Margherita Salvadori

General Overview on the PGLPIL's Rules on Choice-of-Court Agreements and on their Importance for the Colombian Legal System

ABSTRACT: This article introduces the of choice-of-court agreements, focusing on the current situation in Colombia where there is no express rule governing the agreements in question. The article highlights the importance of the PGLPIL's rules and the matter of jurisdiction clauses. It deals with the topic of written form, presents the types of choice-of-court agreements. It also examines the suggested rules of the PGLPIL on *lis pendens* with specific regard to cases involving choice-of-court agreements. The article concludes that it would be a good for the international trade if Colombia adopted the 2005 Hague Convention.

KEWORDS: Choice-of-Court Agreements - PGLPIL draft - Written Form - *Lis pendens* - 2005 Hague Convention - Colombia

I. *Introduction*

Choice-of-court (or forum selection) agreements are often included within international contract[1]. Such contractual clauses designate the jurisdiction, the country or the court, where disputes arising from the contract where they are included will be settled[2]. Thus, by including forum selection clauses within their international contracts, the parties designate the specific jurisdiction where they wish that disputes arising from said

1. International contracts are agreements between parties from different countries. These contracts can involve a wide range of commercial transactions, including the sale of goods, services, licensing agreements, and more. International contracts often raise complex legal issues related to choice of law, jurisdiction, and dispute resolution.
2. An example of choice-of-court agreement may be worded as follows: «The [Country chosen] courts shall have jurisdiction over any disputes arising under the Agreement […] arising directly or indirectly in relation to this Agreement, be it a dispute in tort or in contract or for any other cause».

contracts be settled. The designated jurisdiction may be that where one of the parties is established or even a neutral third country.

The primary purpose of including choice-of-court agreement within international contracts is that of enhancing clarity and ensuring predictability in case of disputes. The inclusion of such clauses also mitigates the risk of so-called forum shopping that is to say that a party may opt among several jurisdictions and thus bring a claim before the *most favorable* jurisdiction[3].

Choice-of-court agreements may be of different types. The main distinction is that between exclusive and non-exclusive choice-of-court agreements. An exclusive choice-of-court agreement provides that all disputes arising from the contract may be resolved exclusively in the designated jurisdiction. In contrast, a non-exclusive agreement designates a "preferred" jurisdiction, while leaving the parties free to file suit in other jurisdictions[4].

3. When drafting or entering a choice-of-court agreement, the parties should consider factors such as the convenience of the chosen jurisdiction, the expertise of its courts, the language of proceedings, and the enforceability of judgments.

4. Choice-of-court agreements are often accompanied by choice-of-law clauses, which designate the law applicable to the contract. In that perspective a non-State body of law may be chosen. With this respect, it is worth noting that Recital (13) of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4 July 2008, 6-16) provides that: «This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention». Therefore, while the Rome I Regulation excludes from its scope the case where the parties have chosen the application of a non-State body of law, it does not exclude that a similar choice may be permissible. In turn, article 3 of the 2015 HCCH *Principles on the Choice of Law in International Contracts* (https://www.hcch.net/en/instruments/conventions/full-text/?cid=135#text), provides that: «The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise». Therefore, the 2015 HCCH *Principles*, like the Rome I Regulation, allow for the choice of a non-State body of law, to the extent that such a choice is allowed by the lex fori. That said, a non-State body of law which may be said to be generally accepted on an international level, is that of the UNIDROIT *Principles of International Commercial Contracts* 2016 (https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/). The choice of said Principles may take the form of a clause worded as follows: «This contract shall be governed by the UNIDROIT Principles of International Commercial Contracts 2016» (cf. UNIDROIT, *Model Clauses, For the Use of the UNIDROIT Principles of International Commercial Contracts*, 2013, 6).

II. *The current situation in Colombia*

Globalization of commerce has significantly expanded international trade and investments in Colombia. As a consequence, disputes arising from international contracts have become more frequent.

Nevertheless, within the Colombian legal system, most, if not all, contracts involving Colombian nationals are currently governed by Colombian law. In principle, all agreements entered into by Colombian residents are governed by and must be thus settled in accordance with Colombian law. In fact, that there is no mandatory Colombian rule preventing the parties from designating a foreign law as applicable to their international contract. In practice, Colombian courts are likely to adopt a narrow approach, restricting the cases where a choice of foreign law may be deemed permissible. Furthermore, in the event that one of the parties is established in Colombia, the contract's validity will have to be assessed in accordance with Colombian law, even if the disputed international contract calls for performance abroad or was, or ought to be, concluded abroad.

Colombia has ratified few international instruments[5] which rarely may lead to a different outcome as that described above[6]. In principle, in cases of disputes concerning assets situated in Colombia, foreign decisions rendered on said disputes are not enforceable in Colombia[7]. Disputes

5. Colombia is a party to the OAS *Inter-American Convention on Letters Rogatory* of 1975 and to the HCCH *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters* of 1965.

6. I.e. the HCCH *Convention on the Service Abroad* of 1965 applies to service upon natural and legal persons and also to States, governmental agencies, State-owned companies or territorial units of the State, but it does not apply to events when the address of the person to be served is not known (article 1). Juridical channels, diplomatic or consular agents, or the central authority of the state of origin or the state of destination are used to deliver letters rogatory from the interested party to the authority to whom they are addressed. The Chancellery, Colombia's designated central authority, precisely the *Ministerio de Relaciones Exteriores Dirección de Asuntos Migratorios, Consulares y Servicio al Ciudadano*, is responsible for fielding and processing requests from foreign parties to contracts. The Inter-American Convention on Letters Rogatory, January 30, 1975, provides rules for service of process amongst signatory States; also this treay indicate the privious central authoriy.

7. The Colombian General Code of Procedure (articles 605-607) regulates the recognition of foreign judgments in Colombia and the jurisdiction is given to the Civil Chamber of the Supreme Court of Justice. According to the either legislative or diplomatic reciprocity (article 605 of the General Code of Procedure), foreign judgments will be recognized under the authority provided by existing treaties with the State of origin or, absent a treaty between the two States, if that the law of the State of origin affords judgments originating

involving Colombian parties or events occurring within the Colombian territory are governed exclusively by Colombian law[8].

In this context, with respect to the Colombian legal system, choice-of-court agreements designating the jurisdiction where disputes will be settled becomes of crucial importance. Such designated jurisdiction may be either that of Colombia jurisdiction or a foreign one. On the international plane, it should be stressed that, on the one hand, Colombia has adopted few international treaties[9], for instance: the Montevideo Treaties of 1889, ratified in Law 33 of 1992 and the Inter-American Treaty on General Rules of Private International Law of 1971, ratified in Law 21 of 1981. On the other hand, it should be further stressed, that any of such adopted treaties governs choice-of-court agreements[10]. Incidentally, the Inter-American Convention on International Commercial Arbitration, 30 January 1975 (often referred to as the Panama Convention)[11] is primarily focused on arbitration, and simply requires that an arbitral award be recognized or enforced in the same manner as if it were a decision rendered by a national or foreign ordinary court – in accordance with the procedural laws of the respective country –, without addressing the procedure to be followed by the requested court[12].

in Colombia. Recognition of foreign judgments is easily stopped by many different the requirements, between *pluris* are particular relevant the no ongoing proceeding or final decision rendered by national courts on the same matter and of the granted exequatur. Since 2005 the Constitutional Court of Colombia has held that the Supreme Court of Justice's jurisdiction to rule on the recognition of foreign judgments cannot be extended to the analysis of the content of the law that was applied to the merits of the dispute, except to the extent that it might conflict with Colombian international public policy. It is also relevant the fact that Colombia has executed few treaties for the recognition of foreign judgments: a bilateral agreement with Spain, 1908, and the *Convención Interamericana Sobre Eficacia Extraterritorial de las Sentencias y Laudos Arbitrales Extranjeros* in 1981.

8. See J.L. Marín Fuentes, *The Recognition of International Judicial Decisions in the Draft Act on Private International Law for Colombia*, in this Book.

9. See N.R. Londoño Sepulveda - M. Palacio Maldonado, *A Hypothesis about the Application of the Montevideo Treaties of 1889 in Colombia*, in this Book.

10. The Montevideo Treaties of 1889 at "Título XIV - De la jurisdicción" in art. 56 states that: «(1) Las acciones personales deben entablarse ante los jueces del lugar a cuya ley está sujeto el acto jurídico materia del juicio. (2) Podrán entablarse igualmente ante los jueces del domicilio del demandado». There exists no derogation to such rules.

11. See M.-L. Jaime, *International Arbitration in Colombia*, in this Book.

12. Article VI of the Panama Convention provides that: «An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance

In conclusion, currently, within the Colombian legal system, there is not any express rule allowing the parties to designate the court having jurisdiction over disputes arising from their international contracts. When said disputes are brought before national courts, there exists any express rule ensuring that the applicable choice-of-court agreement be enforced.

III. *The PGLPIL's provisions on choice-of-court agreements*

The Instituto Antioqueño de Derecho Internacional Privado's Project of a General Law on Private International Law for Colombia (*Proyecto de Ley General de Drecho Internacional Privado para Colombia*; hereafter, "PGLPIL")[13] contains a specific provision devoted to choice-of-court agreements.

Moving from the plane of Colombian courts and international jurisdiction, the PGLPIL provides for the jurisdiction of national courts over all types of civil and commercial cases when the defendant is domiciled in Colombia, regardless of his/her nationality, the former connecting factor – the domicile – being one commonly employed by rules on jurisdiction in matters of contract.

Choice-of-court agreements and related issues are governed by articles 24 ("*Jurisdiction over freely negotiated contracts*"), 26 ("*Express or tacit choice of Colombian courts*"), 27 ("*Choice of a foreign court*") and 34 ("*International lis pendens*") PGLPIL (see further para. V below).

Jurisdiction is bestowed upon the Colombian courts not only when the contract is concluded or the disputed obligation is, or ought to be, performed in Colombia, but also when the parties decide, either expressly or tacitly, to submit their disputes to the courts of the same country. On the one hand, the possibility of designating Colombian jurisdiction by an express prior agreement is recognized, on the other hand, the exercise of jurisdiction is allowed also in case of tacit prorogation of jurisdiction (article 24 PGLPIL).

In the first case, that of an express agreement designating Colombian courts, such agreement must be in writing, while in the second case, that of

with the procedural laws of the country where it is to be executed and the provisions of international treaties».

13. Instituto Antioqueño de Derecho Internacional Privado - IADIP, *Proyecto de Ley General de Derecho Internacional Privado para Colombia*, Medellín, 2021, also in the Appendix to this Book.

tacit agreement, what is relevant is the claimant's conduct when filing the lawsuit, coupled with that of the defendant performing any action other than that of challenging lack of jurisdiction (see article 26).

The PGLPIL distinguishes in its article 25 the case where the parties have equal bargaining power from that where the same parties have unequal bargaining power. The terminology employed to refer to the second case is: «[…] actions relating to asymmetric contracts». Incidentally, this is a terminology which is unknown in the context of the EU rules on jurisdiction, where reference is rather had to cases involving consumers, employees or insured person, the latter being qualified as weaker contractual parties[14]. Pursuant to article 25 PGLPIL in cases relating to asymmetric contracts, Colombian courts have jurisdiction if the weaker party is domiciled in Colombia, even when the said party is the claimant[15] or the disputed obligation is, or ought to be, performed in the same country[16]. An interesting provision is that found in the final part of article 25, allowing for prorogation of Colombian jurisdiction also by the means of asymmetric choice-of-court agreements, to the extent that the latter expressly or tacitly designate Colombian courts after the dispute has arisen[17].

Having recognised such ample party autonomy, the PGLPIL governs the conduct of the Colombian courts if the parties' agreement designates a foreign jurisdiction. In this case, when there is a valid choice-of-court agreement designating a foreign court, the Colombian court is required to decline its jurisdiction. This provision is of pivotal importance, especially considering that, currently, Colombian courts establish their jurisdiction whenever a Colombian, natural or legal, person is a party to the proceedings or the contract is, or ought to be, performed in Colombia. The sole exception foreseen by the provision in question concerns the case of disputes in matters relating to rights in immovable property situated in Colombia[18]. With the latter respect, it worth highlighting that article 32 PGLPIL, on exclusive jurisdiction, correctly specifies that cases falling within the purview of exclusive jurisdiction are exceptional, they must

14. In fact, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia Regulation) (OJ L 351, 20 December 2012, 1) provides for rules on jurisdiction protecting the consumer, the employee and the insured.

15. Cfr. the protective forum of the consumer of art. 18 Brussels Ia Regulation.

16. Cfr. the protective forum of the employee of art. 21 Brussels Ia Regulation.

17. Also the Brussels Ia Regulation introduces similar limitations in cases involving consumers, employees and insured.

18. See M.J. Ochoa Jiménez, *Property Law*, in this Book.

by thus interpreted restrictively and they cannot be extended to other cases that may arise in connection with the same dispute. This restrictive approach mitigates the risk that the Colombian courts may broaden the scope of the derogation in question and thus, ultimately, of the cases where choice-of-court agreements may be challenged.

In conclusion, it can be noted that, if the PGLPIL will be enacted, choice-of-court agreements will be generally recognised and enforced by Colombian courts. In fact, as described above, the PGLPIL recognizes the principle of party autonomy in the field of jurisdiction.

IV. *Written form and types of choice-of-court agreements*

Written form is typically required for the validity of choice-of-court agreements. Such requirement allows to easily establishing evidence as to the parties' intention to designate a specific jurisdiction for settling their disputes. In particular, the requirement of written form implies that the choice-of-court agreement must be included in a written contract – and thus take the form of a clause –, in written communication exchanged between the parties, such as letters, emails, or in any other writing, which clearly demonstrates their intention to designate a specific jurisdiction. Furthermore, choice-of-court agreements should be drafted in a clear and comprehensible language. While there may not be a strict requirement regarding the language that must be employed, using one which both parties understand is advisable, in order to prevent potential disputes regarding the interpretation of the agreement in question. In other words, the agreement should be drafted in such way as to reflect the parties'genuine consent and intention to be bound by it. In particular, choice-of-court agreements should be unambiguous with respect to the designation of the given jurisdiction. In practice, it is common that the parties involved sign choice-of-court agreements. Signature provides further evidence of the parties' consent to the agreements in question. Written agreements, including choice-of-court agreements, may take the form of an electronic document. In fact, Colombian law generally recognizes electronic documents as valid forms of written communication. Overall, the country's legal system has embraced the use of electronic communications and digital signatures in the context of international contracts, making it thus possible to meet the requirement for a written agreement electronically. Ideally, choice-of-court agreements should be an integral part of the main contract to which they refer. However,

the agreements in question may be contained in a separate agreement expressly referring to the main contract.

Practice has embraced various types of choice-of-court agreements, reflecting the diverse needs and circumstances of parties engaged in international transactions. At least four types of choice-of-court agreements may be distinguished: exclusive; non-exclusive, asymmetric and multi-tiered clauses.

Exclusive choice-of-court agreements mentioned above are perhaps the most common type in the context of international contracts. Such agreements designate a specific jurisdiction as the exclusive jurisdiction where disputes arising from the contract may be settled. In other words, the parties agree that only the designated jurisdiction will have the power to settle the case, thereby excluding other potential jurisdictions. Therefore, choice-of-court agreements provide clarity and predictability, reducing the risk of forum shopping and parallel proceedings.

Non-exclusive choice-of-court agreements also mentioned above are also referred to as permissive or non-binding clauses. Such agreements do not restrict the parties' ability to bring their dispute in a single jurisdiction. On the contrary, they designate a specific jurisdiction as a "permissible forum", while recognising the parties'ability to bring disputes in other jurisdictions if they so choose. Therefore, non-exclusive choice-of-court agreements offer broader flexibility than exclusive choice-of-court agreements[19].

Asymmetric choice-of-court agreements allow one party to bring claims in a higher number of jurisdictions, as opposed to the other party. The former party typically has the discretion to bring the disputes before the most favourable jurisdiction. Asymmetric clauses are often employed when one party enjoys a stronger bargaining position. A specific type of asymmetric choice-of-court agreement is the so-called one-sided choice-

19. See EUCJ case *Meeth v. Glacetal*, 9 November 1978 (C-23/78), in which non-exclusive agreements are legally recognized and enforceable within the EU law. The case revolved around an agreement between parties that conferred jurisdiction under which two parties from different EU member states agree that disputes will be resolved exclusively in their own national courts, such an agreement is valid and enforceable. The case emphasized the flexibility of agreements conferring jurisdiction and allowed courts to consider set-offs related to the legal dispute even when parties had agreed on a specific jurisdiction. The European Court stated that parties could agree to confer jurisdiction on the courts of their respective countries, even if they are different. According to the European Court of Justice, this flexibility allows for efficient dispute resolution and respects the parties'freedom to shape their contractual relationships.

of-court agreement, which combines elements of both exclusive and non-exclusive choice-of-court agreements. The latter type of agreements provide that one party may exclusively bring disputes in one jurisdiction, while leaving the other party free of bringing disputes in other jurisdictions. One-sided choice-of-court agreements are designed to balance the advantages of exclusivity with the flexibility of non-exclusivity.

Finally, multi-tiered choice-of-court agreements provide for multi-step dispute resolution mechanisms, before court litigation is initiated. Similar agreements may provide that the parties be required to engage in negotiation or mediation before initiating court proceedings. These clauses aim to promote alternative dispute resolution methods, potentially reducing the caseload of ordinary courts.

In summary, recognising and fostering the use of choice-of-court agreements brings a number of advantages and implications. Choice-of-court agreements provide clarity and predictability. By designating the jurisdiction where disputes will be settled, choice-of-court agreements reduce legal uncertainty. This advantage is attained in particular by concluding exclusive choice-of-court agreements, since the latter may streamline dispute resolution by preventing parallel proceedings in multiple jurisdictions, and thus, ultimately, lead to cost and time savings. Choice-of-court agreements allow the parties to tailor dispute resolution to their preferences and needs. Parties can rely on these clauses to enforce judgments in the designated jurisdiction. However, enforcing choice-of-court agreements, especially asymmetric and multi-tiered agreements, can pose challenges in practice.

V. *The PGLIPL's rules on lis pendens*

Lis pendens refers to situations where the same dispute is being litigated in multiple jurisdictions. General rules on lis pendens in the context civil proceedings, including those related to international contracts, are established to promote legal order and prevent conflicting judgments.

The PGLPIL addressed the issue of international *lis pendens* in Section 4. In particular, article 34 PGLPIL[20] introduces a rule similar to that found

20. Art. 34 PGLPIL provides that: «(1) Colombian courts shall suspend the exercise of their jurisdiction when the same cause, with the same object and between the same parties, has been previously initiated in the court of a State that is reasonably related to the matter or the parties unless it is evident that in that forum the process will not be resolved in a fair,

in the 1968 Brussels Convention[21], and, later, in the Brussels I Regulation[22]. In order to avoid conflicting judgments, the article provides that, if a lawsuit is already pending in a Colombian court regarding the same dispute between the same parties, another court, either in Colombia or abroad, may decline jurisdiction in favour of the court where the litigation was first initiated. Accordingly, if a dispute arising from an international contract is brought before Colombian courts and foreign courts, Colombian courts may apply such rule to determine which court should proceed to hear the case: the court that first asserted jurisdiction will take precedence in order to avoid the duplication of legal proceedings. Therefore, the fundamental principle is that the first seized court – i.e., where the lawsuit was initially filed – takes priority. In other words, if one of the courts began proceedings before the other, that court will generally continue with the case, and the other court may decline jurisdiction.

The outcome of a *lis pendens* case may also be influenced by a choice-of-court agreement included in the parties'contract. The priority accorded to the court first seized rule may not fully protect a choice-of-court agreement. This is clear from the experience of the European judicial area. In fact, at the time of Article 17 of the 1968 Brussels Convention and of Article 23 of the Brussels I Regulation, the pendency of the same case before judges of two different Member States – even when the judge subsequently seized was the one designated – always and only determined the jurisdiction to the judge previously seized to verify the existence of the choice-of-court agreement. Consequently, the court subsequently seized, although the one designated in the choice-of-court agreement, could not rule until the judge previously seized had decided on the validity of the choice-of-court agreement in question[23]. This situation was at the centre of the Gasser case[24], relating to

effective and diligent manner. (2) The suspension based on lis pendens may be extended until the decision in the foreign State acquires the force of res judicata, provided that such a decision is rendered within a reasonable period and may be effective in Colombia».

21. See art. 21 of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ L 299, 31 December 1972), 32-42.

22. See art. 27 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), OJ L 12, 16 January 2001, 1-23.

23. Cf. P. Hay, *Notes on the European Union's Brussels-I "Recast" Regulation: An American perspective*, in *European legal forum: Forum iuris communis europae*, 2013, Vol. I, 2.

24. See EUCJ, judgment of 9 December 2013 - case C-116/02, *Erich Gasser v. MISAT*, 9 December 2003. The position taken in the Gasser case was subsequently confirmed in EUCJ, judgment of 3 April 2014 - case C-438/12, *Irmengard Weber v. Mechthilde Weber*.

an exclusive choice-of-court agreement in favour of Austrian jurisdiction and concluded between an Italian and Austrian party. Despite that agreement, the Italian party brought a lawsuit in Italy, based on the head of jurisdiction available under the 1968 Brussels Convention, the special forum in contractual matters[25], claiming the invalidity of the choice-of-court agreement. Thereafter, the Austrian party sought resort before the designated Austrian courts. Before the latter courts, the Italian party challenged that, according to the general *lis pendens* rule, the Austrian courts had to stay proceedings. The Austrian court referred a preliminary question to the Court of Justice which, noting that the referring judge was the second seized judge, in application of the general rule on lis pendens, confirmed the obligation to stay proceedings, pending the decision of the first seized judge on the existence, or lack, of Italian jurisdiction. The Court of Justice, answering to the intervention of United Kingdom Government, held that: «the difficulties of the kind referred to by the United Kingdom Government, stemming from delaying tactics by parties who, with the intention of delaying settlement of the substantive dispute, commence proceedings before a court which they know to lack jurisdiction by reason of the existence of a jurisdiction clause are not such as to call in question the interpretation of» the general rule on lis pendens[26].

25. Cf. art. 5.1, 1968 Brussels Convention, modified in art. 5.1, Brussels Ia Regulation, the latter only renumbered in art. 7.1, Brussels Ia Regulation.

26. The observations presented by the Government of the United Kingdom, intervening in the proceeding in Luxembourg, are worth of being reproduced: «The United Kingdom Government states that, whilst Article 17 comes below Article 16 in the hierarchy of the bases of jurisdiction provided for in the Brussels Convention, it nevertheless prevails over the other bases of jurisdiction, such as Article 2 and the special rules on jurisdiction contained in Articles 5 and 6 of the Convention. The national courts are thus required to consider of their own motion whether Article 17 is applicable and requires them, if appropriate, to decline jurisdiction. The United Kingdom Government adds that it is necessary to examine the relationship between Articles 17 and 21 of the Brussels Convention taking account of the needs of international trade. The commercial practice of agreeing which courts are to have jurisdiction in the event of disputes should be supported and encouraged. Such clauses contribute to legal certainty in commercial relationships, since they enable the parties, in the event of a dispute, easily to determine which courts will have jurisdiction to deal with it. Admittedly, the United Kingdom Government observes that, to justify the general rule embodied in Article 21 of the Brussels Convention, the Court held, in paragraph 23 of Overseas Union Insurance, that in no case is the court second seised in a better position than the court first seised to determine whether the latter has jurisdiction. However, that reasoning is not applicable to cases in which the court second seised has exclusive jurisdiction under Article 17 of the Brussels Convention. In such cases, the court designated by the agreement conferring jurisdiction will, in general, be

The above-described situation has been stigmatized as Torpedo[27] actions, or also Italian Torpedo, and has been addressed by the Brussels Ia Regulation, which came into force on January 10, 2015, replacing the Brussels I Regulation, and which today represents the key legal instrument within the EU governing jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[28].

The newer Brussels Ia Regulation contains different provisions that govern choice-of-court agreements in the context of jurisdiction and the recognition and enforcement of judgments in civil and commercial matters within the EU[29]. The rules on choice-of-court agreements in the Brussels Ia Regulation serve to honour the principle of party autonomy and promote legal predictability and certainty in cross-border disputes within the EU. It ensures that the parties'agreements to resolve their disputes in a specific jurisdiction are respected by courts throughout the EU, contributing to a more efficient and harmonized system for international civil and commercial litigation. In particular, article 25 Brussels Ia Regulation upholds the principle of party autonomy. It provides that parties either can agree, before or after a dispute arises, to submit their disputes to the courts of a specific EU Member State. The parties have the freedom to designate the court or jurisdiction they believe is most appropriate for resolving their disputes.

The Brussels Ia Regulation, as the previous rules, does not specify a particular form that choice of court agreements must take. They can be in writing, oral, or implied by the parties'conduct. However, to ensure clarity

in a better position to rule as to the effect of such an agreement since it will be necessary to apply the substantive law of the Member State in whose territory the designated court is situated. Finally, the United Kingdom Government concedes that the thesis which it defends might give rise to a risk of irreconcilable judgments. To avoid that risk, it proposes that the Court hold that a court first seised whose jurisdiction is contested in reliance on an agreement conferring jurisdiction must stay proceedings until the court which is designated by that agreement, and is the court second seised, has given a decision on its own jurisdiction».

27. Torpedo is the missile that, when fired underwater, detonates on contact with the target.

28. See M. Salvadori, *Gli accordi di scelta del foro nello spazio giudiziario europeo*, Torino, 2018, 114 ss.

29. See art. 25 and 31.2 of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast) (Bruxelles Ia Regulation), OJ L351, 20 December 2012, 1-32.

and evidentiary value, it is advisable that such agreements be in writing or at lease evidenced in writing.

The Brussels Ia Regulation protects both exclusive and non-exclusive choice of court agreements. In particular, the Brussels Ia Regulation includes a strong mechanism for enforcing exclusive choice-of-court agreements. If a court in a Member State is seized of a dispute covered by a valid exclusive choice-of-court agreement, it is generally obligated to decline jurisdiction in favour of the court designated by the parties, unless the agreement is invalid or its enforcement is contrary to the public policy of the Member State. In cases where one party initiates proceedings in a court of an EU Member State in breach of a valid choice of court agreement, article 31(2) Brussels Ia Regulation, which exclusively applies to the case of exclusive choice-of-court agreements, introduces an exception to the general rule on *lis pendens*:

> where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement

thereby solving the issues of the so-called Torpedo actions[30]. Incidentally, the exception to the rule of first-seized jurisdiction was introduced within the Burssels Ia Regulation in order to conform to the provisions of the 2005 Hague Convention on choice-of-court agreements.

In summary, under the PGLPIL, in cases of *lis pendens*, Colombian courts will be generally obligated to respect the priority of the court first seized even in the presence of an applicable choice-of-court agreement.

VI. *The 2005 Hague Convention: a proposal to enter the Convention*

The international landscape of commercial transactions has evolved significantly over the years, with cross-border contracts becoming increasingly prevalent. As a result, the need for legal frameworks that govern jurisdiction and the enforcement of choice-of-court agreements in inter-

30. We must remember that the Court of Justice has always denied the possibility that the other party may seek an anti-suit injunction from the court chosen in the agreement, even if this injunction can restrain the party from pursuing proceedings in the court not chosen by the parties.

national contracts has grown. The 2005 Hague Convention on choice-of-court agreements stands as a landmark instrument in this regard[31].

The Hague Conference on Private International Law (often referred to simply as the "Hague Conference" or HCCH)[32], is an intergovernmental organization dedicated to developing and promoting international conventions and protocols in the field of private international law. It was established in 1893 and is headquartered in The Hague, Netherlands. The Hague Conference plays a pivotal role in facilitating international cooperation and harmonizing legal standards across jurisdictions. The establishment of the Hague Conference on Private International Law was a response to the growing need for a standardized legal framework for resolving private international law issues.

The Hague Conference's primary role is to develop international conventions and protocols that address various aspects of private international law, including family law, civil procedure, commercial law, and more. These conventions are intended to create uniform rules and procedures for cross-border legal matters. The Hague Conference promotes legal cooperation and mutual understanding between countries. It provides a platform for member states to engage in discussions, share experiences, and negotiate international agreements. By harmonizing international legal standards and simplifying procedures related to cross-border transactions, the conference contributes to the growth of international trade and commerce.

The 2005 Hague Convention is primarily concerned with facilitating the recognition and enforcement of choice-of-court agreements in international contracts.[33] Its key objectives can be summarized as follows: promotion of party autonomy; uniformity and predictability and enhanced enforcement. Central to the 2005 Hague Convention is the principle of party autonomy. It recognizes the parties' right to choose the jurisdiction where their disputes will be resolved. This principle aligns with the need to respect the freedom of

31. See the website of the Hague Conventions www.hcch.net, precisely on the 2005 Convention https://www.hcch.net/en/instruments/conventions/full-text/?cid=98.

32. Colombia it is not a party to the Hague Conference of Private International Law.

33. More recently see P. Beaumont - M. Keyes, *Choice of Court Agreements. A Guide to Global Private International Law*, 2022; Z. Mchirgui, *L'Accord exclusif d'èlection de for à travers la Convention de la Haye de 2005*, L'Harmattan, 2022; A. Briggs, *Civil Jurisdiction and Judgments*, VII ed., Routledge, London, 2021; F. Pocar, *Brief Remarks on the Relationship between the Hague Judgments and Choice of Court Conventions*, in *Liber Amicorum Monika Pauknerová*, Wolters Kluwer, 2021; R.A. Brand, *The 2005 Choice of Court Convention - the triumph of party autonomy*, Edward Elgar Publishing, 2020.

contract and the choices made by commercial entities in their international dealings. The 2005 Hague Convention aims to establish uniform rules for recognizing and enforcing choice of court agreements. By providing clarity and predictability, it seeks to reduce legal uncertainty and potential disputes arising from divergent national laws. Parties to international contracts often face challenges when enforcing judgments in foreign jurisdictions. The 2005 Hague Convention streamlines the enforcement process by obligating contracting states to recognize and enforce judgments rendered by the chosen court in accordance with the agreement.

The structure of the 2005 Hague Convention consists of a preamble and six main sections, each addressing different aspects of choice of court agreements and their enforcement: Article 1 defines the convention's scope, which is limited to exclusive choice-of-court agreements. These are agreements in which parties designate a specific court or jurisdiction as the exclusive forum for resolving disputes. Articles 8 through 16 lay out the procedures and requirements for recognizing and enforcing judgments resulting from exclusive choice of court agreements in contracting states. The convention establishes a straightforward process and sets specific conditions for enforcement. Articles 2-7 provide interpretive guidelines for understanding and applying the convention's provisions. They emphasize the importance of adhering to the convention's objectives and the principle of good faith. Article 3 of the convention specifies that choice-of-court agreements must be «in writing or evidenced in writing» to be valid and enforceable. The concept of the equivalence of the written form is a crucial aspect of the Hague Convention. It acknowledges that in the modern era, international agreements, including choice of court agreements, are often reached through electronic communications such as emails, electronic signatures, and other digital means. The convention recognizes that electronic forms of communication are a prevalent and practical means of reaching agreements, and it accommodates this reality by equating them with traditional written agreements.

Article 21 allows contracting states to make reservations when ratifying or acceding to the convention. These reservations may limit the convention's applicability in certain circumstances. Article 22 clarifies the relationship between the 2005 Hague Convention and other international agreements, such as regional conventions and bilateral treaties. It outlines the priority of the Hague Convention when conflicting obligations arise. The final clauses address various administrative and procedural aspects, including accession to the convention, entry into force, and its territorial application (articles 23-30).

The 2005 Hague Convention has gained traction since its adoption, with several countries becoming contracting parties. Notable adopters include[34] the European Union and its Member States[35], the United States, Singapore, Mexico, and United Kingdom[36]. This widespread adoption reflects the convention's potential to foster international legal cooperation and enhance the enforceability of choice of court agreements. Unfortunately, Colombia is not a party to the 2005 Hague Convention on choice-of-court agreements. There are multiple reasons to conclude that Colombia should adopt the 2005 Hague Convention, and thus take part to the related uniform legal framework for the recognition and enforcement of choice-of-court agreements, thereby promoting legal certainty in international contracts.

For international businesses and legal practitioners, the 2005 Hague Convention offers a standardized framework that promotes legal certainty in cross-border transactions. Parties can have confidence that their choice-of-court agreements will be recognized and enforced in contracting states, reducing the risks associated with jurisdictional disputes and enforcement challenges. An exclusive choice-of-court agreement and the choice of law

34. See for the status of the 2005 Hague Convention: https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.

35. Before Brexit, when the United Kingdom was still an EU Member State, the Brussels Ia Regulation applied in that country (see Recital (40) Brussels Ia Regualtion). After the withdrawal of the United Kindgom from the EU, the Brussels Ia Regulation no longer applies nor binds that country. According to the prevailing view, the 1968 Brussels Convention – superseded by the Brussels I Regulation –, cannot "revive", after Brexit, in the context of the relations between the United Kingdom and the EU Member States. See B. Cortese, *Brexit e diritto internazionale private tra Roma, Bruxelles e Lugano: How Can I Just Let You Walk Away?*, in *Cuad. Der. Trans.*, 2021, par. 9; C. Tuo, *The Consequences of Brexit for Recognition and Enforcement of Judgments in Civil and Commercial Matters: Some Remarks*, in *Riv. dir. int. priv. proc.*, 2019, 309, 308-309; G. Rühl, *Judicial Cooperation in Civil and Commercial Matters After Brexit: Which Way Forward?*, in *Int'l & Comp. L. Q.*, 2018., 104 ff.). Furthermore, unlike the Rome I Regulation, the Brussels Ia Regulation is not a party of the so-called retained EU law by UK law.

36. As said, before Brexit, when the United Kingdom was still an EU Member State, the 2005 Hague Convention on choice-of-court agreements was in force in that country. After Brexit, on 28 September 2020, the United Kingdom has "autonomously" acceded the 2005 Hague Convention (cfr. https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1318&disp=eif). Thus, at present, teh 2005 Hague Convention is once more in force in the United Kingdom in the relations with the other parties to the Convention. As a consequence, in the post-Brexit era, in the specific area of exclusive choice-of-court agreements, a uniform set of rules applies in relations between the United Kingdom and the other parties to the 2005 Hague Convention.

are related but distinct elements in international contracts. While they both play crucial roles in shaping the dispute resolution process, they serve different purposes, and the presence of one does not necessarily imply the other. However, parties often consider them together to create a comprehensive framework for handling disputes in their contracts. The exclusive choice-of-court agreement designates a specific jurisdiction as the exclusive venue for resolving disputes arising from the contract. It provides clarity and predictability regarding where legal actions related to the contract will be heard. Parties select a jurisdiction based on various factors, including familiarity with the legal system, perceived fairness, and convenience.

The choice of law clause, on the other hand, determines the substantive law that will govern the contract and any disputes arising from it. It specifies which country's legal principles and rules will apply when interpreting and enforcing the contracts terms. The choice of law clause determines the substantive legal principles that will be applied to interpret the contract and resolve disputes[37]. It influences issues such as contract interpretation, contractual obligations, and remedies available to the parties. The exclusive forum selection clause, meanwhile, deals with procedural aspects and the jurisdiction in which disputes will be heard.

The interaction between these two clauses depends on the parties' intentions and the legal context. In many international contracts, parties include both an exclusive choice-of-court agreement coupled with a choice of law clause. These clauses work together to create a comprehensive framework for dispute resolution, i.e. complementary approach. For instance, parties might choose Medellin as the exclusive forum for disputes and specify that Colombian law will govern the contract. There may be situations where parties select an exclusive forum without specifying the governing law, or vice versa. This might occur when parties are more concerned about where disputes will be resolved than the specific laws that will apply, i.e. separate considerations. While an exclusive choice-of-court agreement is not inherently tied to the choice of law, the two

37. Incidentally, looking to EU Member States, article 1, point 2, letter e) of the Rome I Regulation – akin to article 1, point 2, let. d), of the 1980 Rome Convention – refers to the exclusion of choice-of-court and arbitration agreements from the scope of the regulation. This means that the regulation does not determine the law applicable to these types of agreements. This notwithstanding, it cannot be excluded that the Rome I Regulation or the 1980 Rome Convention may be applied by the national courts of the EU Member States indirectly to the agreements in question.

clauses are often considered together in international contracts to create a comprehensive dispute resolution framework.

The 2005 Hague Convention on could constitute a vital development in international commercial law in Colombia. As more countries adopt the convention, it has the potential to simplify and streamline dispute resolution in international contracts, benefiting businesses, legal professionals, and the global economy as a whole. Its principles reflect the ongoing efforts to harmonize international legal norms and enhance the functioning of cross-border commerce.

VII. *Conclusions*

In conclusion, choice-of-court agreements play a crucial role in the current context of international trade. The objectives of clarity and predictability that these agreements pursue are best achieved when the agreements in question are made in written form and are exclusive. At present, there are no regulations in Colombia that govern choice-of-court agreements. Therefore, the proposal contained in the PGLPIL to regulate this matter is welcomed. Indeed, such regulation is generally favourable as it primarily protects and embraces the principle of party autonomy in the context of jurisdiction. Furthermore, the regulation is comprehensive, recognizes different types of clauses, not only exclusive ones, and also addresse aspects of *lis pendens*. However, it is worth noting that the application of the general rule on *lis pendens* - which gives priority to the court first seized - could pose some challenges in the context of exclusive choice-of-court agreements. The 2005 Hague Convention introduces an exception to that rule, which ensures a greater "stability" of (exclusive) choice-of-court agreements. For this reason, and considering the importance this would also have in a broader perspective, it would be highly beneficial if Colombia adopted the 2005 Hague Convention.