DAMAGES FOR BREACH OF A CHOICE-OF-COURT AGREEMENT: REMAINING ISSUES

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I. Introduction

The present article is a supplement to my earlier article on the same theme (hereafter referred to as 'the previous article'), which was published in the previous

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volume of this Yearbook.[1] The analysis throughout the previous and present articles rests on some basic concepts. It will be convenient to set out their definitions below.

A 'breach of a choice-of-court agreement' is deemed to take place when an action has been brought in a non-chosen forum if the agreement is valid and exclusive in the eyes of the court before which a claim for damages is made. The forum in which the action has been brought in breach of the agreement is referred to as 'the forum first seised' (and its court as 'the court first seised'). The fact that the court first seised may find the same agreement invalid or non-exclusive is irrelevant to the concept of the 'breach of a choice-of-court agreement.'

The cases in which a damages claim may be made for breach of a choice-of-court agreement may be divided into two categories, depending on how the court first seised will respond to the defendant's allegation that the action has been brought in breach of a choice-of-court agreement. In the first category of cases, the court first seised 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. In the second category of cases, the court first seised, notwithstanding the defendant's allegation, decides to hear the case on the merits by refusing to dismiss or stay its proceedings. The defendant may then make a claim for damages for breach of the choice-of-court agreement in order to recover from the plaintiff the costs which he has incurred in disputing the jurisdiction and merits. In addition, if he has been ordered by a judgment on the merits to pay a sum of money, he may seek to claw back the sum as well as the costs of the plaintiff he has been ordered to bear.

The present article will make a number of references to the pertinent parts of the previous article.[2] In Section VI of the previous article, it has been noted that where an action has been brought in breach of a choice-of-court agreement, the

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[1] TAKAHASHI K., 'Damages for Breach of a Choice-of-Court Agreement' in: this *Yearbook*, Volume 10 (2008), pp. 57-91. Both the present and previous articles are revised versions of my Japanese article '*Kankatsu Gôi Ihan no Songai Baishô* [Damages for Breach of Jurisdiction Agreement]' in: *Kokusai Shiô Nenpô* [Japanese Yearbook of Private International Law] 2007/9, pp. 104-162.

[2] It will be convenient to indicate below the issues which have been examined in the previous article by setting out its table of contents: I. Introduction – II. What Constitutes a Breach of a Choice-of-court Agreement? – III. Categories of Cases: A. The First Category of Cases; B. The Second Category of Cases – IV. An Overview of the Case Law – V. Is the Question Procedural or Substantive? – VI. The Legal Basis of the Claim – VII. Availability of the Remedy in the Forum First Seised: A. The First Category of Cases; B. The Second Category of Cases – VIII. Availability of the Remedy in Another Forum. A. Finality of the Settlement of a Jurisdictional Battle. 1. Pleas of *res judicata*. 2. General Principles of Procedure Law. B. Comity towards the Court First Seised. 1. The First Category of Cases. 2. The Second Category of Cases. – IX. Comparison with an Antisuit Injunction – X. Quantification of Damages – XI. Duty to Mitigate Loss – XII. Express Clause on Damages – XIII. Dichotomy Between the Common Law and the Civil Law – XIV. Conclusion.

defendant may seek relief in contract or tort or restitution. Among those legal bases, the previous article has focused on the contractual basis of the claim. The present article will consider all three legal bases (Section II). The article will then examine the governing law of the claim with respect to each of those legal bases (Section III). The examination will then be directed to jurisdiction to hear such claims (Section IV). That analysis will be followed by the examination of the enforceability of the judgment awarding damages or ordering restitution in other countries (Section V). The present article will end by addressing whether damages should be awarded for breach of a choice-of-*law* agreement (Section VI).

In Section V of the previous article, it has been acknowledged that a choice-of-court agreement possesses procedural character but has been argued that it is not impossible to characterise the recoverability of damages for its breach as substantive. The analyses from Section II through to Section IV of the present article are based on the assumption that the substantive characterisation is adopted by the court seised of the claim. If the court favours the procedural characterisation, unless it is the court first seised or the court chosen by the choice-of-court agreement,[3] it will presumably decline jurisdiction since the claim concerns the procedure of another country.

The present article will avoid repeating the points made in the previous articles. As a consequence, the readers who only read the present article may form an impression that this analysis is overly sanguine about the recoverability of damages for breach of a choice-of-court agreement. To demonstrate that this author is not unaware of the hurdles to recovery considered in the previous article, notably the preclusion by the principle of *res judicata*, the international comity concern and the difficulty of quantification, it is necessary to set forth below an excerpt from the Conclusion (in Section XIV) of the previous article:

> … 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. … 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

[3] The court first seised will hear the claim since it concerns its own procedure. Also, the court chosen by the choice-of-court agreement may hear the claim on the basis of inherent jurisdiction to safeguard its process.

> 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 … and the contrasts between the common law and civil law camps.

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 [and] that the quantification of damages is less difficult …. 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.

Since the publication of the previous article, the English practitioners' have voiced mixed opinions: the Bar Council of England and Wales has expressed a view in favour of the remedy[4] while the Law Society of England and Wales has

[4] Bar Council of England and Wales, 'Response of the Bar Council of England and Wales to the Commission's Green Paper on the Review of Council Regulation (EC) No

expressed a view against it.[5] The European Union Committee of the United Kingdom House of Lords has also come out against enshrining the remedy in the Brussels Regulation[6] but it probably did not mean to express any view in a context more general than that of reform of the Regulation. On the civil law side, it has come to the author's attention that the highest court of Spain (the *Tribunal Supremo*) recently awarded damages to the tune of nearly 650,000 Euros for breach of a Spanish choice-of-court agreement by treating the agreement like a substantive contract (hereafter referred to as 'the Spanish *Tribunal Supremo* case').[7] This decision admittedly muddies the waters but it is believed that the divide between the common law and the civil law portrayed above can be maintained. Against the backdrop of this fluid state of play, the topic has begun to attract a greater attention from commentators.[8]

44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters' (June 2009) para. 3.9 (available on the European Commission's website 'Consulting the public' at <http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0002_en.htm> as of February 2010).

[5] 'Review of Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters – Brussels I. Response of the Law Society of England and Wales' (July 2009) para. 12 (Also available on the European Commission's website, note 4).

[6] The European Union Committee of the House of Lords, 'Green Paper on the Brussels I Regulation: Report with Evidence' 21st Report of Session 2008–09 (HL Paper 148) paras. 63 and 69 (Also available on the European Commission's website, note 4).

[7] STS (Sala de lo Civil, Sección 1ª), 12 January 2009, RJ 2009/544. For a brief account in English, see REQUEJO M., 'On the Value of Choice of Forum and Choice of Law Clauses in Spain', at <http://conflictoflaws.net/2009/on-the-value-of-choice-of-forum-and-choice-of-law-clauses-in-spain>. For a more detailed account and commentary in English, see ALVAREZ S., 'The Spanish Tribunal Supremo grants damages for breach of a Choice-of-Court agreement', in: *IPRax* 2009, p. 529. According to the latter, the Spanish *Tribunal Supremo* awarded damages also in an earlier case (STS (Civil) 23 February 2007, RJ 2007 1/2 118) but, unlike the latest judgment, did not discuss the legal foundation. The earlier case seems to belong to the second category (according to the terminology of the present analysis) while the latest case seems to belong to the first category.

[8] In addition to the works cited in the previous article, see e.g. MANKOSWSKI P., 'Ist eine vertragliche Absicherung von Gerichtsstandsvereinbarungen möglich?', in: *IPRax* 2009, p. 23; REQUEJO M., 'Violación de Acuerdos de Elección de Foro y Derecho a Indemnización: Estado de la Cuestión', in: *Revista Electrónica de Estudios Internacionales* 2009, p. 17 (available only online at <http://www.reei.org/reei17/doc/articulos/articulo_REQUEJO_Marta.pdf>); ALVAREZ S. (note 7); BŘÍZA P., 'Choice-of-Court Agreements: Could the Hague Choice of Court Agreements Convention and the Reform of Brussels I Regulation be the Way Out of the Gasser-Owusu Disillusion?', in: *Journal of Private International Law* 2009, p. 537; CUNIBERTI G. / REQUEJO M., 'La sanction des clauses d'élection de for par l'octroi de dommages et intérêts', in: *ERA Forum* 2010-1 (pending publication).

II. Legal Bases of the Claim

Where an action has been brought in breach of a choice-of-court agreement, the defendant may seek remedies in contract or tort or restitution. After recapping the points made in the previous article regarding the contractual basis of the claim, the following analysis will proceed to examine the tortious and restitutionary bases. As explained in Section I above, the analysis in this Section is based on the assumption that the court seised of the claim characterises it as substantive rather than procedural. Instead of seeking to arrive at a definitive conclusion under any particular legal systems, the following analysis will explore the issues which will be pertinent to many of them, drawing materials from various sources.

A. Contract

Under many legal systems, notably those of the civil law countries, contractual liability is based on fault and therefore would not be triggered unless the breach is caused intentionally or negligently. In the context of the present analysis, it would mean either the knowledge of the breach of a choice-of-court agreement or the ignorance of it due to negligence. In many cases of the first category, it would be possible to find intent or negligence since the court first seised in that category of cases also acknowledges that there is a breach. Making such a finding would be more difficult in some of the cases of the second category where the court first seised does not acknowledge that there is a breach, though there may still be room to find 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.

The same difficulty does not arise under the legal systems, typically the common law systems, which adopt a strict liability regime for breach of contract. Notwithstanding that, under the traditional common law approach, 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 an antisuit injunction. The reasons given in one English decision were the difficulty of quantifying damages for breach of a choice-of-court agreement and the negative impact that damages award might have on international comity.[9] It has been argued in Section VI of the previous article that the difficulty of quantification *per se* is not a good reason to deny relief. As regards the comity concern, since it is a consideration extraneous to the contractual theory, reference should be made to the discussion in Section VIII.B of the previous article.

[9] *OT Africa Line Ltd v. Magic Sportswear Corp* [2005] 1 C.L.C. 923 para. 33 (CA).

B. Tort

Where an action has been brought in breach of a choice-of-court agreement, the defendant may make a claim in tort to seek damages. In some legal systems, an institution of an action may constitute a tortious act in certain circumstances. Thus, the American Law Institute's Restatement (Second) of Law of Torts puts it concisely in Section 674:

> One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if:
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> (a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and
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> (b) except when they are *ex parte*, the proceedings have terminated in favor of the person against whom they are brought.

A challenge for any legal system willing to treat the institution of an action in certain circumstances as a tortious act is how to define the circumstances, so that the right to seek judicial remedies is not unduly restricted. In one case, the Japanese Supreme Court stressed that a great care should be taken to avoid imposing undue restrictions on the right to seek judicial remedies and declared that the institution of an action was generally not a tortious act.[10] But the Court acknowledged that where the institution of an action was plainly unreasonable in the light of the purpose of the judicial system, it could constitute a tortious act. The French Cour de cassation, too, was cautious when it held that the institution of an action was in principle a right and did not give rise to liability to pay damages unless it was done with malice, bad faith or gross negligence.[11]

The courts which have power to punish abusive procedural steps by means of a costs order may not find it necessary to treat a wrongful institution of an action as a tort. In Japan, the costs order is issued against the losing party[12] but it only covers the court filing fees and not lawyers' fees[13] and is imposed irrespective of intent or negligence, with the result that it is not effective to curb abusive actions. Distinguishing an order for costs in that sense from an award of damages, the Japanese Grand Court of Judicature (*Taishin-in*)[14] held *obiter* that damages could

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[10] e.g the judgment of the Supreme Court on 26 January 1988 (reported in 42-1 *Minshu* 1).

[11] The French Cour de cassation Civ.2^{e}, 11 January 1973, n° 71-12.446 (reported in *Bulletin des arrêts Cour de Cassation Chambre civile* 2 N. 17 P. 12).

[12] Article 61 of the Code of Civil Procedure [*Minji Soshô Hô*] (Japan).

[13] Article 2 of the Act on Legal Costs [*Minji Hiyô Tou ni Kansuru Hôritsu*] (Japan).

[14] Japan's highest court in the period prior to the Second World War. Its decisions are still considered to have a status of authority today unless they have been overruled by the Supreme Court, which is the post-War highest court.

be awarded to allow the defendant to recover his lawyer's fees from the plaintiff where the institution of the action was deemed to be a tortious act.[15]

The loss arising from the wrongful institution of an action is pure economic loss since it is financial rather than physical. Some legal systems treat pure economic loss differently within its overall regime for tort liability, while others make no distinction. Under English law, while the largest category of tort is negligence, its core is to protect persons and property.[16] The protection of purely economic interests is largely[17] left to the defined categories of intentional torts, which the English courts would not be easily persuaded to expand. One such category is the tort of malicious prosecution, which was held by the House of Lords in *Gregory v. Portsmouth City Council*[18] to be limited to the malicious institution of criminal prosecutions and certain civil proceedings which constituted special cases of abuse of legal process. Those special cases had been held to include malicious petition of bankruptcy, malicious commencement of execution proceedings, and malicious detention of ships. Lord Steyn observed that the extension of the tort to a civil action was less necessary in England than in the U.S., referring to the fact that the English courts, unlike the U.S. counterpart, had power to impose costs to deter groundless actions.[19] On that reasoning, where an action is brought before a foreign court which has no power of imposing costs to deter groundless actions, the extension of the tort may be warranted.[20] Such reasoning was adopted when the Court of Appeal in *Union Discount Co v. Zoller*[21] awarded damages for the institution of an action in New York in breach of an English choice-of-court agreement.[22] That was

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[15] e.g the judgment of the Grand Court of Judicature on 2 November 1943 (reported in 22 *Minshu* 1179).

[16] *Murphy v. Brentwood District Council* [1991] 1 A.C. 398.

[17] An exception is the principle enunciated by the House of Lords in *Hedley Byrne* [1964] A.C. 465.

[18] [2000] 1 A.C. 419.

[19] *Ibid.*, 429.

[20] Accord: THAM C.H., 'Damages for breach of English jurisdiction clauses: more than meets the eye', in: *LMCLQ* 2004, p. 46 et seq., at 62.

[21] [2002] 1 W.L.R. 1517 (CA) paras 11, 38.

[22] Another category of intentional economic tort, the tort of procuring a breach of contract, was considered in a recent English case, *Horn Linie GmbH & Co. v. Panamericana Formas E Impresos S.A., Ace Seguros S.A.* [2006] EWHC 373 para. 26. In that case, Morison J visited the question whether damages were recoverable in respect of a foreign action brought in breach of an English choice-of-court agreement and held *obiter* that awarding damages as a remedy for a tort of procuring a breach of contract would involve legally difficult questions but observed that it might offer a more ideal solution than an antisuit injunction which might be seen as an undue interference with foreign proceedings. The court mentioned the legally difficult questions presumably because this type of tort, also called the tort of inducement of breach of contract, is supposed to arise from a three-party situation (*OBG Ltd v. Allan* [2008] 1 AC 1. See also DUGDALE A. / JONES M. / SIMPSON. M., *Clerk and Lindsell on Torts* (19th ed., 2006) para 25-15; BURTON O., 'Two Tripartite Economic Torts', in: *Journal of Business Law* 2008, at 723, *i.e.* where a person who is not party to a

a case belonging to the first category. It would be *a fortiori* in the second category of cases since the court first seised, quite contrary to punishing the institution of the action by means of a costs order, decides to hear the action.

The pure economic loss will be more readily recoverable under legal systems which adopt the French tradition of a single compensation rule.[23] Article 1382 of the French Code Civil embraces all kinds of losses, stipulating that 'Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.'[24] Negligent conducts are subject to the same rule as intentional acts.[25] The Japanese tort law also belongs to the French tradition[26] and its Civil Code provides in Article 709 that anyone who intentionally or negligently violates other's rights or interests worthy of legal protection must compensate for the losses thereby caused. When the Japanese Supreme Court acknowledged that the institution of an action could constitute a tortious act if it was plainly unreasonable in the light of the purpose of the judicial system, it alluded to the case where the plaintiff was aware that the rights he asserted had no 'factual or legal foundation.' What the Court apparently had in mind was the case where the substantive claim lacked foundation. But the unrestricted language of Article 709 is open to embrace all types of conducts. Therefore, the institution of an action in breach of a choice-of-court agreement may be deemed to be a tortious act if it is found to be plainly unreasonable in the light of the purpose of the judicial system.

It should be noted that the tort claim is not founded upon the breach of a choice-of-court agreement *per se* but upon a broader context in which the action has been commenced. Though a breach of a choice-of-court agreement is a major element of that context, the test is whether the whole circumstances are such that the institution of the action is, under the Restatement, 'primarily for a purpose other than that of securing the proper adjudication of the claim' or, under the test of the Japanese Supreme Court, 'plainly unreasonable in the light of the purpose of the judicial system.' Since the procedural character of a choice-of-court agreement does not have a direct impact, the tort claim is more conducive to substantive characterisation than the contractual claim. It means that the court which would not allow a contractual claim to recover damages for breach of a choice-of-court

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contract has knowingly procured or induced a party to the contract to break it without reasonable justification or excuse.

[23] WAGNER G., 'Comparative Tort Law', in: REIMANN M. / ZIMMERMANN R. (eds.), *The Oxford Handbook of Comparative Law,* Oxford 2006, p. 1012 *et seq.,* at 1020 argues that the difference between English and Continental legal systems is more apparent than real but does not deny that a difference exists between English law and French law on the recoverability of pure economic loss.

[24] English translation available on *Légifrance* <http://www.legifrance.gouv.fr>.

[25] Article 1383 of the French Code Civil which provides, 'Everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence.' (English translation available on *Légifrance*).

[26] HIRAY Y., 'Japanese Tort Law in Comparative Perspective', in: *The Japanese Annual of International Law* 1990, p. 90 et seq., at 91.

agreement by treating it as a procedural matter may allow a tort claim, provided that the requirements in all other respects are fulfilled.

Some legal systems do not permit concurrent claims in contract and tort.[27] Under such systems, if a contractual claim is considered to be available to seek damages for breach of a choice-of-court agreement, a concurrent tort claim will not be allowed.[28]

C. Restitution

A restitutionary claim is not a claim seeking to recover damages but is a claim seeking to strip away gain. It is outside the scope of the present article if the expression 'damages for breach of a choice-of-court agreement' is strictly understood. However, it merits an examination since, by bringing an action in breach of a choice-of-court agreement, the plaintiff may obtain gain and the defendant may wish to deprive him of it.

In the first category of cases, since the court first seised refuses to hear the case, both parties may suffer losses in the form of costs but neither will obtain gain. No restitutionary claim will therefore be available.

In the second category of cases, since the court first seised decides to hear the case, the plaintiff obtains gain if the judgment is more favourable to him than that which would be rendered in the forum chosen by the choice-of-court agreement. Since the gain obtained by the plaintiff in this situation is also manifested as the loss incurred by the defendant, the defendant may make a claim in contract or tort to recover damages. However, as observed in Section II.B above, a tort claim may not be granted unless the wrong has been committed intentionally or negligently. As examined in Section II.A, a contractual claim, too, may be subject to a fault-based liability regime depending on the applicable legal system. Since fault will not be a prerequisite for a restitutionary claim, the absence of intention or negligence will not constitute an obstacle if the defendant frames the claim in restitution.

Even if a claim framed in contract or tort is considered to be available, a concurrent restitutionary claim should not be precluded[29] since the cause of action is different: a claim for damages, whether framed in contract or tort, is founded on the wrong causing losses whereas a restitutionary claim is founded on the wrong resulting in gain. That is not, however, the position accepted by all legal systems.

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[27] e.g. French law adopts the principle of *non-cumul des responsabilités contractuelle et délictuelle*: Cour de cassation, Ch Civ., 11 January 1922; cf. Japanese law allows concurrent claims: e.g. the judgment of the Grand Court of Judicature on 20 October 1917 (reported in 23 *Minroku* 1821).

[28] In the Spanish *Tribunal Supremo* case, when awarding damages, the court expressed preference for the contractual characterisation and did not comment on the possibility of non-contractual claims notwithstanding that the plaintiff relied also on a tort claim: ALVAREZ S. (note 8).

[29] This is the position widely accepted under Japanese law.

In English law, the availability of restitution for wrongs, as distinguished from restitution for subtractive enrichment, is severely restricted.[30] Thus, restitution for a tort is normally only granted for proprietary torts in which the title to, or possession of, the property of the injured party has been infringed. With respect to restitution for a breach of contract, the traditional view is that it does not succeed save in exceptional circumstances such as where the breach of contract also constitutes a proprietary wrong (whether breach of a restrictive covenant or a tort) or an equitable wrong (such as breach of confidence or breach of fiduciary duty).[31] The restriction was apparently somewhat relaxed by the House of Lords in *Attorney-General v. Blake*,[32] in which it was held that restitution of profits could be ordered for a breach of contract in an exceptional case where damages measured by a plaintiff's loss or specific relief were inadequate or unavailable, especially if the plaintiff had a legitimate interest in preventing the defendant's profit-making activity. In the absence of more specific guidance, it is not certain how that test would be applied to the case of a breach of a choice-of-court agreement even if we assume for the sake of argument that damages do not provide adequate relief. If, as it would seem, the circumstances must be something out of ordinary, a breach of a choice-of-court agreement would not normally so qualify.

In many civil law systems, both restitution for wrongs and restitution for subtractive enrichment will be covered by a broad rule allowing the claimant to deprive the defendant of gain obtained without legal basis.[33] Under Japanese law, for example, restitution is granted if the defendant has gained at the expense of the claimant in the circumstances where the gain has no legal basis.[34] If, by bringing an action in breach of a choice-of-court agreement, the plaintiff has obtained gain in the shape of a more favourable judgment than that which would be rendered in the forum chosen by the choice-of-court agreement, that gain may be deemed to have no 'legal basis,' depending on the interpretation of that expression under the applicable law.[35]

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[30] For a critique, see VISSER D., 'Unjustified Enrichment in Comparative Perspective', in: REIMANN M. / ZIMMERMANN R. (eds.), *The Oxford Handbook of Comparative Law,* Oxford 2006, p. 969 *et seq*., at 979.

[31] BURROWS A. (ed.), *English Private Law* (2nd ed. 2007) para. 18.236 (by BURROWS A.).

[32] [2001] 1 AC 268, 285.

[33] cf. In English law, the absence of legal basis is not enough but it is necessary to identify a specific 'unjust factor' such as mistake or duress. Although the influential late professor Birks advocated abandoning that approach in favour of the civil-law approach in his last monograph *Unjust Enrichment* (2nd edn, 2005), that view has not earned a wide support in England: See VISSER D. (note 30), at 997.

[34] Article 703 of the Civil Code (Japan).

[35] If such an interpretation is possible, it might be wondered whether restitutionary relief is available even in the absence of a choice-of-court agreement if a more favourable judgment has been obtained from a foreign court which would not have jurisdiction in the eyes of the court from which the relief is claimed. It might further be wondered whether restitutionary relief is also available if for whatever reason the foreign favourable judgment

It should be noted that the restitutionary claim is not founded upon the breach of a choice-of-court agreement *per se* but upon a broader context in which the breach has resulted in the plaintiff's gain. Since the procedural character of a choice-of-court agreement does not have a direct impact, the restitutionary claim is more conducive to substantive characterisation than the contractual claim. It means that the court which would not allow a contractual claim to recover damages for breach of a choice-of-court agreement by treating it as a procedural question may allow a restitutionary claim to strip away the plaintiff's gain, provided that the requirements in all other respects are fulfilled.

III. Governing Law

As examined in the preceding Section, where an action has been brought in breach of a choice-of-court agreement, the defendant may counter by making a claim in contract or tort to recover damages for the breach or by making a claim in restitution to strip away the plaintiff's gain resulting from the breach. The governing law of the claim on each legal basis will be examined in turn below. As explained in Section I above, the analysis in the present Section is based on the assumption that the court seised of the claim characterises it as substantive rather than procedural.

A. Contract

The choice-of-law rules of most countries will give effect to the parties' choice of law for their contract provided that it satisfies the prescribed conditions.[36]

If there is an express choice-of-law agreement specifically made for disputes arising from the breach of a choice-of-court agreement, effect will be given to it. Such an express choice-of-law agreement is not wholly inconceivable. Since some of the model clauses for a choice-of-court agreement have begun to suggest including an express provision on damages for its breach,[37] it is a short step to include an express choice-of-law agreement for the damages claim.

However, in the majority of cases, even the parties who are legally prudent to conclude a choice-of-court agreement do not take the trouble of negotiating a

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is not eligible for recognition in the forum in which the relief is sought. To avoid perpetuating cross-border litigation, each legal system will rein in the availability of restitutionary relief within the limit as it sees fit.

[36] Article 3 of the Rome I Regulation (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); Article 7 of the Act on the Application of Laws [*Hô no Tekiyô ni Kansuru Tsûsoku Hô*] (Japan, an English translation of the Act by ANDERSON, K. / OKUDA Y. is available in: this *Yearbook* 2006, pp. 427-441).

[37] As examined in Section XII of the previous article.

choice-of-law agreement to sort out disputes arising from a possible breach of their choice-of-court agreement. Then, a contractual damages claim for breach of a choice-of-court will be governed by the law which governs the agreement. As to what that law is, the positions under the choice-of-law rules of different countries will be different.[38] The likely options are the governing law of the substantive contract to which the choice-of-court agreement is attached,[39] the law of the forum chosen by the choice-of-court agreement,[40] and the law specified by the choice-of-law rules of the forum chosen by the choice-of-court agreement.

The last of those options has been adopted by Articles 5(1) and 6(a) of the 2005 Hague Convention on Choice of Court Agreements[41] read in conjunction with its explanatory report.[42] The position has been defended on the basis that it serves to avoid the undesirable result of parallel proceedings and the denial of justice which might arise if the court seised and court chosen apply different laws.[43] It is to be wondered whether the same objective could not be achieved equally well, with the added advantage of simplicity, by the second option, *i.e.* the law of the forum chosen by the choice-of-court agreement.

The first and second options tend to coincide with each other in practice. That is because where parties to a contract conclude a choice-of-court agreement, they often favour the application of the law of the chosen forum and conclude a choice-of-law agreement accordingly. Even in the absence of an express choice-of-law agreement, the choice-of-court agreement may serve as evidence of an implied choice in favour of the law of the chosen court.

Those two options did not coincide with each other in the U.S. case of *RGC International Investors v. Ari Network Services*.[44] In that case, a choice-of-court agreement granting exclusive jurisdiction to the District Court of Delaware was contained in a contract which expressly selected Wisconsin law to govern the 'rights and liabilities created thereunder.' An action was first brought in Wisconsin but the court had declined to hear it. The defendant to that action then brought a claim in Delaware for damages for breach of the choice-of-court agreement. The

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[38] There is no uniformity among the EU Member States since Article 1(2)(e) of the Rome II Regulation excludes a choice-of-court agreement from its scope of application.

[39] This is the option adopted by the English case law as observed by COLLINS L. *et al.* (eds.), *Dicey, Morris & Collins on the Conflict of Laws,* 14th ed., London 2006, para 12-090.

[40] 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) Ch 14, p. 403 et seq., at 404.

[41] Not in force at the time of writing (September 2009).

[42] HARTLEY T. / DOGAUCHI M., 'Explanatory Report on the 2005 Hague Choice of Court Agreements Convention' (2007) para 125.

[43] See e.g. SCHULZ A., 'The Hague Convention of 30 June 2005 on Choice of Court Agreements', in: *Journal of Private International Law* 2006, p. 243 *et seq*., at 256.

[44] 2004 WL 189784 (United States District Court, D. Delaware 2004) (Not reported in F.Supp.2d).

court dismissed the claim on the ground that no authority was cited for the proposition that such remedy was available under Wisconsin law. The court thus favoured the first option, *i.e.* the governing law of the substantive contract to which the choice-of-court agreement is attached. But this decision leaves room for another interpretation: the court may have construed the clause choosing Wisconsin law to govern the 'rights and liabilities created thereunder' as covering disputes arising from the breach of a choice-of-court agreement.

B. Tort

1. Classification

As observed in Section II.B above, a tort claim seeking damages for breach of a choice-of-court agreement is not founded solely upon the breach of a choice-of-court agreement. But it is undeniably closely connected with the agreement. Where a claim framed in tort has a close connection with a contractual relationship, it depends on the applicable set of choice-of-law rules whether it is classified as tort or as contract.

If it is classified as contract, the rest of the choice-of-law analysis will be as set out in Section III.A above.

It is classified as tort under, for example, the Rome II Regulation[45] since it contemplates in Article 4(3) the possibility of such a claim falling within the choice-of-law rules for tort.[46] The position is the same under the Japanese choice-of-law rules since a tort claim having a close connection with a contractual relationship is expressly treated under a choice-of-law rule for tort.[47] Under such rules, a tort claim seeking damages for breach of a choice-of-court agreement will be subject to the choice-of-law rules for tort. Then, the next step is to examine the connecting factors.

2. Connecting Factors

The connecting factors depend on the precise formulation of the applicable choice-of-law rules. However, the following broad observation may be possible.

Under the choice-of-law rules of many countries, the governing law of a tort claim will be the law of the place of tort or, more precisely, either the law of the place in which the tortious act has occurred or the law of the place in which the

[45] Regulation (EC) No 864/2007 of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations [2007] O.J. L199/40.

[46] Recital 11 of the Regulation makes it clear that the concepts covered by the Regulation are subject to European autonomous meanings.

[47] Article 20 of the Act on the Application of Laws [*Hô no Tekiyô ni Kansuru Tsûsoku Hô*] (Japan).

ensuing loss has occurred.[48] Which places would such rules point to if they are applied to the cases where a tort claim is made to recover damages for breach of a choice-of-court agreement? It is easy to imagine that the place of tortious act will be localised in the forum first seised. The place of ensuing loss, too, will be localised in the same forum since what the claim seeks to recover in the first category of cases are principally the costs incurred and left unrecovered in that forum. Also in the second category of cases, what the claim seeks to recover are principally the costs incurred and left unrecovered in the forum first seised as well as the expenses which may have been incurred to comply with the costs order and the judgment on the merits rendered in that forum. Although the actual financial pain may be felt in the country where the account is maintained, that place will be irrelevant since the loss would have to be the direct result of the tortious act[49] or the place of the ensuing loss would have to be foreseeable.[50]

The choice-of-law rules of some countries may contain a rule of displacement[51] under which the otherwise applicable law is displaced by the law of the place with which the tort is manifestly more closely connected in the light of all the circumstances of the case. Under such rules, a tort claim seeking damages for breach of a choice-of-court agreement will in the final analysis be governed by the law which governs the agreement since the claim is undeniably closely connected with the agreement. As to what law governs a choice-of-court agreement, reference should be made to the discussion in Section III.A above.

The choice-of-law rules of some countries may allow the parties to choose the governing law before a tortious act takes place and may give the party autonomy precedence over the objective connecting factors.[52] Under such rules, effect will be given to an express choice-of-law agreement specifically made for disputes arising from the breach of a choice-of-court agreement, if it is couched in terms wide enough to cover a claim in tort. As noted in Section III.A above, such an express choice-of-law agreement is, albeit not wholly inconceivable, unlikely to be concluded in practice.

One caveat is in order. The choice-of-law rules for tort of some countries may retain what is known as the double-actionability rule,[53] under which the

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[48] e.g. Article 4(1) of the Rome II Regulation; Article 17 of the Act on the Application of Laws [*Hô no Tekiyô ni Kansuru Tsûsoku Hô*] (Japan).

[49] e.g. Article 4(1) of the Rome II Regulation.

[50] e.g. Article 17 of the Act on the Application of Laws [*Hô no Tekiyô ni Kansuru Tsûsoku Hô*] (Japan).

[51] e.g. Article 4(3) of the Rome II Regulation; Article 20 of the Act on the Application of Laws [*Hô no Tekiyô ni Kansuru Tsûsoku Hô*] (Japan).

[52] e.g. Article 14(1)(b) of the Rome II Regulation but only if the choice is made by an agreement freely negotiated between parties pursuing a commercial activity. cf. Article 21 of the Act on the Application of Laws [*Hô no Tekiyô ni Kansuru Tsûsoku Hô*] (Japan) only allows the parties to change the governing law after a tort has taken place.

[53] e.g. Article 22 of the Act on the Application of Laws [*Hô no Tekiyô ni Kansuru Tsûsoku Hô*] (Japan). The rule is based on dubious policy-oriented grounds and is seen by many theorists as an anomaly. For details, see TAKAHASHI K., 'A Major Reform of Japanese

cumulative application of the law of the forum is reserved. If the claim is brought in the forum adopting such a rule, the hurdle that it must overcome is so much the higher since it has to meet also the requirements of the law of the forum.

C. Restitution

As observed in Section II.C above, restitution will not be available in the first category of cases, since no gain accrues to either party. The following analysis will therefore focus on the second category of cases.

1. Classification

As observed in Section II.C above, a restitutionary claim seeking to strip away the gain which has resulted from a breach of a choice-of-court agreement is not founded solely upon the breach of a choice-of-court agreement. But it is undeniably closely connected with the agreement. Where a claim framed in restitution has a close connection with a contractual relationship, it depends on the applicable set of choice-of-law rules whether it is classified as restitution or as contract.

If it is classified as contract, the rest of the choice-of-law analysis will be as set out in Section III.A above.

It is classified as restitution under, for example, the Rome II Regulation since it contemplates in Article 10(1) the possibility of such a claim falling within the choice-of-law rules for restitution.[54] The position is the same under the Japanese choice-of-law rules since the rules for restitution contain a reference to a claim having a close connection with a contractual relationship.[55] Under such rules, a restitutionary claim seeking to strip away the gain which has resulted from a breach of a choice-of-court agreement will be subject to the choice-of-law rules for restitution. Then, the next step is to examine the connecting factors.

Private International Law', in: *Journal of Private International Law* 2006, p. 333-334. Among the common law countries which had been influenced by the English line of cases originating from *Phillips v Eyre* (1870) LR 6 QB 1, some have since rejected the double-actionability rule (e.g. the Supreme Court of Canada in *Jensen v Tolofson* [1994] 3 SCR 1022; the Australian High Court in *Régie Nationale des Usines Renault SA v Zhang* (2002) 187 ALR 1) but there are presumably others which still retain it.

[54] cf. CHONG A., 'Choice of Law for Unjust Enrichment/Restitution and the Rome II Regulation', in: *ICLQ* 2008, p. 863, at 872, takes the view that the classification of a restitutionary claim for wrong under the Regulation is not unequivocal, pointing out the danger that the English courts might classify it as wrong and falling outside the scope of Article 10 whereas the German courts would be likely to classify it as falling within Article 10.

[55] Article 15 of the Act on the Application of Laws [*Hô no Tekiyô ni Kansuru Tsûsoku Hô*] (Japan).

2. Connecting Factors

The connecting factors depend on the precise formulation of the applicable choice-of-law rules. However, the following broad observation may be possible.

Under the choice-of-law rules of some countries, the governing law of a restitutionary claim will be the law of the country where the causal facts have taken place[56] or, more precisely, the law of the place where the gain has accrued.[57] If such rules are applied to the cases where a restitutionary claim is made to strip away the gain which has resulted from a breach of a choice-of-court agreement, which places would they point to? It is easy to imagine that the place of causal facts will be localised in the forum first seised since, in the second category of cases, the institution of the action in breach of a choice-of-court agreement can be deemed to be the fact causing the gain. It is equally likely that the place of gain will also be localised in the forum first seised since, in the second category of cases, the gain can be deemed to have accrued in that forum through the costs order and the judgment on the merit.

Where restitution concerns a relationship arising out of a contract, the choice-of-law rules of some countries may give priority to the law that governs that relationship.[58] Under such choice-of-law rules, a restitutionary claim seeking to strip away the gain which has resulted from a breach of a choice-of-court agreement will be governed by the law that governs the choice-of-court agreement. As to what law governs a choice-of-court agreement, reference should be made to the discussion in Section III.A above.

The choice-of-law rules of some countries may contain a rule of displacement[59] under which the otherwise applicable law is displaced by the law of the place with which the restitution is manifestly more closely connected in the light of all the circumstances of the case. Under such rules, a restitutionary claim seeking to strip away the gain which has resulted from a breach of a choice-of-court agreement will in the final analysis be governed by the law which governs the agreement since the claim is undeniably closely connected with the agreement.

The choice-of-law rules of some countries[60] may allow the parties to choose the governing law before the event causing unjust enrichment takes place and may give the party autonomy precedence over the objective connecting factors. Under

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[56] e.g. Article 14 of the Act on the Application of Laws [*Hô no Tekiyô ni Kansuru Tsûsoku Hô*] (Japan).

[57] e.g. Article 10(3) of the Rome II Regulation.

[58] e.g. Article 10(1) of the Rome II Regulation.

[59] e.g. Article 10(4) of the Rome II Regulation; Article 15 of the Act on the Application of Laws [*Hô no Tekiyô ni Kansuru Tsûsoku Hô*] (Japan).

[60] e.g. Article 14(1)(b) of the Rome II Regulation but only if the choice is made by an agreement freely negotiated between parties pursuing a commercial activity. cf. Article 16 of the Act on the Application of Laws [*Hô no Tekiyô ni Kansuru Tsûsoku Hô*] (Japan) only allows the parties to change the governing law after the event causing unjust enrichment has taken place.

such rules, effect will be given to an express choice-of-law agreement specifically made for disputes arising from the breach of a choice-of-court agreement, if it is couched in terms wide enough to cover a claim in restitution. As noted in Section III.A above, such an express choice-of-law agreement is, albeit not wholly inconceivable, unlikely to be concluded in practice.

IV. Jurisdiction

As examined in Section II above, where an action has been brought in breach of a choice-of-court agreement, the defendant may counter by making a claim in contract or tort to recover damages for the breach or by making a claim in restitution to strip away the plaintiff's gain resulting from the breach. Jurisdiction to entertain such claims will be examined below. As explained in Section I above, the analysis in the present Section is based on the assumption that the court seised of the claim characterises it as substantive rather than procedural.

The jurisdictional bases depend on the precise formulation of the jurisdictional rules of the forum in which the claim is brought. Instead of seeking to arrive at a definitive conclusion under any particular jurisdictional rules, the following analysis will explore the issues which will be pertinent to many of them, drawing materials from various sources.[61]

The jurisdictional rules of many countries provide for what may be called 'consent jurisdiction,' 'home-court jurisdiction,' 'submission jurisdiction,' 'derived jurisdiction' (*compétence dérivée*) and 'claim-based jurisdiction.' In considering jurisdiction over a claim seeking relief against a breach of a choice-of-court agreement, the central issue is the availability of the consent jurisdiction since if it confers exclusive jurisdiction on the court chosen by the agreement, all the rest of the jurisdictional bases, except 'submission jurisdiction,' become irrelevant.

It must be noted that even if the court seised of the claim has jurisdiction under the bases examined below, it may decline to exercise it if it has discretion to do so and takes the view that hearing a claim for damages for breach of a choice-of-court agreement would infringe comity towards the court first seised. Such a view is more likely to be taken in the second category of cases than the first category since, as noted in Section VIII.B.2 of the previous article, the negative implication for comity is greater in the second category.

[61] In the following discussions, some provisions of the Code of Civil Procedure (Japan) will be cited. The Code contains provisions for determining the *internal* jurisdiction. Under the case law, international jurisdiction has been determined by the *mutatis mutandis* applications of those provisions. The references in the following discussion to the provisions of the Code of Civil Procedure should be understood in that sense. The Japanese Ministry of Justice is currently preparing legislation for international jurisdiction.

A. Consent Jurisdiction

Under the jurisdictional rules of many countries, a choice-of-court agreement will be given effect if it satisfies the conditions prescribed by the rules.[62]

If there is an express choice-of-court agreement specifically made for disputes arising from the breach of another choice-of-court agreement, the effect will be given to it. Such an express choice-of-court agreement is not wholly inconceivable. Since some of the model clauses for a choice-of-court agreement have begun to suggest including an express provision on damages for its breach,[63] it is a short step to include an express choice-of-court agreement for the damages claim.

However, in the majority of cases, even the parties who are legally prudent to conclude a choice-of-court agreement do not take the trouble of negotiating another choice-of-court agreement to sort out disputes arising from a possible breach of the choice-of-court agreement which they have concluded. Should the latter agreement then be interpreted as covering such disputes within its scope of application?

There is an English case in which an arbitration agreement was interpreted as covering a damages claim for its breach.[64] When the English court took jurisdiction to hear a damages claim for breach of an English choice-of-court agreement in *Union Discount v. Zoller*,[65] it may have interpreted the agreement as covering the claim, although it did not consciously discussed the question.[66] Similarly, when the Spanish *Tribunal Supremo* took jurisdiction to hear a damages claim for breach of a Spanish choice-of-court agreement, it may have interpreted the agreement as covering the claim, although it did not consciously discussed the question, either.[67]

It should be noted that if a choice-of-court agreement is interpreted as covering disputes arising from its breach, it means that the court chosen by the agreement has exclusive jurisdiction since a breach of a choice-of-court agreement is logically only conceivable where the agreement is exclusive.[68] If, on the other hand, a choice-of-court agreement is not interpreted as covering disputes arising from its breach, a number of courts may have jurisdiction. As will be examined below, those may include the court first seised, the defendant's home court, the court to the jurisdiction of which the defendant has submitted, and the court chosen by the choice-of-court agreement as the court for the place of performance of the contractual obligation or as the court for the place where the loss caused by a tort

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[62] Article 23 of the Brussels I Regulation; Article 11 of the Code of Civil Procedure (Japan).

[63] As examined in Section XII of the previous article.

[64] *Mantovani v. Carapelli* [1978] 2 Lloyd's Rep. 63, 73 (per Donaldson J), affirmed by the Court of Appeal in *Mantovani v. Caparelli* [1980] 1 Lloyd's Rep 375, 382.

[65] [2002] 1 W.L.R. 1517(CA). For the facts, see Section IV of the previous article.

[66] Another, albeit not likely, possibility is that the court relied on the claim-based jurisdiction for contract (See Section IV.E.1 below).

[67] ALVAREZ S. (note 7).

[68] See Section II of the previous article.

has occurred. The inquiry must, therefore, be directed to ascertain whether reasonable persons in the parties' position would have intended to agree that disputes arising from the breach of the choice-of-court agreement *must*, rather than *may*, be brought in the chosen court.

Some policy considerations militate in favour of the interpretation that a choice-of-court agreement covers disputes arising from its breach. Firstly, if the court chosen by a choice-of-court agreement does not have exclusive jurisdiction, the risk of parallel proceedings (*lis alibi pendens*) or concurrent related proceedings may arise. Parallel proceedings may arise, for example, if a damages claim for breach of a choice-of-court agreement is brought in the defendant's home court as well as in the court chosen by the agreement. Concurrent related proceedings may arise if, for example, a damages claim in contract is brought in the court first seised and a damages claim in tort is brought in the court chosen by the agreement. It is true that the risk of parallel or concurrent related proceedings exists with respect to any disputes. But what the present analysis is concerned with is a dispute about where the dispute on the substance should have been heard: the situation is already complicated with a single set of proceedings. That complication would be exacerbated if parallel or concurrent related proceedings are permitted to arise.

Secondly, if jurisdiction is to be concentrated in one forum, the court chosen by the choice-of-court agreement would be best placed to hear the dispute. Otherwise, an anomalous situation may arise in which another court awards damages for breach of a choice-of-court agreement finding the agreement to be valid and exclusive when the court chosen by the agreement would find the same agreement to be invalid or non-exclusive.

Thirdly, the chosen court is best placed to hear the claim particularly in the second category of cases since the quantification of damages involves speculation on what costs order and judgment on the merits the chosen court would render,[69] a task difficult to undertake for other courts.

Each of those policy arguments may be rebutted or neutralised. To begin with the last, the difficulty of quantification can be, and will normally be, resolved through the operation of the rules concerning the burden of proof. If the defendant to the damages claim fails to make out to the satisfaction of the court what costs order and judgment on the merits the chosen court would render, the court hearing the damages claim may legitimately disregard that factor in quantifying the damages.

As regards the second policy argument, anomalous though the situation may look, it is not entirely indefensible. The whole idea of awarding damages for breach of a choice-of-court agreement is founded on the notion that if a party is aggrieved by his opponent's unscrupulous litigational behaviour, the courts should not shrink from offering the remedy provided that the nexus with the case is sufficiently strong.[70] If this basic policy stance is accepted, it is arguable that the courts

[69] See Section X of the previous article.

[70] See the conclusion in Section XIV of the previous article, as reproduced in part in Section I of the present article.

with such a close nexus with the case as to have jurisdiction on one of the bases examined below should be allowed to offer the remedy even if the possibility exists that the court chosen by the choice-of-court agreement may find the agreement invalid or non-exclusive.

The first policy argument may be neutralised by a different policy argument in favour of having multiple forums available. Thus, from the viewpoint of the party aggrieved by the breach of a choice-of-court agreement, if a number of courts have jurisdiction, it would be easier to bring a claim in the country where the opposite party has assets. That consideration may be important because, as will be examined in Section V below, a judgment granting relief for breach of a choice-of-court agreement may not, depending on the factual circumstances, be enforced in many countries.

If it is accepted from the foregoing analysis that the policy considerations are not conclusive on either side, the interpretation will depend on the factual circumstances of the case. The remainder of this Section will proceed on the premise that the choice-of-court agreement in the given case does not, upon its proper interpretation, cover disputes arising from its breach.

B. Home-court Jurisdiction

Under the jurisdictional rules of many countries, defendant's home court has jurisdiction. Whether the 'home' means domicile, residence, habitual residence, or other similar concepts depends on the precise formulation of each such rule.[71] The home-court jurisdiction, unlike the claim-based jurisdiction, is generally available irrespective of the legal basis of the claim. It should, therefore, be available also where a claim is brought seeking relief against a breach of a choice-of-court agreement, whether it is framed in contract, tort, or restitution.

C. Submission Jurisdiction

Under the jurisdictional rules of many countries, jurisdiction will be vested in the court to which the defendant has submitted by taking the prescribed procedural steps.[72] The submission jurisdiction, like the home-court jurisdiction, will be generally available irrespective of the legal basis of the claim. It should, therefore, be available also where a claim is brought seeking relief against a breach of a choice-

[71] e.g. 'domicile' under Article 2 of the Brussels I Regulation (domicile); 'domicile' and 'presence' under Article 4(2) of the Code of Civil Procedure (Japan); 'presence' in the common law: see e.g. *Colt Industries Inc v. Sarlie* [1966] 1 WLR 440, *Burnham v. Superior Court of California* 109 L Ed 2d (1990).

[72] e.g. under Article 24 of the Brussels I Regulation, it is an entering of appearance without contesting jurisdiction; under Article 12 of the Code of Civil Procedure (Japan), it is making an argument on the merits or making a statement in the preparatory proceeding without contesting jurisdiction.

of-court agreement, whether it is framed in contract, tort, or restitution. Unlike the home-court jurisdiction, the submission jurisdiction should be available even if the choice-of-court agreement is interpreted as covering the damages claim since it implies that the parties have made a fresh agreement on the choice of court. But the practical utility of this jurisdictional basis for bringing such a claim will be limited. The reason is firstly that if the claim is brought in a forum other than the forum first seised, the defendant is not likely to submit to the court because his favourite forum is likely to be the forum first seised as manifested by the fact that he has earlier brought proceedings there notwithstanding that he may possibly be accused of breaching the choice-of-court agreement. Another reason is that even though the defendant may be more willing to submit to the court first seised, the claimant is not very likely to bring the claim there since, as examined in Section VI of the previous article, the chances of the claim being granted by that court are not high.

D. Derived Jurisdiction

Under the jurisdictional rules of many countries, the court which has jurisdiction over a claim on some basis may have what may be termed 'derived jurisdiction' over another closely connected claim.[73] A counter claim, for example, may be subject to derived jurisdiction if it is closely connected with the main claim over which the court has jurisdiction on some basis.

In the second category of cases, since the court first seised decides to hear the case notwithstanding the defendant's allegation that the action has been brought in breach of a choice-of-court agreement, the defendant may bring a counter claim seeking relief for the breach.[74] The court may, however, hold that it is not competent either jurisdictionally or procedurally to hear the claim, if it finds that the connection between the counter claim and the main claim is not sufficiently close. Such a finding is possible since the main claim is a substantive claim whereas the counter claim is founded on the choice-of-court agreement. If the court uses a more lenient test to gauge the connection, it may find itself to be jurisdictionally and procedurally competent to hear the claim brought as a counter claim.

E. Claim-based Jurisdiction

1. Contract

Under the jurisdictional rules of many countries, jurisdiction over a contractual claim will be vested in the courts for the place where the obligation is to be

[73] e.g. Article 6 of the Brussels I Regulation.

[74] As discussed in Section VII.B of the previous article, even in the second category of cases, there are circumstances in which the court first seised may grant relief against the alleged breach of the choice-of-court agreement.

performed.[75] Where a contractual claim is made to recover damages for breach of a choice-of-court agreement, (1) with respect to which obligation will the place of performance be determined and (2) which place will be pointed to as the place of performance?

As regards the first question, where damages are claimed for breach of a contract generally, two interpretations are possible. The first is to determine the place of performance with respect to the obligation to pay damages. The second interpretation is to do the same with respect to the obligation the breach of which has given rise to the damages claim. The latter interpretation was adopted by the European Court of Justice[76] when it interpreted the words 'the obligation in question' in Article 5(1) of Brussels Convention.[77] It is submitted that the same interpretation should be adopted for similar jurisdictional rules of other countries if the point is not settled,[78] since it is defensible in principle. The main rationale for conferring jurisdiction on the courts for the place of performance of a contractual obligation is twofold. Firstly, it is usually not contrary to the parties' wishes to have their contractual dispute resolved in the place of performance.[79] Secondly, the relevant evidence is often located in the place of performance. As regards the first rationale, when parties entered into a contract, the place of payment of damages was unlikely to be in their contemplation whereas they were usually aware of the place of performance of the obligation the breach of which has given rise to the damages claim. As to the second rationale, the relevant evidence is not necessarily located in the place of payment of damages but is often found in the place of performance of the obligation the breach of which has given rise to the damages claim. Under the preferred interpretation, where a contractual claim is made to recover damages for breach of a choice-of-court agreement, the place of performance would be determined not with respect to the obligation to pay damages but with respect to the obligation under the choice-of-court agreement.

Turning to the second question, the determination of the place of performance of the obligation under a choice-of-court agreement encounters a difficulty since the agreement does not impose an obligation to sue on the parties unwilling to sue but creates an obligation not to sue elsewhere than the chosen forum. On the basis that it imposes an obligation to sue in the chosen forum if the party decides to

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[75] e.g. Article 5(1) of the Brussels I Regulation; Article 5(1) of the Code of Civil Procedure (Japan).

[76] Case 14/76, *de Bloos v. Bouyer* [1976] E.C.R. 1497.

[77] Article 5(1)(a) of the Brussels I Regulation uses the same wording. Since a choice-of-court agreement is neither a contract for sale nor a contract for the provision of services (see subparagraph (b)), it will come under subparagraph (c) which refers back to the general rule contained in subparagraph (a).

[78] e.g. in Japan, the judgment of the Tokyo District Court on 23 April 1993 (840 *Hanrei Times* 197) took the former interpretation while the judgment of the Tokyo District Court on 14 January 1994 (861 *Hanrei Times* 267) adopts the latter interpretation.

[79] It should be noted that there is a subtle difference from the rationale for the consent jurisdiction. The latter is based on the parties' positive expectation to have their dispute resolved in the chosen forum.

sue at all, the chosen forum may be regarded as the place of performance. Such an interpretation is not entirely satisfactory since the relevant evidence is not particularly likely to be situated in the chosen forum. But it may be supported since having a dispute concerning a choice-of-court agreement resolved in the forum chosen by the agreement would usually not be contrary to the parties' wishes.

If the interpretations suggested above are accepted, the court chosen by a choice-of-court agreement will have jurisdiction to hear a contractual claim for damages for breach of the agreement.

2. Tort

Under the jurisdictional rules of many countries, jurisdiction over a claim in tort will be vested in the courts for the place where the tort has occurred,[80] or more precisely, the courts for the place where the tortious act has occurred and/or the place where the ensuing damage has occurred.[81] While choice-of-law rules would have to choose between those places, jurisdictional rules may specify the courts of either or both of those places. If such jurisdictional rules are applied to the cases where a tort claim is made to recover damages for breach of a choice-of-court agreement, which places will they point to? The analysis is essentially the same as that undertaken earlier in Section III.B.2 for the choice-of-law rules for tort. Thus, it can hardly be doubted that the place of tortious act will be localised in the forum first seised. The place of ensuing loss, too, will be localised in the same forum since what the claim seeks to recover in the first category of cases are principally the costs incurred and left unrecovered in that forum. Also in the second category of cases, what the claim seeks to recover are principally the costs incurred and left unrecovered in the forum first seised as well as the expenses which may have been incurred to comply with the costs order and the judgment on the merits rendered in that forum. Although the actual financial pain may be felt in the country where the account is maintained, that place will be irrelevant since such an indirect financial loss will not be enough to found tort jurisdiction.[82]

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[80] e.g. Article 5(3) of the Brussels I Regulation; Article 5(9) of the Japanese Code of Civil Procedure as applied by way of analogy to determine the international jurisdiction of the Japanese courts.

[81] Jurisdiction is conferred on the courts of both places under Article 5(3) of the Brussels I Regulation: Bier v. Mines de Potasse (Case 21/76) [1976] ECR 1735, a decision under the Brussels Convention then in force. The Japanese courts, too, have held that they had jurisdiction if either the tortious act or the ensuing damages took place in Japan: e.g. the judgment of the Tokyo District Court on 27 May 1965 (16-5 *Kaminshu* 923).

[82] Under the Brussels I Regulation / Convention, see Antonio Marinari v. Lloyds Bank plc and Zubaidi Trading Company C-364/93 [1995] ECR I-02719; under Japanese law, see e.g. the judgment of the Tokyo District Court on 15 February 1984 (35-1~4 *Kaminshu* 69).

3. Restitution

The jurisdictional rules of many countries provide for no jurisdictional bases specifically designed for a restitutionary claim.[83] The jurisdictional bases available irrespective of the legal basis of the claim, such as the home-court jurisdiction and the submission jurisdiction, will be available. Furthermore, restitution for wrongs[84] may be classified as the wrong to which it relates, with the result that jurisdictional basis for contract or tort may also be available. Thus, under the Brussels I Regulation / Convention, there is a suggestion[85] that Article 5(1) for matters 'relating to a contract' is applicable where the wrong constitutes a breach of a consensual relationship,[86] while Article 5(3) for 'matters relating to tort' is applicable where the wrong constitutes a tort.[87] Such a suggestion should be supported as it has the merit of allowing the consolidation of claims. It has been argued in Section II.C above that a restitutionary claim for wrongs does not share the same cause of action as a claim in tort or contract. But that should not prevent the consolidation of claims on the jurisdictional sphere for the sake of procedural convenience. If such a suggestion is accepted, a restitutionary claim arising out of a breach of a choice-of-court agreement may be brought in the courts which have jurisdiction over a claim seeking damages for the breach either in contract or tort.

V. Enforceability of the Judgment in Other Countries

Where a judgment has been rendered awarding damages for breach of a choice-of-court agreement or ordering restitution of the gain which had resulted from the breach, if the judgment debtor does not have sufficient assets in the country of the rendering court, the judgment creditor may wish to seek enforcement in other countries. How likely will such a judgment be enforced?[88] The precise require-

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[83] e.g. The Brussels I Regulation contains no jurisdictional basis specifically intended for a restitutionary claim.

[84] Other types of restitution will be treated differently. See e.g. TAKAHASHI K. 'Jurisdiction over a Claim for Restitution of Benefits Conferred under a Void Contract: under the Brussels Convention' in: SCHRAGTE E.J.H. (ed.) *Unjust Enrichment and the Law of Contract*, The Hague 2001, p. 397-404.

[85] PANAGOPOULOS G., *Restitution in Private International Law*, Oxford 2000, p. 228 (a suggestion under the Brussels Convention).

[86] The same interpretation would be possible under Article 5(1) of the Code of Civil Procedure (Japan), referred to in Section IV.E.1 above.

[87] MAGNUS U. / MANKOWSKI P., (eds), *Brussels I Regulation*, Munich 2007, Art. 5, note 197 (by MANKOWSKI P.) suggests that restitution for wrongs is covered by Article 5(3) arguing that the latter is not restricted to claims for damages.

[88] BRIGGS A., *The Agreements of Jurisdiction and Choice of Law,* Oxford 2008, para 8.43 says that an English judgment awarding damages for breach of a choice-of-court

ments for enforcement depend on the law ('enforcement rules') of the country where enforcement is sought.[89] However, the following broad observation may be possible.

The enforcement rules of many countries prohibit the court ('enforcing court') from engaging in the review of the substance of the foreign judgment (*révision au fond*)[90] unless the judgment is so offensive that its enforcement would be tantamount to infringing the international public policy (*ordre public)* of the enforcing country.[91] It follows that in the case where the enforcement of a foreign judgment granting relief for breach of a choice-of-court agreement is sought, it is not relevant if the enforcing court would not grant the same remedy on the facts of the case. Nor is it relevant if the enforcing court finds the choice-of-court agreement in question invalid or non-exclusive. It is submitted that it is also immaterial if the enforcing court would not grant remedies for breach of a choice-of-court agreement for the reason that it would regard the question as procedural. However, if the enforcing court finds that the enforcement would be contrary to international comity towards the court first seised,[92] that reason may be sufficient to justify invoking the *ordre public* to deny enforcement, though this proposition, too, may be doubted as it might be thought that international comity should have no bearing on the *ordre public,* the latter being constituted by the fundamental principles of the domestic legal system.

Under the enforcement rules of many countries, a foreign judgment will not be enforced if it is incompatible with any domestic judgment.[93] In the second category of cases, the judgment granting relief for breach of a choice-of-court agreement may not be enforced in the forum first seised since it may be deemed

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agreement is 'in reality unlikely to have international legs' while 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, Ch 14, p. 403 *et seq.*, at 416 suggests that a judgment awarding damages would, unlike an antisuit injunction, be enforceable under the Brussels I Regulation.

[89] e.g. Article 45 of the Brussels I Regulation incorporating by reference the requirements for the recognition of foreign judgments as laid down in Article 34; Article 24 of the Civil Execution Act (Japan) incorporating by reference the requirements for the recognition of foreign judgments as laid down in Article 118 of the Code of Civil Procedure (Japan).

[90] e.g. Article 45(2) of the Brussels I Regulation; Article 24(2) of the Civil Execution Act (Japan).

[91] e.g. Articles 34(1) and 45 of the Brussels I Regulation; Article 118(3) of the Code of Civil Procedure (Japan).

[92] As seen in Section VIII.B of the previous article, the negative implication for comity is greater in the second category of cases than in the first category.

[93] e.g. Articles 34(3) and 45 of the Brussels I Regulation; Article 118(3) of the Code of Civil Procedure (Japan) requires compatibility with the *ordre public* of Japan, which has been interpreted by the case law (e.g. the judgement of the Osaka District Court on 22 December 1977, 361 *Hanrei Times* 127) as requiring also compatibility with domestic judgments.

inconsistent with the judgment of the court first seised in the sense that it implies denial of the jurisdiction of that court.[94]

The enforcement rules of many countries will require the enforcing court to verify according to its own jurisdictional rules that the rendering court had jurisdiction to hear the case.[95] In the second category of cases, it may happen that the enforcing court considers that the court granting relief for breach of a choice-of-court agreement had jurisdiction on such basis as examined in Section IV above and also considers that the court first seised had jurisdiction to hear the merits. Then, the enforcing court may face two foreign judgments which may be seen as inconsistent with each other. Where there are inconsistent foreign judgments each of which would otherwise be eligible for recognition, the enforcement rules of some countries give priority to the judgement delivered earlier in time.[96] Under such rules, the judgment granting relief for breach of a choice-of-court agreement may not be enforced since it is normally[97] rendered after the judgment of the court first seised has been delivered.[98]

VI. Damages for Breach of a Choice-of-*Law* Agreement?

There is a view which says that damages should be awarded for breach of a choice-of-*law* agreement where a party to the agreement undermines it by bringing an

[94] It is unclear whether this will be the outcome under Article 34(3) of the Brussels I Regulation since the cause of action may have to be the same for two judgments to be regarded as irreconcilable within the meaning of that provision (cf. Article 34(4) which expressly makes this point clear). COLLINS L. *et al.* (eds.), *Dicey, Morris & Collins on the Conflict of Laws,* 14th ed.. London 2006, para 14-219 suggests that an English judgment issuing an antisuit injunction and a foreign judgment obtained in defiance of the injunction are not irreconcilable within the meaning of Article 34(3). If this view is correct, a judgment granting relief for breach of a choice-of-court agreement would not be irreconcilable with the judgment rendered by the court first seised.

[95] e.g. Article 118(1) of the Code of Civil Procedure (Japan). cf. Article 35(3) of the Brussels I Regulation prohibits the review of jurisdiction, except the bases which are enumerated in subparagraph (1) but do not include the consent jurisdiction.

[96] e.g. see Article 45 referring to Article 34(4) of the Brussels I Regulation.

[97] For a more detail discussion on the timing of granting the relief, see the discussion in Section X of the previous article on the identification of the precise timing at which the loss is deemed to have materialised.

[98] This will not be the outcome under Article 34(4) of the Brussels I Regulation. That provision expressly requires the cause of action (in the French text, 'objet' and 'cause') to be the same for two judgments to be deemed irreconcilable. Therefore, a judgment granting relief for breach of a choice-of-court agreement will not be seen as irreconcilable with the judgment rendered by the court first seised.

action in a forum which would not respect the choice. Professor Briggs is the major proponent.[99] He illustrates the point as follows:[100]

> When in the last decade the Russian economy went into collapse, many Russian banks which had engaged in speculative financial transactions suddenly found that they were unable to meet their obligations. Though the obligations created by these complicated financial transactions were expressed to be governed by English law, some banks brought proceedings before the Russian courts to seek the annulment of the contracts on the ground that the contracts were, as they alleged, governed by Russian law, or that the contracts, even if governed by English law, were liable to be annulled by a Russian court. When they did that, did the Russian banks breach their original promises? It seems to me that they did. Did their doing so amount to a breach of contract? It seems to me that it did. Did the Russian court do anything wrong when it annulled the contracts? No, for a Russian court is obliged to apply Russian law. But the allegation of breach is not made against the Russian court, but against the Russian bank: did the Russian bank act inconsistently with the legal obligations created in the contract when it sought to have its performance obligations altered by decree of a Russian court which was asked to apply Russian law? It seems to me that it did; and in this it is to be seen as having breached its contract. In short it did not do what it had promised to do, which was to assume and perform the obligations of an agreement which was to be governed by English law. … It is, to my mind, open to an English court to conclude that a choice of law provision in a contract can be broken by taking proceedings in a court which will not give it conclusive effect, or even by advancing a case which is inconsistent with it. …

This proposition will provoke many questions. The following two seem most important. Firstly, it may be asked who is to decide whether a particular choice-of-law agreement is valid and should be given effect. A choice-of-law agreement may be seen as valid in one forum but may be not in another since the existence and validity of the parties' consent as to the choice of the law may be determined by different legal systems in different forums.[101] Furthermore, whether and to what

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[99] See 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 vol. 308 p. 21 (available at <http://elib.doshisha.ac.jp/cgi-bin/retrieve/sr_bookview.cgi/U_CHARSET.utf-8/BD00005456/Body/028003080009.pdf>) paras. 32-34; BRIGGS A., 'The Further Consequences of a Choice of Law', in: *Law Quarterly Review* 2007, p. 18 *et seq.,* at 21; BRIGGS A., *The Agreements of Jurisdiction and Choice of Law,* Oxford 2008, paras 11.45 *et seq*.

[100] BRIGGS A., 'Distinctive aspects' (note 97), para. 34.

[101] In some forums, it may be determined by the law of the forum (*lex fori*). In other forums, it may be determined by the law which would govern the agreement if it were valid.

extent party autonomy is given effect depend on the choice-of-law rules of the forum. In some forums, party autonomy will be confined to contractual obligations, whereas in others it may be permitted also for some non-contractual obligations. While autonomy will be respected for contractual obligations in most forums, exceptions will be allowed to varying degrees. In dealing with the breach of a choice-of-court agreement throughout the present and previous articles, the analysis has proceeded on the basis that it is the court seised of the damages claim which is to determine whether a choice-of-court agreement is valid and exclusive irrespective of whether the court first seised makes the same finding.[102] The same approach may be taken when we deal with a choice-of-law agreement: it is the court seised of the damages claim which is to determine, in accordance with its choice-of-law rules, whether the choice-of-law agreement is valid and should be given effect.

Secondly, it may be asked what constitutes a breach of a choice-of-law agreement. Professor Briggs argues that a choice-of-law agreement can be broken by taking proceedings in a court which will not give effect to it.[103] With respect, this view would be undeniably right if a choice-of-law agreement expressly contains an undertaking not to bring an action in a court which would deny effect to it. However, if, as in most cases, a choice-of-law agreement does not contain such an express undertaking, it would seem difficult to read into it an implied undertaking to do the same.[104] If such an undertaking could be implied, the same should be possible with all other contractual terms. The upshot would be that an assertion of nullity of any terms would constitute their breach and entail liability. While it would be possible to argue that there is a breach of a choice-of-court agreement when proceedings are taken in a non-chosen forum,[105] it is not possible to conceive of a breach of a choice-of-law agreement since it is silent as to where

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In some of the latter, the party disputing the existence of the agreement may, by way of exception, be allowed to invoke the law of the country in which he is habitually resident (e.g. Article 10 of the Rome I Regulation).

[102] See the previous article, p. 58.

[103] However, when it comes to the quantification of damages, a difficulty will arise where there are a number of courts which would give effect to the choice-of-law agreement. BRIGGS A., *The Agreements of Jurisdiction* (note 97), at para 11.71, suggests that the court which would give the most favourable ruling for the breaching party should be identified for the purpose of quantification.

[104] cf. BRIGGS A., *The Agreements of Jurisdiction* (note 97), while acknowledging that the question is one of construction (para. 11.53), maintains that a choice-of-law agreement necessarily implies such an undertaking (para 11.52). Professor Briggs explains that the absence of a choice-of-court agreement ought not to be seen as a problem, citing the possibility that parties may settle the choice of law while leaving the choice of court to be determined later (para 11.52).

[105] cf. DICKINSON A., 'Restitution and incapacity: a choice of law solution?', in: *Restitution Law Review* 1997, p. 66, fn.26, argues that both a choice-of-court agreement and a choice-of-law agreement are a request to the court to give effect to them and accordingly, relief of damages could not be granted for their breach.

proceedings must be taken.[106] Therefore, a parallel cannot be drawn between them[107] and it must be concluded that a contractual claim seeking damages for breach of a choice-of-law agreement could not be allowed unless the agreement contains an express undertaking not to bring an action in a court which would deny effect to it.

The preceding argument finds support in a recent Australian decision. In *Ace Insurance v. Moose Enterprise*,[108] an antisuit injunction was sought to restrain an action in California, which had been brought to take advantage of Californian law notwithstanding that there was an express choice-of-law agreement in favour of 'the law of Australia, its States and Territories.' One of the submissions on which the application was based presupposed that if the Californian court delivered a judgment favourable to its plaintiff as the result of the application of Californian law, damages for breach of the choice-of-law agreement would be recoverable in Australia. The New South Wales Supreme Court granted an antisuit injunction but refused to endorse that submission. Brereton J observed that at the foundation of that submission was the proposition that the choice-of-law agreement was promissory in effect and held:

> 47. ... the courts have long recognized that a choice of law clause is not a choice of jurisdiction clause, and does not have the effect of a choice of jurisdiction clause ... No doubt a contractual provision could be framed which unambiguously contained a promise to do nothing that might result in some other system of law becoming applicable. However, in my opinion that is not ordinarily the effect of a choice of law clause, which is usually declaratory of the intent of the parties, rather than promissory. …
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> …
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> 51. … Where a choice of law is 'inferred' rather than 'express', it is not conceivable that there would be an implied negative stipulation not to invoke the jurisdiction of a court, which would apply a law other than the chosen one. In my view, that supports the conclusion that where there is an express choice of law, there is similarly no

[106] cf. in the Spanish *Tribunal Supremo* case, in stating the reasons for awarding damages for breach of a Spanish choice-of-court agreement, the court mentioned the breach of a Spanish choice-of-law agreement always alongside with the breach of the choice-of-court agreement: ALVAREZ S. (note 7).

[107] A parallel could be more aptly drawn between a choice-of-court agreement and an arbitration agreement. However, the remedy of damages for breach of an arbitration agreement has its own history of development and involves certain issues which would not arise from breach of a choice-of-court agreement such as whether the arbitral tribunal has competence to hear the damages claim and whether the court of the seat of arbitration or other courts have jurisdiction to do the same. Therefore, it merits a full analysis in a separate article.

[108] [2009] NSWSC 724 (31 July 2009).

> implied obligation not to invoke the jurisdiction of a court, which will not apply the chosen law .... It may well be that the parties could frame a provision which was promissory in effect, but – given the conventional function of a choice of law clause – it would require very clear language to make it promissory rather than declaratory.

It should be noted that the conclusion put forward above, namely that a contractual claim seeking damages for breach of a choice-of-law agreement is not available, does not preclude the possibility of a tort claim since such a claim does not rely on the untenable concept of 'breach of a choice-of-law agreement' but is founded on the broad context in which the action has been commenced. Thus, the institution of an action may be deemed a tortious act if the circumstances are such that the institution of the action is, under the test of the Restatement, 'primarily for a purpose other than that of securing the proper adjudication of the claim' or, under the test of the Japanese Supreme Court, 'plainly unreasonable in the light of the purpose of the judicial system.' If there is a choice-of-law agreement which, according to the choice-of-law rules of the court seised of the tort claim, is valid and should be given effect, the fact that the agreement would not be given effect in the foreign forum in which the action has been brought may form a significant part of the circumstances making the institution of the action a tortious act. The circumstances in which the Russian banks brought actions in Russia as portrayed by Professor Briggs in the passage quoted above might fit the profile.

It should be noted that also in the context of a tort claim, a parallel cannot be drawn with the breach of a choice-of-court agreement since the 'breach of a choice-of-law agreement' is logically inconceivable. Thus, the first and the second categories into which the cases involving the breach of a choice-of-court agreement have been classified have no relevance to the cases involving a choice-of-law agreement. Nor can the analysis on the governing law[109] be fully extended to the cases involving a choice-of-law agreement: if the applicable choice-of-law rules contain a rule of displacement under which the otherwise applicable law is displaced by the law of the place with which the tort is manifestly more closely connected, the proposition that the tort claim is closely connected with the governing law of the choice-of-*law* agreement is less defensible than the proposition that the tort claim is closely connected with the governing law of the choice-of-*court* agreement.

The remaining question is whether a restitutionary remedy is available. Suppose that the plaintiff has obtained a favourable judgment in a forum where the choice-of-law agreement is denied effect – a judgment more favourable than that which he would obtain in a forum where the agreement is given effect. Could the defendant make a restitutionary claim to deprive the plaintiff of the gain? The answer must be in the negative since it cannot be said that the favourable judgment lacks legal foundation, given that a choice-of-law agreement does not mandate an action to be brought in a particular forum.

[109] Section III.B above.

VII. Final Remarks

The previous and present articles have considered a number of issues. The analysis has often been technical. However, underneath all those issues, there lies a fundamental policy question: where to draw a line between autonomy and coordination.

The starting point is autonomy. Each country, as a sovereign entity, constructs from factual situations its own legal order according to its own law which include choice-of-law rules. However, if each country sticks with its own point of view, one and the same factual situation may be given different legal meanings by different countries. Acknowledging the possibility that the interests of private persons may be harmed through the fragmentation of their legal positions along borderlines, private international law accommodates some mechanisms for coordination with the legal orders of other countries.

Each country is free to determine the extent to which and the context in which autonomy is surrendered in favour of coordination in its private international law. Thus, in the spirit of promoting coordination, some countries accept the second degree renvoi (*i.e.* the application of the law of a third country referred to by the choice-of-law rules of the country which is specified by the choice-of-law rules of the forum on the condition that the choice-of-law rules of the third country designate its own law). Some countries choose to determine preliminary questions by the law governing the principal questions. And some countries opt to resolve the internal conflict-of-law problems of a federal state by consultation with the law of that state. Also, many countries recognise foreign judgments without reviewing the substance albeit within the limit of its public policy. Some countries go further by embracing the theory of the recognition of situations (*reconnaissance des situations*).

The remedy of damages for breach of a choice-of-court agreement should be seen in this wider context. It is true that the court determining the availability of the remedy cannot act solely on its point of view since, as examined in the present article on the assumption that the court seised of the claim characterises it as substantive, the availability depends also on the applicable law, which may, depending on the facts, be a foreign legal system. Yet, the remedy is undeniably an instrument to enhance autonomy, as apparent from the premise of the discussion that if a breach of a choice-of-court agreement exists from the perspectives of the court before which the remedy is sought, it is deemed to exist irrespective of whether it does exist from the viewpoints of other countries. It must be acknowledged that even if deployed in the best intention as a shield for preserving autonomy, this remedy may be viewed by other countries as a weapon capable of disturbing their autonomy and may thus undermine comity. It shares this feature with an antisuit injunction. The basic position, however, remains that a country and its courts are free to stand up for their own belief that circumstances dictate that the aggrieved

party should be granted relief, so long as they stay clear of violating public international law.[110]

[110] However, in the intra-EU context, in which 'mutual trust' is the name of the game, a greater emphasis has been placed on coordination.