction of the court seised in violation of such a contractual clause. There is case law stressing that clauses that impose an obligation upon the parties to seek amicable solution before seising a court are not binding upon courts³⁰.

In the second place, one could argue that the exclusion of art. 1 (2) (e) of the Rome I Regulation should be narrowly interpreted³¹. The Mediation Directive and the Rome I Regulation were drafted in the same year. In spite of this temporal element, the two instruments do not take a direct stand on the exclusion of contractual mediation clauses from the scope of application of the regulation. Moreover, the fact that art. 1 (2) (e) only speaks of arbitration, and not of ADR in general, could also lead to believe that mediation clauses are not excluded from the scope of application of the regulation. Where the EU lawmaker wanted to take into consideration all ADR systems, rather than just one of them, it has done so³².

3.1. The general conflict of laws rules under the Rome I Regulation

Should one be convinced that mediation clauses are essentially contractual agreements, even though with procedural effects, not excluded from the scope of application of the Rome I Regulation, the law governing this clause should be determined according to the harmonised conflict of laws rules. However, the identification of the proper conflict of laws rule, and thus of the application of the regulation itself, might prove not to be easy.

The easiest scenario, which does not seem to be recurring in practice, is that the parties identify themselves the law governing the contractual mediation clause (which, as said, is independent from the contract). According to art. 3 of the Rome I Regulation, «[t]he choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case». Where the express choice of law gives rise to less problems, it has to be reminded that an implied choice of law can only be demonstrated by the circumstances of a given specific case³³. In this sense, it seems particularly difficult to make use of the extended case law developed under art. 3 (1) of the Rome I Regulation also for mediation clauses. Domestic courts that had to determine whether an implied choice of law was reached by the parties always took into consideration contracts with substantive obligations. The language, the value and the location of goods or services have been taken into consideration to determine the tacit choice of law. Such case does not seem fit for mediation clauses, since an obligation of the parties not to immediately seise a court, if it has to be analysed autonomously from the contract, bears little elements from which the implicit will of the parties can be “clearly” derived from. Only in case where the mediation clause preventively identifies the possible competent mediator, a court could try to argue that a choice for the law governing the clause itself is demonstrated by the circumstances of the case.

³⁰ Cour d’appel (LU) 03.05.1995 – 16671, in *unalex*, LU-93: «[v]ereinbaren die Vertragsparteien in einer Gerichtsstandsklausel, dass das bezeichnete Gericht erst nach der Durchführung eines Verfahrens zur gütlichen Einigung angerufen werden darf, so ist das bezeichnete Gericht auch dann zuständig, wenn das Güteverfahren nicht durchgeführt wird. Die Unterlassung des Güteverfahrens führt nicht zu der Unwirksamkeit der Gerichtsstandsklausel, und zwar unabhängig davon, aus welchem Grund kein Güteverfahren durchgeführt worden ist».

³¹ Cf on this point, C. ESPLUGUES, *Civil and Commercial Mediation in the EU after the Transposition of the Directive 2008/52/EC*, in C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*, Cambridge, 2014, p. 485, at p. 747 f., and E.B. CRAWFORD, J.M. CARRUTHERS, *United Kingdom*, cit., p. 467.

³² Cf. lastly Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes, cit., and the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes, where ADR where considered in their broader meaning. On the contrary, in the Mediation Directive, only mediation amongst the different ADR was taken into consideration.

³³ OGH (AT) 29.01.2013 - 9 Ob 3/13a, in *unalex*, AT-901; High Court - Queen’s Bench Division London (UK) 18.07.2012 - [2012] EWHC 2013 (QB) - Sapporo Breweries Limited / Lupofresh Limited, in *unalex*, UK-455.

Should art. 3 of the Rome I Regulation not be applicable, since in most cases the parties will not expressly choose the law applicable to the contractual mediation clause, and factual elements might not be sufficient to sustain that an implied choice of law has been met by the parties, courts – if they apply the Rome I Regulation – will have to make use of other conflict of law provisions. The general rule of art. 4 of the Rome I Regulation will be potentially applicable.

However, the application of art. 4 of the Rome I Regulation does not prove to be easy. Art. 4 provides a list of contracts, identifying for each contract the connecting factor. For example, for a contract for the sale of goods, the law of the country where the seller has his habitual residence is the law applicable to the contract. Mediation clauses, by themselves, are neither sales contracts, nor service contracts, etc. To cope with contracts that do not fit in the classes of art. 4 (1), the Rome Regulation also prescribes that, in such cases the governing law is that of the country where the party required to effect the characteristic performance has his habitual residence (art. 4 (2)). Nonetheless, what is the characteristic performance in a mediation clause? And who is the party required to effect the characteristic performance in a mediation clause? Should one argue that that the obligation – which has to be performed by both parties – is not to seise a court, then the law applicable would be the law of the state of any party to the mediation clause. Being impossible for a court to arbitrarily choose between two laws, it seems that only art. 4 (4)³⁴ of the Rome I Regulation could lead to a final solution. According to this provision, where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the [clause] shall be governed by the law of the country with which it is most closely connected. Of course, in this evaluation the court will have to take into careful consideration all the elements that connect a mediation clause to a state, and justify its reasoning.

3.2. Validity of mediation clauses under the Rome I Regulation

Where the validity of a mediation clause is concerned, should one apply the Rome I Regulation, it has to be reminded that, as a matter of principle, its existence and validity has to be determined by the law which would govern it under the regulation³⁵. Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law that would govern the clause under the regulation³⁶. The provision at hand is applicable for all pathological issues connected with the clause that do not concern its formal requirements³⁷, since issues on the formal validity are governed by art. 11 of the Rome I Regulation.

Where the general principle rests upon a *fictio iuris* concerning the validity of the mediation clause, a fiction that is necessary to determine the proper putative law, the exception of art. 10 (2) of the Rome I Regulation has been introduced mainly (but not only) to solve the problem of silence in the formation of the contract. In giving any party the possibility to rely upon the law of the country of his habitual residence, art. 10 (2) of the Rome I Regulation does not bear any specification on whether the habitual residence has to be evaluated at the time the contested consent was given (or not given), or at the time the claim has

³⁴ Art. 4 (3) of the Rome I Regulation does not seem applicable in this case, since it admits the application of the law of a third state to which the clause might be connected. Whilst the provision could be employed to invoke the application a third law that has a most clear connection to the clause, art. 4 (3) of the Rome I Regulation does not seem the appropriate legal basis to choose between two laws.

³⁵ Rome I Regulation, Art. 10 (1). On the application of the rules, cf, in the domestic case law Rechtbank 's Gravenhage (NL) 01.02.2012 - 404341 / HA ZA 11-2504 - Genencor International B.V. / Eurosyn S.R.L., in *unalex*, NL- 1075; Rechtbank Dordrecht (NL) 03.11.2010 - 80250 / HA ZA 09-2220 - Hoogwegt Cheese B.V. / Fayrefield Foods Limited, in *unalex*, NL-1117; Audiencia Provincial Almería (ES) 01.07.2002 - 205/2002, in *unalex*, ES-694, and LG Hildesheim (DE) 11.12.1991 - 7 S 236/91, in *unalex*, DE-2339.

³⁶ Rome I Regulation, Art. 10 (2). On art. 10 of the Rome I Regulation, see in the legal literature, I. QUEIROLO, *Art. 10*, in P. MANKOWSKI, U. MAGNUS (eds.), *Rome I Regulation*, Munich, 2015, *forthcoming*; F. FERRARI, *Rom I-VO, Art. 10*, in F. FERRARI, E. KIENINGER, P. MANKOWSKI, K. OTTE, I. SAENGER, G. SCHULZE, A. STAUDINGER, *Internationales Vertragsrecht: Rom I-VO, CISG, CMR, FactÜ*, München, 2012, p. 264; P. STONE, *EU Private International Law*, Cheltenham, 2010, p. 324, and B. CORTESE, *Art. 10. - Consenso e validità sostanziale*, in F. SALERNO, P. FRANZINA (eds.), *Regolamento CE n. 593/2008 del Parlamento europeo e del Consiglio del 17 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali (« Roma I »)*, in *Le nuove leggi civili commentate*, 2009, p. 804.

³⁷ It should also preliminary be recalled that the issue of the existence and validity of the contract is a different matter from the matter of formal validity of the contract, which is dealt with by Art. 11 of the Rome I Regulation. In particular, issues of existence and validity of the contract are not connected to the formal requirements to externalise the will of the parties, but are rather connected with the different issue of determining the minimum requirements to qualify the contract as “existing”.

been brought before a court³⁸. Moreover, no indication is given on what has to be understood as “unreasonable”³⁹.

Limiting the scope of application of the provision, it has to be reminded that should art. 10 (2) of the Rome I Regulation find application, the law of the habitual residence of this party will only determine the existence of consensus⁴⁰, whilst it will not be applicable to determine any other elements of the contractual mediation clause. Should this law determine that consent has been given, the law governing the contractual mediation clause will determine the way to express the consent.

As for the formal validity of the mediation clause, art. 11 of the Rome I Regulation prescribes that the formal validity is governed by the law that governs the clause according to the conflict of laws rules of the regulation. Alternatively, where the clause is entered into by persons who are in the same country, the formal validity can also be governed by the law of the country where the agreement is concluded⁴¹. Should the parties not be in the same country, then the law of the country where either of the parties had his habitual residence at that time governs the formal validity⁴². According to these provisions, where the mediation clause is formally invalid under the law that governs the clause, but is valid under the law of the state where the agreement has been concluded, in the first case, or under the law of state of habitual residence of any of the parties, in the second case, the clause will be deemed formally valid⁴³.

To this general rule on formal validity, other follows. In the first place, it seems that art. 11 (5) of the Rome I Regulation is not applicable in cases of mediation clauses. This provision applies to contracts «*the subject matter of which is a right in rem in immovable property or a tenancy of immovable property*», and a mediation clause does not directly concern rights *in rem*, but rather an obligation upon the parties to try to seek an amicable solution.

On the contrary, due to the different wording, the applicability to mediation clauses of art. 11 (4) of the Rome I Regulation raises some doubts. According to this last provision, the general rule on formal validity finds no application if the contract «*falls within the scope of application of Article 6*». Had art. 11 (4) of the Rome I Regulation stated “consumers contracts”, rather than contracts “falling within the scope of application” of the rules concerning consumer contracts, there would have been little doubt: the object of mediation clauses is not a contract of sales or service for non-commercial purposes, hence the provision should find no application. However, the terminology used “falling within the scope of application” of consumer contracts is wider than “contract the subject matter of which is” the purchase of goods and services for non-commercial use. Whilst there is no doubt that the formulation of the provision was originally meant to expressly identify consumer contracts, it appears nonetheless that the terminology employed can justify the application of the provisions not only to consumer contracts, but also to *agreements related to* consumer contracts, such as the case of a contractual mediation clause (even concluded after the main contract) could be. Should this interpretation be accepted, the *ratio* of the protection of the contractually weaker party imposes that the formal validity of the contractual mediation clause shall be governed by the law of the country where the consumer has his habitual residence.

3.3 Incapacity and mediation clause under the Rome I Regulation

Where, as a matter of principle, questions involving the status or legal capacity of natural persons are excluded from the scope of application of the Rome I Regulation⁴⁴, the issue of the incapacity does fall

³⁸ There are those correctly argue that the relevant habitual residence should be the one at the time consent was given, since it is only at that point in time that a party can rely on a given law. Cf. B. CORTESE, *Art. 10. - Consenso e validità sostanziale*, cit., p. 807.

³⁹ Thus the courts have to establish the reasonableness of the behavior of the party challenging the consent. In the case law, see OLG Schleswig 19 September 1989 - 3 U 213/86, in *Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts*, 1989, p. 48, where the court held that in those circumstances where the silence of one party is deemed, by the law governing the contract, as an acceptance of the contractual proposal, the party challenging the consent can rely upon the law of his/her habitual residence if, according to the latter, silence of natural persons is not to be considered as acceptance.

⁴⁰ Cf. U. VILLANI, *La Convenzione di Roma sulla legge applicabile ai contratti*, Bari, 2000, p. 187. See in the case law, OGH 13 December 2012, 1 Ob 48/12h, in *Zeitschrift für das gesamte Bank- und Börsenwesen*, 2013, p. 506, with note by T. THIEDE, p. 513. Already on the EGBGB, see BGH 19 March 1997 - VII ZR 316/96, *Neue Juristische Wochenschrift*, 1997, p. 1697.

⁴¹ Rome I Regulation, art. 11 (1), second period.

⁴² Rome I Regulation, art. 11 (2).

⁴³ On the *favor validitatis* expressed by the conflict of laws provisions, see B. CORTESE, *Art. 11. - Validità formale*, in F. SALERNO, P. FRANZINA (eds.), *Regolamento CE n. 593/2008 del Parlamento europeo e del Consiglio del 17 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali (« Roma I »)*, in *Le nuove leggi civili commentate*, 2009, p. 809, at p. 810, and G. SCHULZE, *Rom I-VO, Art. 11*, in F. FERRARI, E. KIENINGER, P. MANKOWSKI, K. OTTE, I. SAENGER, G. SCHULZE, A. STAUDINGER, *Internationales Vertragsrecht: Rom I-VO, CISG, CMR, FactŪ*, München, 2012, p. 284, at p. 285.

⁴⁴ Rome I Regulation, art. 1 (2) (a).

within its scope of application⁴⁵. According to art. 13 (only)⁴⁶ a natural person can rely upon the legal incapacity recognised by a law which is not the law of the place of the country in which the parties concluded the contract, nor the *lex contractus*, if the agreement is concluded between parties who are in the same country. Additionally, the provision only applies if the other party was aware, or should have been, of such incapacity⁴⁷. This provision should balance the opposed interests of the challenging party, and of the party concluding a contract in good faith⁴⁸.

Given the traditional dichotomy between *Rechtsfähigkeit* (or *capacità giuridica*, in Italian) and *Handlungsfähigkeit* (or *capacità di agire*, in Italian), the notion that seems relevant under art. 13 of the Rome I Regulation is the one referring to the possibility of individuals to enter a contract and to freely determine their contractual relationships. Nonetheless, art. 13 of the Rome I Regulation does only prescribe that the legal incapacity of one natural person can be governed by “the law of another country”. In the field of personal statuses, the most adopted connecting factor has been the nationality of the individual⁴⁹; a connecting factor that some states⁵⁰ still favour, showing that this matter represents the *pièce de résistance* of private international law to new theories on connecting factors.

3.4. Legal capacity of natural persons under the Rome I Regulation

Should one believe that the Rome I Regulation is applicable to mediation clauses, and having understood that its applicability does not seem without issues, nor that from such application different aspects of mediation clauses are necessarily governed by only one law, it has to be reminded that, as mentioned, issues related to the legal capacity of individuals⁵¹ and companies⁵² are excluded from the scope of application of the regulation. This means that the issue of legal capacity is solved by courts in application of domestic conflict of law provisions. With one relevant exception: domestic conflict of law provisions are limited when incapacity is invoked by the applicability of art. 13 of the Rome I Regulation. Should this last provision not be applicable, domestic conflict of laws rules not only will address issues of capacity, but also issues in which the existence of such capacity is being challenged.

4. Mediation clauses and issues of private international law: *academic interest v. practitioner interest*

There is no doubt that the private international law issues raised by mediation clauses are of particular dogmatic interest. Starting from the very applicability of the Rome I Regulation, that imposes a study on its scope of application and of the very nature of contractual mediation clauses – and their comparability to arbitration and choice of court agreements, to the difficulty in identifying the proper conflict of laws rule absent a choice of the parties and the possible application of different laws to a single mediation clause, these clauses seem to be a true private international law “leakage test”. However, a further question has to be raised, regardless of whether one believes that domestic or EU private international law rules are applicable: is it strictly necessary to determine the law governing the mediation clause?⁵³

⁴⁵ See in the legal literature P. STONE, *EU Private International Law*, cit., p. 328; T. RAUSCHER, *Internationales Privatrecht*, Heidelberg, 2012, p. 147; F. MARONGI BUONAIUTI, *Art. 13. – Incapacità*, in F. SALERNO, P. FRANZINA (eds.), *Regolamento CE n. 593/2008 del Parlamento europeo e del Consiglio del 17 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali (« Roma I »)*, in *Le nuove leggi civili commentate*, 2009, p. 830; G. SCHULZE, *Rom I-VO, Art. 13*, in F. FERRARI, E. KIENINGER, P. MANKOWSKI, K. OTTE, I. SAENGER, G. SCHULZE, A. STAUDINGER, *Internationales Vertragsrecht: Rom I-VO, CISG, CMR, FactÜ*, München, 2012, p. 306, and J. KROPHOLLER, *Internationales Privatrecht*, Tübingen, 2006, p. 317.

⁴⁶ For a further reading, see I. QUEIROLO, *Art. 13*, in P. MANKOWSKI, U. MAGNUS (eds.), *Rome I Regulation*, Munich, 2015, forthcoming.

⁴⁷ On the reasons to protect the party that was not aware of the other’s legal incapacity, see F. MOSCONI, *Le norme relative alla capacità dei contraenti nella Convenzione C.E.E. sulla legge applicabile alle obbligazioni contrattuali*, in SCUOLA DI NOTARIATO “A. ANSELMINI” DI ROMA (ed.), *La Convenzione di Roma sulla legge applicabile alle obbligazioni contrattuali, Vol. I*, Milano, 1983, p. 189, at p. 195.

⁴⁸ In the case law, see the French Cassation, Req. 13 January 1861, *Lizardi v Chaise*, in *Dalloz Périodique*, p. 305, where the buyer, party to a series of international sales contracts, resulted incapable according to his personal law. However, according to the law of the place of the performance, the subject was considered capable. The French Supreme Court reaffirmed the principle that personal capacities were to be determined by the national law of the party, but, at the same time, concluded that it was not possible to completely ignore both the principle of good faith in contractual transactions and certainty of law in those circumstances in which contracts were deemed to be valid under one law, and invalid under the law governing the legal capacity of one of the parties.

⁴⁹ P.S. MANCINI, *Della nazionalità come fondamento del diritto delle genti*, Torino, 1851.

⁵⁰ Cf. in the German system, art.7 (1) EGBGB and in the Italian system, art. 20 of the law on private international law (no. 218/1995).

⁵¹ Rome I Regulation, art. 1 (2) (a).

⁵² Rome I Regulation, art. 1 (2) (f).

⁵³ Also casting doubts on the purpose of pursuing enforcement of contractual mediation clauses, cf. E.B. CRAWFORD, J.M. CARRUTHERS, *United Kingdom*, cit., p. 467.

To properly answer the question, the following scenario can be pictured. “A” and “B” conclude a sales contract with a general clause according to which the parties agree to seise the prorogated court in Genoa (Italy) only after mediation is sought. After receiving the goods, from “B”, “A”, dissatisfied with the quality of the merchandise, seises the prorogated court to seek compensation for losses. When appearing before the court of law, “B” challenges the jurisdiction of the prorogated court, arguing that the mediation clause prevents the court from hearing the case, since the parties have agreed that mediation should be a condition for the action.

As already mentioned, and opposed to choice of court and arbitration agreements, contractual mediation clauses are not *per se* able to determine a lack of jurisdiction of the seised court⁵⁴. This means that “B” will not have the possibility to enforce a mediation clause against the court, which will hold jurisdiction over the case. Moreover, “B” will not be able to enforce the contractual mediation clause against “A” either. Mediation is a proceeding voluntary in nature⁵⁵: this means that without the counterpart’s consent, the parties cannot go through a whole mediation procedure. In other words, “B” will only be left with the possibility to seek redress against “A” for breach of contract.

Called to assess the breach of the mediation clause, the court will in the first place determine whether the mediation clause – even though the procedure rests upon the will of the parties – is “exclusive”. Should the clause not impose an obligation on the parties, but just give them the option between a judicial proceeding and a prior mediation proceeding, no breach of contract will be found⁵⁶.

In the second place, the court will have to determine the formal and substantial validity of the clause in light of the relevant applicable law (found either through domestic private international law rules, or through a combination of domestic and EU private international law rules). Should the court exclude the validity of the clause, no redress will be granted. Should after all a (non-directly-enforceable) contractual mediation clause be valid, the question becomes: what is the damage suffered by “B”? Where in choice of court and arbitration agreements the most clear damage is the economic damage following the proceeding started before a non-competent court, in contractual mediation clauses the parties only have agreed to try seek an amicable solution prior to eventual court proceedings should they not succeed. The outcome of mediation procedures depends on the will of the parties. The outcome of arbitration proceedings and judicial proceedings instructed before non-competent judicial authorities do not, on the contrary, depend upon the will of the parties. The outcome of a judicial proceeding is not a contractual settlement of a dispute, but a decision of a third party solving the dispute. If the behavior of “A” is interpreted as a will *not* to mediate, and thus as a behavior that preempts the negative outcome of the mediation proceeding in whose relation “B” should have no expectation (depending the result from the will of both parties), it becomes difficult to identify “B’s” right that has been breached. Whilst it is true that “B” has a right to the procedure, it is also true that “B” does not have a right to mediate. No negative consequences are directly connected with the disregard of the contractual mediation clause, but for the impossibility to take the mediation procedure itself. Where it is apparent that one party does not wish to mediate, avoiding a mediation procedure could be in the interest of all the parties, who will save time and resources. Furthermore, the disregard of the contractual clause does not even impair the right to mediate during a judicial proceeding, should the circumstances change and induce “A” to re-think his position. All legal systems nowadays know mediation, and all courts have the power to suspend proceedings if the parties request a stay for mediation, and/or the power to suggest the parties a mediation procedure.

Given the lack of any economic damage, and the lack of any impairment of the parties’ rights of the parties to amicably settle their dispute at a later stage, it seems quite difficult to identify a damage a court would grant redress to after a contractual mediation clause has been disregarded by one party. All in all, even though the private international law issues raised by contractual mediation clauses are of high dogmatic and systematic interest, they might turn out to have little practical importance. A little practical importance that seems to find comfort in the very limited case law that has been delivered on the question of the law applicable to contractual mediation clauses.

⁵⁴ Cour d’appel (LU) 03.05.1995 – 16671, in *unalex*, LU-93, cit.

⁵⁵ Cf. Directive 2008/52/EC, art. 3 (1) (a).

⁵⁶ Cf., in the context of exclusive choice of court agreements, K. TAKAHASHI, *Damages for Breach of Choice-of-court Agreement*, cit., p. 59.