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Implied jurisdiction agreements in international commercial contracts: a global comparative perspective

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This article examines the principles of implied jurisdiction agreements and their validity on a global scale. While the existing scholarly literature primarily focuses on express jurisdiction agreements, this study addresses the evident lack of scholarly research works on implied jurisdiction agreements. As such, it contributes to an understanding of implied jurisdiction agreements, providing valuable insights into their practical implications for international commercial contracts. The paper's central question is whether implied jurisdiction agreements are globally valid and should be enforced. To answer this question, the article explores primary and secondary sources from various jurisdictions around the world, including common law, civil law, and mixed legal systems, together with

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insights from experts in commercial conflict of laws. The paper argues for a cautious approach to the validity of implied jurisdiction agreements, highlighting their potential complexities and uncertainties. It contends that such agreements may lead to needless jurisdictional controversies and distract from the emerging global consensus on international jurisdiction grounds. Given these considerations, the paper concludes that promoting clear and explicit jurisdiction agreements, as supported by the extant international legal frameworks, such as the Hague Conventions of 2005 and 2019, the EU Brussels Ia Regulation, and the Lugano Convention, would provide a more predictable basis for resolving cross-border disputes.

Keywords: Choice of Court Agreements; implied; Hague Choice of Court Convention 2005; Hague Judgments Convention 2019; common law; civil law; mixed legal systems; global comparative perspectives; Brussels Ia Regulation; Lugano Convention

A. Introduction

An express jurisdiction agreement is a well-established principle in domestic legal systems and international frameworks. In an era characterised by an immense volume of transactions, conducted by business entities on a global scale, it has become the norm for parties to include in their agreement clauses that stipulate the jurisdiction or venue for resolving potential disputes.[1] Ex-ante agreements regarding the appropriate venue for dispute resolution have their advantages. They notably contribute to legal certainty and predictability, which are two of the core needs of business entities that engage in cross-border activities.[2] Such agreements can potentially mitigate transaction costs by circumventing the need to litigate preliminary jurisdictional issues, thereby saving businesses valuable time and resources.

When parties explicitly choose the court(s) of a state as the appropriate forum for resolving disputes arising from their contractual relationship, such provision is commonly referred to as an express choice of court agreement or express jurisdiction clause. This agreement may be exclusive, non-exclusive, or asymmetric in nature.[3] However, beyond this well-recognised notion of an express jurisdiction

[1]Christian Schulze, "The 2005 Hague Convention on Choice of Court Agreements" (2007) 19 *South African Mercantile Law Journal* 140, 146; ZS Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Routledge, 2014), i.

[2]A Yekini, "The Effectiveness of Foreign Jurisdiction Clauses in Nigeria: An Empirical Inquiry" (2023) 19 *Journal of Private International Law* 67, 71–72; M Keyes and BA Marshall, "Jurisdiction Agreements: Exclusive, Optional and Asymmetrical" (2015) 11 *Journal of Private International Law* 345, 348; R Fentiman, "Legal Risk in International Commercial Disputes", in M Dyson (ed), *Regulating Risk through Private Law* (Intersentia, 2018), 292; RF Frimpong Oppong and SKC Gibbs, "Damages for Breach and Interpretation of Jurisdiction Agreements in Common Law Canada" (2017) 95 *Canada Bar Review* 383, 384.

[3]For a comprehensive exploration of the meaning and distinctions between these types of jurisdiction agreement, see Keyes and Marshall (n 2).

agreement, it has also been suggested that parties might implicitly consent to litigate in a particular forum, even if that forum is not expressly stated in their contract. In other words, they may effectively agree to that venue through their actions or conduct, and the terms of the contract. This alternative arrangement could be referred to as an implied, tacit, implicit, or unexpressed jurisdiction agreement.

There is an abundance of literature on jurisdiction agreements,[4] with most of the relevant scholarly works appearing to assume that these agreements must be explicit. Moreover, what is often considered alongside express jurisdiction agreements is submission by appearance (unconditional appearance) or waiver of the right to contest jurisdiction.[5] However, there is an evident lack of scholarship regarding implied jurisdiction agreements.[6] This observation is supported in the judicial realm, with an English judge (Cockerill J) recently noting "limited authorities"[7] on this subject.[8] To the best of our knowledge, this is the first work devoted to a global comparative perspective on implied jurisdiction agreements in international commercial contracts.

Given the significance of jurisdiction agreements in international commercial contracts, the concept of an implied jurisdiction agreement therefore merits inquiry. This inquiry is necessary, because parties may occasionally neglect to

[4]For English language monographs on the subject of choice of court agreements, see Tang (n 1); M Keyes (ed), *Optional Choice of Court Agreements in Private International Law* (Springer, 2020); A Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2018); M Ahmed, *The Nature and Enforcement of Choice of Court Agreement* (Hart Publishing, 2017); D Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, 3rd edn, 2015); T Hartley, *Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention* (Oxford University Press, 2013); A Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008).

[5]For instance, see M Keyes, "Party Autonomy in Dispute Resolution: Implied Choices and Waiver in the Context of Jurisdiction" [2015] *Japanese Yearbook of Private International Law* 223.

[6]See Tang (n 1). Ch 4.1; A Kennedy and A Moran "Vizcaya Partners Ltd v Picard: Implications for the Recognition and Enforcement of Foreign Judgments at Common Law and Beyond", in S McKibbin and A Kennedy (eds), *The Common Law Jurisprudence of Conflict of Laws* (Hart, 2023), 225–44. A few case notes have also been published in response to the Privy Council's decision in *Vizcaya Partners Ltd v Picard* [2016] UKPC 5. See H Kupelyants, "Implication of Jurisdiction Agreements" (2016) 75 *Cambridge Law Journal* 216; S Lee and C Ford, "Can Submission to the Jurisdiction under the Common Law Be Implied? An Australian Perspective on the Privy Council Decision in Vizcaya Partners" (2016) 2 *Corporate Rescue and Insolvency* 55; M Driscoll, "Common Law Recognition of Foreign Judgments by English and Commonwealth Courts: What Are You Implying?" (2016) 7 *Journal of International Banking and Financial Law (JIBFL)* 396.

[7]*Addax Energy SA v Petro Trade Inc* [2022] EWHC (Comm) 237 [31].

[8]*Ibid*.

explicitly include a jurisdiction clause in their agreements, often due to "inadvertence"[9] or "inexperience".[10]

The central question of this article may be captured as follows: are implied jurisdiction agreements recognised globally, and should they be enforced? In conducting this research, the authors have considered primary sources of law that specifically address the issue of implied jurisdiction agreements across various jurisdictions around the world, including common law, civil law, and mixed legal systems. In addition, this paper incorporates secondary sources, for example, academic works, where pertinent, as well as information gathered from commercial conflict of laws experts across different jurisdictions.

In contrast, this article does not seek to address the concept of submission by appearance or waiver of the right to challenge jurisdiction, as these are not contractual submissions, ie jurisdiction agreements.[11] Moreover, submission by appearance or waiver is globally recognised as a permissible basis for international jurisdiction. Thus, it is not a particularly contentious or topical issue. Furthermore, this article does not discuss the different types of jurisdiction agreements, such as exclusive, optional, or asymmetrical, as these are covered extensively in the existing literature.[12]

Following an evaluation of the legal frameworks in various jurisdictions and considering the perceived complexity and uncertainty of the implication of jurisdiction agreements, this paper advocates for a cautious approach to the permissibility or validity of implied jurisdiction agreements. While acknowledging their potential utility, the authors assert that implied jurisdiction agreements are fundamentally misaligned with the core needs of cross-border business entities and litigants. Consequently, the paper contends that the concept of an implied jurisdiction agreement would lead to unnecessary jurisdictional controversies, both at trial and at the enforcement of judgments stages. Besides, the concept might be a needless distraction from the emerging global consensus on international jurisdiction grounds, as exemplified in the works of the Hague Conference on Private International Law (HCCH).

This article is divided into five parts, including the introduction (Section A) and conclusion. Section B presents the theoretical and conceptual foundations underpinning implied jurisdiction agreements. Section C analyses the validity of implied jurisdiction agreements within various domestic and international instruments. Section D critically evaluates the arguments against the recognition of implied jurisdiction agreements, and section E concludes the paper.

[9]Briggs (n 4), para 4.41.
[10]*Ibid*.
[11]Keyes (n 5).
[12]For instance, see Keyes and Marshall (n 2), 378.

B. Theoretical and conceptual frameworks

1. *Theoretical foundations*

Jurisdictional issues hold inherent importance for both the state and private litigants. As a matter that touches on the very foundation of state sovereignty and the exercise of state powers, each state not only has a vested interest in how it exercises its jurisdictional powers, but also in how the jurisdictional powers of other states might impact its own interests.[13] The same applies to private actors who are likewise deeply affected by these concerns. Within the realm of international commercial disputes, the selection of the dispute resolution forum can significantly influence the substantive outcome of litigation and, as a result, the financial benefits achieved by the parties.

Prominent scholars in the fields of public and private international law (for example, von Mehren, Brilmayer, Michaels, and Whincorp) have expounded on three principal theoretical foundations for the exercise of jurisdiction: power theory, relational theory, and fairness theory.[14] The power theory has its foundations in public international law. As demonstrated in the prominent *Lotus case*,[15] one of the implications of sovereignty is that a state has adjudicatory, prescriptive, and enforcement jurisdiction over its territory, inhabitants, and every incident that occurs within the confines of its territory.[16] Beyond that, the powers of a state are limited.[17] This territorial approach to jurisdiction is one of the most settled questions of private international law. It represents the basis for personal jurisdiction in the US,[18] general jurisdiction premised on domicile in the European Union (EU)[19] and other civil law states, and residence/transient

[13]AT von Mehren, "Adjudicatory Jurisdiction: General Theories Compared and Evaluated" (1983–1984) 6 *Tel Aviv University Studies in Law* 50, 60–61; HS Lewis Jr, "The Forum State Interest Factor in Personal Jurisdiction Adjudication: Home-Court Horses Hauling Constitutional Carts" (1982) 33 *Mercer Law Review* 769, 771–81; L Roorda and C Ryngaert, "Public International Law Constraints on the Exercise of Adjudicatory Jurisdiction in Civil Matters", in S Forlati and P Franzina (eds), *Universal Civil Jurisdiction: Which Way Forward?* (Brill, 2020), 74–98.

[14]von Mehren (n 13); R Michaels, "Two Paradigms of Jurisdiction" (2006) 27 *Michigan Journal of International Law* 1003, 1027–30; R Brilmayer and M Smith "The (Theoretical) Future of Personal Jurisdiction: Issues Left Open by Goodyear Dunlop Tires v Brown and J McIntyre Machinery v Nicastro" (2012) 63 *South Carolina Law Review* 617, 621–27; M Whincorp, "Three Positive Theories of International Jurisdiction" (2000) 24 *Melbourne University Law Review* 379.

[15]*The Lotus Case (France vs Turkey)*, PCIJ, Series A, No 10 (1927).

[16]*Ibid*, paras 46–47.

[17]*Ibid*, para 45.

[18]von Mehren (n 13) 62–73.

[19]F Pocar, Explanatory Report: Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Signed in Lugano on 30 October 2007 [2009] OJ C319/4.

jurisdiction in the common law countries.[20] Power or territorial theory needs no further justifications, as it is less problematic.

The era of globalisation, combined with advancements in transportation, communication, and business platforms, has facilitated seamless cross-border civil and commercial activities. Private actors engage in a multitude of commercial transactions worldwide, which can necessitate holding them accountable for claims in jurisdictions where they do not typically reside. It is in this context that the relational and fairness theories gain significance. The relational theory posits that a litigant can be subjected to a state's jurisdiction, due to their relationship or connection with that state.[21] A relationship of this nature can take various forms, such as conducting business activities in a country, entering into one-time or ongoing contracts, or performing contractual obligations within a country's borders. These limited relationships or interactions give rise to what is commonly referred to as "special jurisdiction" in the private international law scholarship. While the precise extent of the relationship or contact required to establish jurisdiction has been a topic of debate for several decades,[22] this debate is not relevant to the present discussion.

An aspect of the relational theory is the consensual theory, which also intersects with the fairness theory. The consensual theory asserts that a court can exercise jurisdiction over a dispute or litigants if the parties have voluntarily chosen that court to resolve their dispute.[23] This aligns with the principle of party autonomy, which is one of the cardinal principles of commercial law. Consent can be established through a contractual agreement made prior to the dispute. By agreeing to resolve a dispute in a specific forum, a litigant establishes a relationship with that jurisdiction, becoming answerable to the court's summons regarding claims that fall within the scope of the contract. Apart from the relational aspect, allowing a chosen court to exercise jurisdiction over parties is considered fair, as it also meets the legitimate and reasonable expectations of the contracting parties. Therefore, if genuine consent can be established expressly or impliedly, it is permissible for a chosen court to exercise jurisdiction over the claim/parties.

Nevertheless, consent-based jurisdiction is not without challenges. One might question why a litigant should be bound by a jurisdiction agreement, if neither resident within that state nor having any aspects of the contract connected to it. For instance, the 2021–2022 English Commercial Court Report revealed that

[20]Lord Lawrence Collins and Jonathan Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (Sweet and Maxwell, 16th edn, 2022), para 11–042.
[21]Michaels (n 14), 1082.
[22]See Linda Silberman, "Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention be Stalled" (2002) 52 *DePaul Law Review* 319; T Monestier, "(Still) A 'Real and Substantial' Mess: The Law of Jurisdiction in Canada" (2013) 36 *Fordham International Law Journal* 396, 464.
[23]Michaels (n 14), 1029; von Mehren (n 13) 1138.

approximately 69% of the cases adjudicated by the Court that particular year were non-domestic and lacked any substantial connection to the UK, apart from the customary inclusion of English law and jurisdiction clauses.[24] The fairness theory provides a reasonable response to this dilemma. Parties may have valid reasons for choosing a foreign court, such as the expertise and efficiency of the procedures, the global enforceability of the foreign court's decisions, or the availability of assets within the chosen jurisdiction, among other considerations.[25] In the absence of any vitiating factors or overriding mandatory policies, the appropriate legal approach is to uphold and facilitate the parties' contractual expectations. As rightly noted by Brilmayer and Smith, a "genuine consent to an arrangement justifies enforcing that arrangement".[26]

Another challenge associated with the consent-based approach is the issue of the "semantic content" of consent, as described by Brilmayer and Smith.[27] While this might present no issues in cases where the parties have explicitly agreed to a chosen court, it can become particularly problematic when the express terms of the agreement are ambiguous or if the concept of an implied jurisdiction agreement is introduced. Determining which actions or circumstances constitute valid consent to jurisdiction becomes an onerous task, as subsequent sections of this paper will demonstrate.

2. *Conceptual clarification*

Jurisdiction is a threshold matter that courts are often invited to determine before delving into substantive issues. It is indisputable that no matter how well-conducted the proceedings, they are nullified where a court lacks jurisdiction. This is especially important for cross-border litigants, who may often need to present judgments from foreign proceedings before courts of other states for enforcement. Consequently, one of the foremost (and very often crucial) issues to be examined concerns the jurisdiction of foreign courts. If the court addressed concludes that the foreign court lacks jurisdiction to entertain the proceedings (in accordance with the norms of indirect jurisdiction of the court addressed), the foreign judgment is denied recognition and will not be enforceable. This underscores why legal certainty and predictability in jurisdictional matters are of immense value to international commercial contracts.

[24]Courts and Tribunals Judiciary Business and Property Courts, The Commercial Court Report 2021–2022 (Including the Admiralty Court Report), March 2023 <https://www.judiciary.uk/wp-content/uploads/2023/04/14.244_JO_Commercial_Court_Report_WEB.pdf> accessed 28 May 2023. See also L Merrett, "Orally Agreed Jurisdiction Agreements under the Brussels I Regulation Recast" (2018) 77 *Cambridge Law Journal* 472, 472.
[25]A Yekini, *The Hague Judgments Convention and Commonwealth Model Law: A Pragmatic Perspective* (Hart Publishing, 2021), 170.
[26]Brilmayer and Smith (n 14), 621.
[27]*Ibid*.

Litigants employ various strategies to mitigate the potential for the non-enforcement of contracts. One such approach is prior agreement over the choice of venue. Jurisdictional agreements are often in writing but may be agreed orally.[28] Express jurisdiction agreements are the easiest way in which parties can clearly demonstrate consent to submit to the jurisdiction of a specified court. Several English court decisions hold that an agreement to submit must be express and cannot be implied.[29] However, even when explicit, these terms can face interpretative problems, wherein courts are invited to infer that the parties' choice implicitly refers to some other court, or to extend the scope of the agreement to cover closely related contracts that contain no explicit jurisdiction agreement. These scenarios present an avenue for establishing an implied jurisdiction agreement within the context of express agreements. For instance, in a recent Hungarian case, the parties had chosen the Municipal Court of Szolnok as the forum for resolving their contractual dispute. However, the Claimant filed an action at the Regional Court of Szolnok because the monetary value of the claim exceeded the jurisdictional limit of the Municipal Court. The Defendant objected to the jurisdiction of the Regional Court, arguing that it was not the court chosen by the parties. The trial court and the Court of Appeal reasoned that the parties' agreement demonstrated their intention to opt for any suitable court within the Hungarian court system. This decision was then upheld by the Supreme Court.[30] Other examples include cases where a clause in a facility agreement is construed to implicitly cover a dispute under a comfort letter[31] and a jurisdiction clause in a purchase agreement implicitly extends to a dispute under a representation letter, due to the close links between these transactions.[32]

From a conceptual standpoint, it is conceivable that parties may implicitly agree to submit to the jurisdiction of a particular court, and this tacit consent

[28]See Merrett (n 24), 473, discussing the CJEU's decision in Case C-221/84 *Berghoefer GmbH & Co KG v ASA*, EU:C:1985:337.

[29]*Vogel v R & A Kohnstamm Ltd* [1973] QB 133; *Singh v Rajah of Faridkote* [1894] AC 670; *Emanuel v Symon* [1908] 1 KB 302.

[30]Case number: Gfv VII 30 382/2018/8. For a summary of the Case, see R Schmidt, "Can an Inapplicable Choice-of-court Clause Be Regarded as a Tacit Jurisdiction Agreement?" <https://www.lexology.com/commentary/litigation/hungary/smartlegal-schmidt-partners/can-an-inapplicable-choice-of-court-clause-be-regarded-as-a-tacit-jurisdiction-agreement> accessed 10 June 2023.

[31]*Etihad Airways PJSC v Flöther* [2019] EWHC 3107 (Comm) (High Court) [143–144]. Cf *Axis Corporate Capital UK II Ltd v Absa Group Ltd* [2021] EWHC 861 (Comm) [49], [50–62].

[32]*Cinnamon European Structured Credit Master Fund v Banco Commercial Portugues SA* [2009] EWHC 3381 (Ch) [37–38]. Cf *Axis Corporate* (n 31). A similar position applies in the Canadian courts: *Instrument Concepts-Sensor Software Inc v Geokinetics Acquisition Co,* 2012 NSSC 62, at para 22, 313 NSR (2d) 200; *Red Seal Tours Inc v Occidental Hotels Management BV,* 2007 ONCA 620, at para 4, 284 DLR (4th) 702. See further, Oppong and Gibbs (n 2), 406–9 for an analysis of the Canadian cases. See also for the Netherlands: Amsterdam District Court, 23 August 2017, EN:RBAMS:2017:6235 [4.5–4.7].

can be inferred from the parties' conduct. Such implications can emerge from situations where the parties are deemed to have selected a particular court, based on the unique circumstances of the case. Given the complex nature of implied jurisdiction agreements, the difficult task is to determine how to identify the acceptable circumstances that would give rise to their existence.[33] Nonetheless, precedents from various jurisdictions offer some guidance on conduct that might constitute unexpressed consent to a jurisdiction agreement. In the US case of *Craig v Brown Root Inc,* an agreement was implied when an arbitration agreement was sent to the employee's home address but not returned by that employee, despite the latter's protestations that the agreement had not been received.[34] The Court concluded that the employee's continued employment should be deemed as acceptance of the agreement. While this case concerned an arbitration agreement, the underlying principle could be applied to implied jurisdiction agreements. Another good example is *SpA Iveco Fiat v Van Hool NV*,[35] where a written agreement containing a jurisdiction clause had lapsed (and was not renewed by the parties). However, the agreement continued to serve as the legal basis for the parties' contractual relationship. Any subsequent contract could therefore constitute a tacit renewal of the contract, including its jurisdictional clause. The consequence of this decision might be to permit the implication of any type of jurisdiction agreement (such as exclusive, optional, or asymmetric agreements).

Lord Collins cited several cases in *Vizcaya Partners Ltd v Picard & Anor (Gibraltar)*[36] to illustrate other circumstances of an implicit jurisdiction agreement. These included *Blohn v Desser*,[37] *Vallee v Dumergue*[38] and *Bank of Australasia v Harding*.[39] *Blohn* illustrates that by conducting business through a partnership in a foreign country and maintaining a registered address in the public register, a judgment debtor had implicitly agreed with anyone who dealt with the firm based on the representations or entries in the public register to submit to the jurisdiction of the courts of that country.[40] In *Vallee*, an election of the domicile at which parties may be notified of proceedings was deemed to constitute an implied jurisdiction agreement. *Bank of Australasia* presents another situation, where a company promoting legislation that permits an action in the relevant country could be deemed to constitute implied submission. The propriety of these circumstances will be discussed in Section C of this paper.

[33]Kennedy and Moran (n 6) 239–40.
[34]84 Cal App 4th 416 (Cal Ct App 2000).
[35]Case 313/85, EU:C:1986:423.
[36]*Vizcaya* (n 6) [32–58]
[37][1962] 2 QB 116. This decision was disapproved in *Vogel* (n 29). Lord Collins equally noted in *Vizcaya* (n 6) that it was wrongly decided, para 58.
[38](1849) 4 Exch 290.
[39](1850) 137 ER 1052.
[40](n 37) [123–24].

Other examples of what may be regarded as an implicit jurisdiction agreement include parties establishing through trade usages or an established course of dealing that a specific jurisdiction agreement has always governed their transactions, whereupon the parties would be estopped from denying the existence of that agreement.

C. Enforceability of implied jurisdiction agreements: a comparative assessment

Jurisdiction agreements are a notable source of international commercial disputes, due to their frequent use in cross-border commercial transactions as a means of minimising or allocating transactional risks. They may be governed by international conventions such as the 2005 Hague Convention on Choice of Court Agreements, or supranational or regional instruments like Brussels Ia[41] or the Lugano Convention,[42] or national laws. Given their nature as *sui generis* contractual terms,[43] courts are tasked with a dual inquiry when dealing with jurisdiction agreements. Firstly, they must ascertain the existence of a valid jurisdiction agreement between the parties. Secondly, they will need to delve into the potential for an implicit agreement: a complex analysis that hinges upon the terms of the contract, an evaluation of the parties' conduct and the surrounding circumstances. These two inquiries throw up typical private international law questions over the choice of the applicable law.

In this context, the law governing the validity of an implied jurisdiction agreement is of crucial importance. An implied jurisdiction agreement must be valid in its form and substance. The form that an implied jurisdiction agreement is required to take is an issue of formal validity, such as whether such agreements must be in writing, evidenced in writing, or require a signature. The substantive validity of an implied jurisdiction agreement concerns the issue, *inter alia,* of existence of consent, fraud, mistake, misrepresentation, duress, and lack of capacity. However, the distinction between formalities and substance can be difficult to appreciate in practice.[44]

[41]Council Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 [2012] OJ L351/1.

[42]Convention of October 2007 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 2009 L147/5).

[43]This is because based on the principle of separability, a jurisdiction agreement is independent of the other parts of the contract. This principle of separability is endorsed in Art 25(5) of Brussels Ia and Art 3(d) of the Hague Choice of Court Convention 2005. In addition, some Nigerian Court of Appeal Judges also treat foreign jurisdiction agreements as an aspect of public law (see *TOF Energy Co Ltd & Ors v. Worldpay LLC & Anor* (2022) LPELR-57462(CA) 42 (Affen JCA); *Dazhia & Anor v. Spaceworld International Airline (Nig) Ltd* (2022) LPELR-59309(CA) 22 (Affen JCA).

[44]For example, the CJEU has held that under Art 25(1) of Brussels Ia, the requirements as to form imposed by that provision serve the purpose of establishing the existence of

The 2005 Hague Convention on Choice of Court Agreements, Brussels Ia and the Lugano Convention, contain autonomous provisions for determining the law applicable to the validity of a jurisdiction agreement. However, domestic conflict of law rules apply to determine the law applicable to jurisdiction agreements in countries that are not parties to the 2005 Hague Convention on Choice of Court Agreements, Brussels Ia and the Lugano Convention, or situations where these instruments are inapplicable in the countries that are parties to them.

It is important to note that an implied jurisdiction agreement will not contain an explicit applicable law that governs such an agreement. Indeed, it will be absurd to have an express applicable law to the jurisdiction agreement, without having an express jurisdiction agreement. Moreover, in the global community, choice of law in international, regional and supranational instruments, exclude from the scope of their operation, the law applicable to forum selection agreements.[45] In other words, there is no uniform choice of law instrument that provides for determining the law that governs a jurisdiction agreement (express or implied). For example, although England still applies the Rome I Regulation in its domestic PIL rules, the common law rules (and not Rome I) determine the law applicable to choice of court agreements (including a putative implied jurisdiction agreement).[46]

The following sub-sections will address the validity of implied jurisdiction agreements within international frameworks and the domestic laws of certain common and civil law countries.

1. *International instruments*

(a) *Hague Choice of Court Convention 2005*

The Hague Choice of Court Convention 2005 ("the Convention") regulates the exclusive choice of court agreements in the global sphere. The Convention is

consensus between the parties, and this must be clearly and precisely demonstrated – C-519/19, *Delayfix*, EU:C:2020:933 [41]. See also L Merrett, "Article 23 of Brussels I Regulation: A Comprehensive Code for Jurisdiction Agreements?" (2009) 58 *International and Comparative Law Quarterly* 545–64; SP Camilleri, "Article 23: Formal Validity, Material Validity or Both?" (2011) 7 *Journal of Private International Law* 297–320.

[45]Art 1(3)(b) of the Hague Principles on Choice of Law in International Commercial Contracts 2015 ("Hague Principles"); Art 1(2)(e) of the Rome I Regulation; Art 1(3) of the Envisaged Draft African Principles on Choice of Law for International Commercial Contracts 2020 ("African Principles"); Art 575(5) of the OHADA Preliminary Draft of the Uniform Act on the Law of Obligations 2015 ("OHADA Preliminary Draft"); Art 3.1 (3)(b) Asian Principles on Private International Law 2018 ("Asian Principles"); and Part 5(V)(D) of the Guide of the Organization of American States on the Applicable Law to International Commercial Contracts 2019 ("the OAS Guide").

[46]Art 1(2)(e), Rome I Regulation – Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations [2008] OJ L177/6 ("Rome I Regulation") – previously the Convention on the Law Applicable to Contractual Obligations [1980] OJ L266 ("Rome Convention").

applicable in the EU (for 26 of its Member States by approval of the EU and in Denmark by its own accession), UK, Montenegro, Mexico, Singapore, and Ukraine.[47] It has also been signed, but not yet ratified, by the US, China, Israel, and North Macedonia. Several countries have likewise shown an interest in becoming a contracting state.[48]

Articles 3(c) and 5(1) of the Convention deal with formal and substantive validity, respectively. Article 5(1) states that:

> The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.

This provision takes no position on the question of the substantive validity of jurisdictional agreements. Rather, such a question is to be determined by the chosen court. This suggests that implied jurisdiction agreements are potentially enforceable if the chosen court decides that they are valid under its law, including its private international law rules. Similarly, even if such question is before a non-chosen court, Article 6(a) of the convention prescribes that the law of the chosen court, including its private international law rules, should be applicable.[49] According to the Explanatory Report, the question of substantive validity is limited to "substantive (not formal) grounds of invalidity".[50] Such grounds include lack of capacity, fraud, mistake, amongst others.

Article 3(c) provides an autonomous approach to formal validity, stating that:

> an exclusive choice of court agreement must be concluded or documented -
> *i)* in writing; or
> *ii)* by any other means of communication which renders information accessible so as to be usable for subsequent reference

While commenting on this Article 3(c), Paul Beaumont,[51] and Adrian Briggs[52] are of the view that it requires writing or its technological equivalent, such as

[47]See Status Table at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> accessed 28 May 2023.
[48]These include Australia, Brazil, New Zealand, Tunisia, and Argentina, inter alia. See Yekini (n 25) 162.
[49]See T Hartley and M Dogauchi, Explanatory Report on the Convention of 30 June 2005 on Choice of Court Agreements (HCCH Publications, 2005) paras 125–26; P Beaumont and M Keyes, "Choice of Court Agreements", in P Beaumont and J Holliday (eds), *A Guide to Global Private International Law* (Hart Publishing, 2022), 393, 399.
[50]*Ibid*.
[51]P Beaumont, "Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status" (2009) 5 *Journal of Private International Law* 125, 139.
[52]A Briggs, *Civil Jurisdiction and Judgments* (Informa Law, 7th edn, 2021), para 25.06.

an email or electronic notification, to create a choice of court agreement or to document an oral choice of court agreement. This is also the position adopted in the Explanatory Report, which suggests that a requirement for the documentation of a choice of court agreement is needed for it to fall within the scope of the Convention.[53] While case law on the HCCH Convention is still emerging and no decision appears to have been handed down under this section, the present authors corroborate the view that the Convention is limited purely to express jurisdiction agreements, considering that the Convention's overall objective is to provide legal certainty in international commercial litigation. This is reinforced by the explicit requirement for the written form or its functional equivalent in Article 3(c)(ii), which highlights the imperative for parties to demonstrate their agreed-upon terms with a high degree of certainty. Consequently, if this interpretation is correct, it is highly likely that the courts will preclude the possibility of implying jurisdiction agreements where the parties seek to infer an agreement based on their conduct.

From the foregoing, it becomes evident that if the Convention applies, an implied jurisdiction agreement is not ordinarily permissible, because the choice of court agreement must be made or documented in a written form. This position is further supported by Article 3 (c) of the Convention that requires the parties to "designate" the chosen court. It is hard to imagine such a designation can be implied.

(b) *Hague Judgments Convention 2019*

Article 5(1)(m) of the Hague Judgments Convention 2019 provides an indirect jurisdiction ground for a chosen court in a non-exclusive jurisdiction agreement. The convention stipulates that the court must be "designated in an agreement concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference". Unlike the Hague Choice of Court Convention 2005, the 2019 Convention solely addresses the question of formal validity, not substantive validity. The Explanatory Report is equally silent on the issue of substantive validity.[54] However, Beaumont has suggested that the requested court is free to assess the

[53]Hartley and Dogauchi, (n 49) paras 13 and 111. See also T Kruger, "The 20th Session of the Hague Conference: A New Choice of Court Convention and the Issue of EC Membership" (2006) 55 *International and Comparative Law Quarterly* 447, 449.

[54]F Garcimartín and G Saumier, Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2020) para 124, 218; P Beaumont, "The Hague System for Choice of Court Agreements: Relationship of the HCCH 2019 Judgments Convention to the HCCH 2005 Convention on Choice of Court Agreements", in M Weller and others (eds), *The HCCH 2019 Judgments Convention: Cornerstones, Prospects, Outlook* (Hart Publishing, 2023), 125, 131.

question of substantive validity of jurisdiction agreements under its laws, including its private international law rules.[55]

We agree with Beaumont that the requirement of formal validity is autonomous, and national laws are not relevant in this context. States are free to decide issues related to substantive validity, such as an assessment of the existence of consent, under national laws. This indicates that concerning the question of formal validity, the analysis from the Hague Choice of Court Convention 2005 applies since the formality requirements are the same. Thus, implied jurisdiction agreements would not meet the formality requirements under Article 5(1)(m) of the 2019 convention. In addition, since a requested court is required to assess the ground upon which a foreign court assumed jurisdiction, it would be challenging for the requested court to confirm jurisdiction based on Article 5(1)(m) where the choice of court agreement is not expressed or documented in writing.

This interpretation aligns with the overarching objective of the 2019 Convention, which aims to establish a "legal regime that provides greater predictability and certainty in relation to the global circulation of foreign judgments".[56] The Explanatory Report of the 2019 Convention further supports this notion by asserting that the convention is designed to enforce judgments in "largely uncontroversial circumstance".[57] This leaves no doubt that implied jurisdiction agreements could not have been envisaged by the drafters of the convention due to the controversies surrounding the implication of jurisdiction agreements in general.

(c) *The EU and some European free trade area states*

Brussels Ia regulates the jurisdiction and enforcement of foreign judgments in civil and commercial matters between EU Member States. The Lugano Convention regulates the jurisdiction and enforcement of foreign judgments in civil and commercial matters between the EU Member States (including Denmark by exercise of its own sovereign agreement), Switzerland, Norway, and Iceland. Article 25 of Brussels Ia and Article 23 of the Lugano Convention (the Brussels-Lugano instruments) both regulate jurisdiction agreements. The key provisions of these two Articles are identical on the question of the validity of jurisdiction agreements.[58] They both provide under the three limbs of paragraph 1 that a jurisdiction agreement is formally valid if it is:

[55]Beaumont (n 54) 131, while suggesting that the rule on substantive validity in the 2005 Convention should be made best practice in the 2019 Convention in the future.
[56]See the Preamble to the text of the Hague Judgments Convention 2019.
[57]Garcimartín and Saumier (n 54) para 21.
[58]Some scholars have observed that the general difference between Art 25 of Brussels Ia and Art 23 of the Lugano Convention is not significant. See Briggs (n 52), para 12.01; Hartley (n 4), paras 7.27 and 7.95; R Fentiman, *International Commercial Litigation* (Oxford University Press, 2nd edn, 2015) para 2.118.

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

The Brussels-Lugano approach is influenced by the Hague Choice of Court Convention 2005, wherein the only noticeable differences are the acceptance of practices between the parties and of international trade usages as the source of a jurisdiction agreement. It has been suggested that international trade usages were included in the Brussels-Lugano instruments to avoid impeding well-established international commercial practices.[59] Nevertheless, the provision was drafted in such a way as to presume a consensus between parties.[60] Geert Van Calster, citing *Colzani*[61] and *Kaefer Aislamientos SA De CV v AMS Drilling Mexico SA De CV & Ors*[62] notes that while the Brussels-Lugano instruments seek to avoid being overly formalistic in their requirements, consent must nevertheless be clearly and precisely demonstrated.[63] In other words, a consensus must be established in fact through one of the three means listed. Van Calster further notes that no CJEU authority would go as far as drawing implicit jurisdiction agreements solely from the conduct of the parties. Relying on *Colzani*, he concludes that the CJEU seems to suggest that the absence of writing (and perhaps, no actual knowledge of the existence of the clause) means that there is no compliance with the formal validity requirements. Concurring with this line of CJEU authorities mentioned above, an English court in *Pan Ocean Co. Ltd v China-Base Group Co. Ltd & Anor*[64] also dismissed an argument asserting that an English jurisdiction agreement solely implied from the conduct of the parties would suffice for compliance with Article 25 of Brussels Ia. Hayk Kupelyants also shares the view that implied jurisdiction agreements may violate the writing requirement and the principle of certainty underpinning the Brussels-Lugano instruments.[65] Thus, while the CJEU has not issued a direct ruling on whether implied jurisdiction agreements are permitted under the Brussels-Lugano regime, the correct and authoritative view is that such agreements are clearly not valid due to the requirement that consent must be precisely and clearly demonstrated in writing under Article 25(1)(a).

[59]Jenard's Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [1979], OJ C59/37; G van Calster, *European Private International Law: Commercial Litigation in the EU* (Hart Publishing, 3rd edn, 2021), 132–33.
[60]Van Calster, *ibid* 132.
[61]Case 24/76, EU:C:1976:177.
[62][2019] EWCA Civ 10.
[63]Van Calster (n 59) 133.
[64][2019] EWHC 982 (Comm), [32–33].
[65]Kupelyants (n 6), 219.

However, Briggs,[66] Ulrich Magnus,[67] and Francisco Garcimartin[68] support the position that an implied jurisdiction agreement, in the absence of writing, may be valid under the second and third limbs of the provision on formal validity, provided that consent is clearly established between the parties.[69] In this connection, the above authors opine that if the parties have had a previous course of dealing or one determined by international usages or commerce, or where they consistently provide for a jurisdiction agreement but omit it in a particular transaction, a court should be able to imply a jurisdiction agreement in such instances. One case that is often cited to illustrate this point is *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL*.[70] In the above, MSG, a transport cooperative based in Würzburg, sued the Defendant in Germany for damage caused to a vessel chartered to the Defendant. The Defendant was based in France and the vessel was mainly operated on the Rhine River in France. After an oral agreement on the hire of the vessel, MSG sent a commercial letter of confirmation to the Defendant, containing a jurisdiction clause in favour of the courts of Würzburg. Invoices from MSG also make reference to the jurisdiction. The Defendant subsequently paid these invoices, neither challenging the commercial letter of confirmation, nor the invoices. When the Defendant subsequently challenged the jurisdiction of the German courts, the following two questions were put to the CJEU:

> (a) Can an agreement conferring jurisdiction in international trade or commerce in accordance with the third hypothesis mentioned in the second sentence of the first paragraph of Article 17 of the 1978 version of the Brussels Convention also be concluded by one party's not contradicting a commercial letter of confirmation containing a pre-printed reference to the courts of the consignors' place of business having sole jurisdiction or must there have been in every case prior consensus with regard to the content of the letter of confirmation?
>
> (b) Is it sufficient in order for there to be an agreement conferring jurisdiction within the meaning of the aforesaid provision if the invoices sent by one party all contain a reference to the courts of the carrier's place of business having sole jurisdiction and

[66]Briggs (n 4), paras 7.61–7.64.
[67]U Magnus, "Prorogation of Jurisdiction", in U Magnus and P Mankowski (eds), *Brussels Ibis – Commentary (European Commentaries on Private International Law)* (Otto Schmidt, 2nd edn, 2022) paras 103, 109.
[68]F Garcimartin, "Prorogation of Jurisdiction", in A Dickinson and E Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press, 2016), paras 9.48, 9.51.
[69]Compare the position of Advocate General Bot who opined in Case C-366/13, *Profit Investment SIM SpA v Stefano Ossi and Others*, EU:C:2015:274, [42] that "It therefore follows clearly from that case-law that consent to a prorogation of jurisdiction clause cannot simply be tacit or inferred from the circumstances [under Art 23(1)(a) of Brussels I Regulation and Art 25(1)(a) of Brussels Ia]. *Other than in the cases provided for in Article 23(1)(b) and (c) of Regulation No 44/2001 [now Article 25(1)(b) and (c)of Brussels Ia]*, the effectiveness of such a clause is, on the contrary, subject to express consent given by using one of the formal modes of expression provided for in Article 23(1)(a) and (2) of that regulation." (Emphasis and square brackets supplied in the quotation).
[70]Case C-106/95 EU:C:1997:70.

to the conditions of the bill of lading used by the carrier which also stipulate the courts of the same place as having jurisdiction, and the other party invariably paid the invoices without objecting, or is prior consensus also required in this respect?

The CJEU ruled as follows:

19 Thus, in the light of the amendment made to Article 17 by the 1978 Accession Convention, consensus on the part of the contracting parties as to a jurisdiction clause is presumed to exist where commercial practices in the relevant branch of international trade or commerce exist in this regard of which the parties are or ought to have been aware.

20 It must therefore be considered that the fact that one of the parties to the contract did not react or remained silent in the face of a commercial letter of confirmation from the other party containing a pre-printed reference to the courts having jurisdiction and that one of the parties repeatedly paid without objection invoices issued by the other party containing a similar reference may be deemed to constitute consent to the jurisdiction clause in issue, provided that such conduct is consistent with a practice in force in the area of international trade or commerce in which the parties in question are operating and the parties are or ought to have been aware of that practice.

21 Whilst it is for the national court to determine whether the contract in question comes under the head of international trade or commerce and to find whether there was a practice in the branch of international trade or commerce in which the parties are operating and whether they were aware or are presumed to have been aware of that practice, the Court should nevertheless indicate the objective evidence which is needed in order to make such a determination.

…

24 Lastly, actual or presumptive awareness of such practice on the part of the parties to a contract is made out where, in particular, they had previously had commercial or trade relations between themselves or with other parties operating in the sector in question or where, in that sector, a particular course of conduct is sufficiently well known because it is generally and regularly followed when a particular type of contract is concluded, with the result that it may be regarded as being a consolidated practice.[71]

Paragraph 24 of the CJEU decision in *MSG* indicates that consent can be actual or presumptive (ie implied), deducible from the established practice between the parties or a "consolidated practice" in the trading sector. The legacy of *Colzani* is still discernible here. Consensus is only implied if it would be contrary to good faith to argue otherwise. In other words, it must be perfectly evident that the parties had actually consented to the jurisdiction of a certain court(s) but failed to express it in the circumstance at hand.

The guideline from *Galeries Segoura SPRL v Société Rahim Bonakdarian*[72] indicates that such an agreement must form part of a continuing trading relationship

[71] *Ibid*.
[72] Case 25/76 EU:C:1976:178.

between the parties. The UNCITRAL Digest on Contracts for the International Sale of Goods (CISG) offers a similar account concerning Article 9(1) of CISG, which deals with trade usages and practices. Some national courts have interpreted Article 9 to mean that for trade usages to be binding, the parties must have established a relationship for a period of time, and the specific trade practice at issue should have occurred in several contracts, to the extent that the parties can assume it would always be observed.[73] As Magnus notes, it would be necessary to establish that the parties have had an original consensus and traded severally on that basis over a period of time.[74] A practical example might be *OT Africa Line Ltd v Hijazy & Anor,* where the Claimant shipowners successfully established through uncontroverted evidence that the standard terms of a bill of lading, including its jurisdictional clause in favour of the English courts, had been extensively used between the shipowner and the Defendants, who were the shippers.[75] The Court had no difficulty in accepting that the Defendants had sufficient knowledge/notice of the clause, therefore holding that it constituted an established practice between the parties under Article 17 of the Brussels Convention[76] (now 25 of Brussels Ia). In the above case, the agreement is express (and arguing under the second limb of Article 17 should have been superfluous). However, the Court would have been ready to imply the jurisdiction agreement, even if the parties had omitted to state it in this instance. Ultimately, whether a practice is sufficiently established between the parties is a question of fact to be decided by evidence.

From the foregoing, it is evident that *Colzani* and other similar CJEU cases strongly suggest that consent should be genuine and clearly established in fact. In several cases where a party had sought to extend an express jurisdiction agreement in contract A to contract B without the latter containing any express jurisdiction agreement, or where a party had attempted to incorporate a jurisdiction agreement that was contained in the general terms and conditions, *Colzani* has been a stumbling block to successful extension or incorporation. This is due to the high threshold of consent that must be established. In other words, a party may only be bound by a jurisdiction agreement if the clause is contained in a contract entered into by that party (thus, evidence in writing). Alternatively, the existence of a jurisdiction clause must be "actually" communicated to a party or explicitly referenced in a document agreed by that party, as demonstrated in other cases.[77] In this regard, if there is no established course of dealing or practices between parties, consent can hardly be assumed or implied under the Brussels-Lugano Conventions.

[73]United Nations, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (Secretariat, UNCITRAL, 2016), 64–65.
[74]Magnus (n 67) para 109.
[75][2001] CLC 148 [59–60].
[76]Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, as amended [1998] OJ C27/1.
[77]C-366/13 *Profit Investment SIM SpA v Stefano Ossi and Others* EU:C:2016:282; C-222/15 *Hoszig* EU:C:2016:525.

2. *National laws*

(a) *Civil law countries*

The national law requirement in most of the civil jurisdictions considered is similar to the first limb of the Brussels-Lugano Conventions discussed above. While most of these countries require the written form, a few do not. The underlying theme in these national legal frameworks is that the formal validity is determined by the law of the forum,[78] For instance, Article 63(1) of the Brazilian Code prescribes that Brazilian courts would only enforce a jurisdiction agreement "when it is stated in a written document and is expressly stated in relation to a specific legal transaction".[79] Essentially, if a jurisdiction agreement cannot overcome the formality hurdle, the question of substantive validity may not arise. However, adopting a *lex fori* approach as a choice of law rule for jurisdiction agreements can result in litigants engaging in forum shopping, such as seeking a jurisdiction that is more favourable to implied jurisdiction agreements. This can, in turn, create uncertainty.

For non-EU civil law jurisdictions such as Indonesia,[80] Japan,[81] South Korea,[82] Vietnam,[83] Cambodia,[84] Tunisia,[85] Angola,[86] and Mozambique,[87] jurisdiction agreements must be in writing with respect to a specific legal relationship.

[78]See the text accompanying footnotes 79–110.
[79]Brazilian Code of Civil Procedure, 2015. See also Art 25 of the Code.
[80]Art 24 of the Indonesian Civil Code, cited in A Kusumadara, "Indonesia", in A Reyes and W Lui (eds), *Direct Jurisdiction-Asian Perspectives* (Hart Publishing, 2021), 254.
[81]Art 3-7(2) of Japan's Code of Civil Procedure, cited in K Nishioka, "Japan", in Reyes and Lui *ibid* 85, 90; K Takahashi, "Japan: Quests for Equilibrium and Certainty", in Keyes (n 4), 261, 264. See also K Takahashi, "Law Applicable to Choice-of-Court Agreements" 58 [2015] *Japanese Yearbook of International Law*, 384–96.
[82]Art 29 of the South Korean Civil Procedure Act. Cited in S Chun, "Korea", in Reyes and Lui *ibid* 111, 119.
[83]Art 3(2)(c) of the Vietnamese Draft Resolution 2009. Cited in N Trinh, "Vietnam", in Reyes and Lui *ibid* 183, 188, 190.
[84]Art 13 of the Cambodian Code of Civil Procedure. Cited in N Teremura, "Cambodia", in Reyes and Lui *ibid* 201, 206.
[85]In Tunisian Supreme Court ruling No 77286 of 1 July 2020, the Court refused to enforce a choice-of-court agreement that was included in an exclusive distribution contract in favour of the Swiss courts, because the agreement was not explicitly consigned in writing (although it was mentioned in some documents exchanged between the parties). In addition, the Court considered that the submission by the Defendant (a Swiss company) of some arguments on the merits, before challenging the jurisdiction of the Tunisian courts, was considered as the Defendant Company's "acceptance" to be subject to the jurisdiction of the Tunisian courts. The applicable statute in Tunisia is Art 4 and 5(2) of the Tunisian Code of Private International Law 1988, cited in B Elbalti, "The Jurisdiction of Foreign Courts and the Enforcement of their Judgments in Tunisia: A Need for Reconsideration" (2012) 8 *Journal of Private International Law* 195, 222.
[86]Angolan Code of Civil Procedure 1961, s 99(5).
[87]Mozambique Code of Civil Procedure 2005, ss 99(3)(c) and 100(2).

In China,[88] Macau,[89] Turkey,[90] Taiwan,[91] and Switzerland,[92] jurisdiction agreements must be in writing or evidenced in writing (for example, email, fax), or a technological equivalent of writing. The laws of the Dubai International Financial Courts (DIFC) specify that the parties could elect and/or agree in writing that the DIFC Courts may hear any civil or commercial dispute between them, provided "such agreement is made pursuant to specific, clear and express provisions".[93] Nevertheless, the Dubai courts seem to have adopted a relaxed approach to the requirement of express agreements, as demonstrated when they held that a jurisdiction agreement was formed because the issuance of a purchase order and payment of invoices constituted implied acceptance of the general terms and conditions within the umbrella agreement.[94]

Where Brussels Ia and the Lugano Convention are inapplicable, in many EU Member States such as Austria,[95] Poland,[96] Hungary,[97] Sweden,[98] Slovenia,[99]

[88]SPC, "Zuigao Renmin Fayuan Guanyu Shiyong 'Zhonghua Renmin Gongheguo Minshi Susongfa' de Jieshi [Interpretation of the SPC on the Application of the PRC Civil Procedure Law]" ("2015 Opinion"), art 29; Fa Shi [2015] No 5, art 522. Zhonghua Renmin Gongheguo Hetong Fa [PRC Contract Law], adopted at the Second Session of the Ninth National People's Congress on 15 March 1999 and promulgated by Order No 15 of the President of the PRC on 15 March 1999, cited in S Tang and others, *Conflict of Laws in the People's Republic of China* (Edward Elgar Publishing, 2016), para 3.39. See also Y Gan, "Jurisdiction Agreements in Chinese Conflict of Laws: Searching for Ways to Implement the Hague Convention on Choice of Court Agreements in China" (2018) 14 *Journal of Private International Law* 295, 302, citing s34 of the Chinese Civil Procedure Law and Art 11 of the Chinese Contract Law. See further, G Tu, "The Hague Choice of Court Convention: A Chinese Perspective" (2007) 55 *American Journal of Comparative Law* 347, 356–57.

[89]Macau Code of Civil Procedure 1999, Art 29(4).

[90]Private International Law Code of Turkey, Art 47, cited in ZD Tarman and ME Oba, "Turkey: Optional Choice of Court Agreements", in Keyes (n 4), 409, 413, 415.

[91]Taiwan's Code of Civil Procedure, Art 24, cited in F Li and R-C Chen, "Taiwan", in Reyes and Lui (n 78), 61, 68. See also R-C Chen "Taiwan: Legislation and Practice on Choice of Court Agreements in Taiwan", in Keyes (n 4), 387, 388.

[92]Swiss Code of Civil Procedure 2008, art 17(2) & Swiss Private International Law Act 1987, art 5(1). See generally Swiss Federal Supreme Court decision in Case no. 4A_507/2021.

[93]Art 5(A)(2) of the Judicial Authority Law, Dubai Law No 12 of 2004 (and its amendments), cited in *Marvin v Malik* [2022] DIFC SCT 25, [2022] DIFC CT 254 [7] & [16].

[94]*Marvin* (*ibid*).

[95]Judicature Act (*Jurisdiktionsnorm)* s 104(1) and a long series of case law from the Austrian Supreme Court (OGH 5 Ob 538/94; 8 Ob 621/91; 8 Ob 342/66; 5 Ob 235/63; 5 Ob 189/59; 2 Ob 257/51; 3 Ob 624/50).

[96]Arts 1104(1) & 1105(1) Polish Code of Civil Procedure 1965 (Amendment 2009), and the decision of the Polish Supreme Court dated 23 March 2018, sygnatura: I CSK 363/17.

[97]Hungarian Private International Law Act 2017, s 99(3). This law is worded similarly to Art 25(1) of Brussels Ia and Art 23(1) of the Lugano Convention.

[98]Chapter 10, s16 of the Swedish Code of Judicial Procedure (SFS:1942:740).

[99]Art 69 of the Slovenian Private International Law and Procedure Act 1999.

France,[100] Netherlands,[101] Germany,[102] Portugal,[103] Czech Republic,[104] Bulgaria,[105] Lithuania,[106] Spain,[107] and Greece,[108] the *lex fori* requires jurisdiction agreements to be in writing. In Romania, jurisdiction agreements must likewise be concluded or evidenced in writing,[109] and in Italy, Article 4 of the Italian Statute on Private International Law stipulates that a jurisdiction agreement in commercial contracts must be documented in writing. However, the Italian Supreme Court, drawing inspiration from Article 25(1)(c) of Brussels Ia and relevant CJEU decisions, has adopted the view that the conduct of the parties can serve as an indication of their consent to jurisdiction. Consequently, if this conduct provides sufficient evidence of the parties' agreement over jurisdiction, it may fulfil the requirement of a written agreement, as long as it aligns with the trade usages that prevail in the relevant field.[110]

Notably, Luxembourg[111] and Latvian[112] national laws adopt a distinct approach by not imposing a requirement for a jurisdiction agreement to be in

[100]French Code of Civil Procedure (amended by Ordinance No 2016-131 of 10 February 2016, ratified by Law No 2018-287 of 20 April 2018), s 48. See also Cour de cassation, Civ. 1re, 17 décembre 1985, 84-16.338, *Bull. civ.*, I, p. 354, *Compagnie de signaux et d'entreprises électriques*; Cour de cassation, Com., 30 janvier 1990, 88-10.466, *Bull. civ.*, IV, Nr 26, p. 17: Cour de cassation, Civ. 1re, 13 mai 2020, 18-25.103. *Cf* Paris Court of Appeal, International Chamber of Commerce, 8 December 2020, RG 19/18298,
[101]Dutch Code of Civil Procedure 2002, Art 8(5).
[102]German Code of Civil Procedure (as promulgated on 5 December 2005 (Bundesgesetzblatt [BGBl] – Federal Law Gazette) I, p 3202; 2006 I, p 431; 2007 I, p 1781), last amended by Art 1 of the Act dated 10 October 2013 (Federal Law Gazette I, p 3786) and Book 10 last amended by Art 1 of the Act of 5 October 2021 (Federal Law Gazette I, p 4607). See also M Weller, "Optional Choice of Court Agreements: German National Report", in Keyes (n 4), 215, 220, 227. Notably, in a recent German decision (BGH, 17/10/2019, III ZR 42/19.), it was held that the law governing the main contract would determine the substantive validity of a jurisdiction agreement. The law applicable to a jurisdiction agreement in Germany is thus an open one.
[103]Arts 94(3)(e) & 97(1) of the Portuguese Civil Procedure Code.
[104]Czech Private International Law Act 2012, ss 85–85. See also N Rozehnalova and others, "Czech Republic: The Treatment of Optional and Exclusive Choice of Court Agreements", in Keyes (n 4), 169, 172, 184.
[105]Art 23 of the Bulgarian Private International Law Code (Amended, SG No. 59/2007).
[106]Lithuania Code of Civil Procedure 2002, art 787(2) & 788.
[107]Article 22bis of the "Ley Orgánica del Poder Judicial" ("Organic" (= Fundamental) Law on the Judiciary – my translation.) This law is worded similarly as Art 25(1) of Brussels Ia and Art 23(1) of the Lugano Convention.
[108]Greek Code of Civil Procedure, arts 42 1(2) and 43. Cited in G Panopoulos, "Greece: A Forum Favorable to Optional Choice of Court Agreements", in Keyes (n 4), 245.
[109]Romanian Code of Civil Procedure 2013, art 1068.
[110]Ruling of 17 June 2005 (no 731) and ruling of 14 February 2011 (no 3568).
[111]Luxembourg Code of Civil Procedure (Memorial, Part A, 2018-07-12, No 589, New Code of Civil Procedure, as amended on 26 December 2021), s 18.
[112]Section 30 of the Latvian Code of Civil Procedure 1998, in force on 1 March 1999.

writing. As a result, it is open to question if implied jurisdiction agreements are permitted in such civil law European countries.

(b) *Common law countries*

English common law is widely adopted in the Commonwealth jurisdictions, and decisions of the English courts remain highly persuasive. However, some advanced jurisdictions like Canada, Australia, and Singapore have developed distinct rules that depart from the position of the English courts.[113] The US has historically established a distinct pathway for itself, especially in the area of private international law. For convenience, however, English law will mainly be discussed in this paper, and where necessary, references shall be made to other common law jurisdictions.

The key question often asked by the courts concerns the governing law of the jurisdiction agreement. The validity of the agreement will be determined by that law. Recent English decisions seem to favour the proper law of the main/host contract as the governing law, whereupon the law governing the main contract will determine the validity and existence of, and consent to, a choice of court agreement within that contract.[114] This is also the approach in other common law countries like Singapore[115] and a mixed legal system like South Africa.[116] These common law courts do not draw a precise distinction between formal and substantive validity. However, some scholars oppose this solution. For instance, Kupelyants argues that the existence of an agreement is a question of fact that should be governed by the *lex fori* in English law.[117] Furthermore, the approach of applying the law of the main contract appears to violate the principle of separability of the jurisdiction agreement from the host contract.[118]

[113]See generally JD McClean, "The Contribution of the Hague Conference to the Development of Private International Law in Common Law Countries", *Hague Collected Courses* (Nijhoff, 1992).

[114]*Vizcaya* (n 6), [59–61]; *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38. Again, it should be noted that the law applicable to choice of court agreements is excluded from the Rome I Regulation. Therefore, the common law rules determine the law applicable to the choice of court agreements (including a putative implied jurisdiction agreement). See Art 1(2)(e), Rome I Regulation.

[115]*PT Jaya Putra Kundur Indah v Guthrie Overseas Investments Pte Ltd* [1996] SGHC 285 [62]; A Chong, "Singapore: A Mix of Rules", in Keyes (n 4), 325. 327.

[116]*Blanchard, Krasner & French v Evans* (2002) (4) SA 144 (T) [9] (Cloete J); *MV Spartan-Runner v Jotun-Henry Clark Ltd* (1991) (3) SA 803 (N) (Shearer J); E Schoeman, "South Africa: Time for Reform", in Keyes (n 4), 347, 352.

[117]Kupelyants (n 6), citing cases such as *Sfeir & Co. v National Insurance Co of New Zealand* [1964] 1 Lloyd's Rep 330, 340; *Vogel* (n 29).

[118]Cf K Takahashi, "Putting the Principle of Severability in the Dock: An Analysis in the Context of Choice of Law for Arbitration and Jurisdiction Agreements", in A Dickinson and E Peel (eds), *A Conflict of Laws Companion : Essays in Honour of Adrian Briggs* (Oxford University Press, 2021), 139–74.

Nevertheless, the UK Supreme Court gave a controversial decision in *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb.,*[119] where it ruled that the law of the main contract, if chosen by the parties, governs an arbitration agreement (unless the parties chose another law to govern the arbitration agreement), and if no law is chosen by the parties, the arbitration agreement is governed by the law of the seat of arbitration. While this decision was rendered in the context of arbitration agreements, it is reasonable to extend the same rationale to jurisdiction agreements. Therefore, it can be inferred that the governing law of the main contract also applies to jurisdiction agreements. In cases where no specific choice of law is made, the law of the chosen court governs matters related to validity. This has far-reaching implications, considering that some contracts may not contain a choice of law clause. In this regard, if an English court is chosen, to give an example, it may mean that the validity of the agreement is determined under the common law applicable law rules. If, on the other hand, the court finds that the question is governed by the law of the main contract, which may be a foreign law, then the parties will need to adduce evidence to prove that an agreement might implicitly be reached under the foreign law. If no evidence is presented before the court or foreign law is not proven satisfactorily, common law courts apply the law of the forum.[120] If the law of the chosen court applies, and assuming that this chosen court is a common law court, then the forum law (ie common law) will determine the validity of the agreement. Moreover, the approach of applying the law of the chosen court leads to circularity because in determining implied jurisdiction agreements, the "chosen court" is usually a contested issue.

What then is the common law position on implied jurisdiction agreements? Divergent opinions have been put forward by academics and judges on whether a jurisdiction agreement can be implied or inferred. For instance, the fifteenth edition of Dicey, Morris and Collins[121] held the view that jurisdiction agreements cannot be implied. However, the editors seem to have shifted their position by the 16th edition, following the decision in *Vizcaya.*[122] Moreover, while *Sirdar Gurdyal Singh v The Rajah of Faridkote*[123] holds that such agreements cannot be implied, *Blohn v Desser*[124] would indicate otherwise. This divergence of opinions is inevitable because common law does not prescribe any strict formalities for contracts generally. Since jurisdiction agreements in English common law are considered as contractual terms, in principle, they may be oral, written, express, and implied.

[119](n 114).
[120]*FS Cairo (Nile Plaza) LLC v Brownlie* [2021] UKSC 45 [112, 119].
[121]Lord Collins of Mapesbury and others (eds), *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell, 15th edn, 2012) para 14-079.
[122]Collins and Harris (eds) (n 20), 14-084.
[123][1896] AC 670, 686.
[124](n 37).

The decision, given by Lord Collins, in the Privy Council case, *Vizcaya Partners,* sparked renewed debate on this topic. After conducting a comprehensive examination of the existing academic and judicial authorities, it was concluded that since it is widely recognised that contractual terms may be implied or inferred, "there is no reason in principle why the position should be any different in the case of a contractual agreement or consent to the jurisdiction of a foreign court".[125] In the above case, the Privy Council considered the enforcement of a New York judgment in Gibraltar. Under English common law, residence and submission are the criteria for establishing the international jurisdiction of a foreign court. Because the judgment debtor was neither resident nor present in New York at the time when the New York Court assumed jurisdiction, the judgment creditor argued that a jurisdiction agreement should be implied, due to the parties' express choice of New York law in the contract. However, it was held that although it is theoretically possible to imply submission by contract for the purpose of recognising and enforcing foreign judgments, such an agreement could not be inferred (either under English law or the applicable New York law) simply because the parties had chosen New York law as the proper law of the contract.

Furthermore, Lord Collins instructively notes that "because there has to be an actual agreement, the agreement or contractual terms cannot be implied or inferred from" merely being a shareholder in a foreign company, the contract being made in that foreign country, governed by its law, and intended to be performed in that foreign country. Although English law recognises the concept of an implied choice of court agreement, the question of whether such a choice of court can be implied must be determined by the law governing the main contract.[126]

Lord Collins took a cautious stance in *Vizcaya* by emphasising the requirement for an actual agreement and highlighting situations where such an agreement could not be inferred. However, His Lordship did not specifically address instances where contractual submission could be reasonably inferred. Instead, he suggested that this determination lay in the general approach of the English courts towards implied terms, where tests like "business efficacy" and "officious bystander" are employed[127] when considering the implications of contractual terms. These tests aim to ascertain the presumed intention of the parties or to give a transaction the efficacy that the parties intended. In other words, courts will only imply terms if it is absolutely necessary or if it is so obvious that the term should be included without explicitly stating it. Therefore, Lord Collins' approach indicates that courts would be reluctant to imply a jurisdiction

[125] *Ibid* [56]. Noted in A Dickinson, "Foreign Submission" (2019) 135 *Law Quarterly Review* 294–320; Kupelyants (n 6); Lee and Ford (n 6) 55–57; Driscoll (n 6). It is important to note that the Privy Council's decision in *Vizcaya* was delivered after the parties settled out of court, so the view of their Lordships was obiter.

[126] *Vizcaya* (n 6), [58–61].

[127] *Vizcaya* (n 6), [58] (Lord Collins), citing Lord Neuberger in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] 3 WLR 1843 [15–31].

agreement unless it was essential for the contract to function effectively, and evident that the parties would have intended such an agreement, even without express mention.

Indeed, the tests employed by the English courts, namely, the business efficacy and officious bystander tests, are not drastically different from the framework established in the Brussels-Lugano regime. Moreover, the English courts have traditionally applied these tests in a cautious and restrictive manner. Like the approach outlined in *Colzani,* it is necessary to demonstrate actual consent, and inferring such consent from the parties' conduct requires strong and compelling evidence. Furthermore, drawing from *Vizcaya* and CJEU jurisprudence on the two limbs of the Brussels-Lugano regime, a higher threshold is set to establish implied jurisdiction agreements. A few interactions or transactions between the parties might be insufficient for the court to infer the existence of a jurisdiction agreement. Indeed, the English courts would likely require more substantial evidence and a greater degree of consistency in the parties' conduct to infer the existence of a jurisdiction agreement. Therefore, the approach adopted by the English courts is closely aligned with the principles outlined in the Brussels-Lugano regime, emphasising the need for clear and convincing evidence of actual consent and a sufficient basis for inferring a jurisdiction agreement.

Some common law countries, for example, India and Hong Kong, accept the view that jurisdiction agreements can be implied. In India, a High Court held that:

> A submission may be express or implied. The mere fact that the parties agree that the law of a particular country would apply may or may not amount to an implied submission to the jurisdiction of the Courts of that country. It will depend on the contract taken as a whole and all the circumstances of a particular case. What must be gathered therefrom is the intention of the parties. But even such an intention cannot be given effect to, if it militates against public policy.[128]

In Hong Kong, the concept of an implied jurisdiction agreement is recognised.[129]

A few other common law countries have taken a different position. For instance, in New Zealand, while dealing with a case involving the recognition and enforcement of a foreign judgment, the High Court seems to have been influenced by the position of an earlier edition of Dicey, Morris and Collins, to the effect that "[i]t may be laid down as a general rule that an agreement to submit to the jurisdiction of a foreign court must be express: it cannot be implied".[130]

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[128] *Indian and General Investment Trust Ltd v Sri Ramchandra Mardaraja Deo*, AIR 1952 Cal 508, Calcutta High Court [59(7)] (Sinha J).

[129] *Hong Kong Civil Procedure 2021* (Sweet and Maxwell, 2020), para 11/1/327; G Johnston and P Harris, *The Conflict of Laws in Hong Kong* (Sweet and Maxwell, 3rd edn, 2017), para 5.032; JYP Wong, "Hong Kong", in A Reyes and W Lui (eds), *Direct Jurisdiction: Asian Perspectives* (Hart, 2021), 44 .

[130] *Korea Resolution and Collections Corporation v Hwe Goung Lee* [2013] NZHC 985 [35] (Matthews J), citing with approval, Lord Collins of Mapesbury (ed) (n 121).

Likewise, in two cases dealing with the recognition and enforcement of foreign judgments, the High Courts of Singapore held that a choice of court agreement must be express; it cannot be implied.[131]

According to Article 742(g) of the Maltese Code of Civil Procedure:[132]

> Save as otherwise expressly provided by law, the civil courts of Malta shall have jurisdiction to try and determine all actions, without any distinction or privilege, concerning the persons hereinafter mentioned … g) any person who expressly or tacitly, voluntarily submits or has agreed to submit to the jurisdiction of the court.

The provision refers to both explicit and tacit agreements, which means that Maltese law is not limited to express agreements. Nonetheless, it needs to be stressed that when Maltese law speaks of tacit jurisdictional agreements, it exclusively refers to submission by appearance. This was established early in Maltese decided cases.[133] In view of this, Maltese law does not recognise the concept of tacit, or implied, jurisdiction agreements.

Scholarly literature from the US suggests that the US courts do not really distinguish between formal and substantive validity either. In fact, Buxbaum notes that "[f]ormal validity is rarely an issue in practice",[134] although parties often challenge jurisdiction agreements for lack of genuine consent. It is possible that this is true of other common law countries where the usual contract law rules are applied to determine whether there is a valid agreement.[135] Consequently, the key question revolves around whether there is actual consent/agreement. Symeonides' empirical account indicates that the US courts largely apply domestic law to determine the validity of jurisdiction agreements, because this is considered to be a procedural matter.[136] What is unclear is whether the US courts permit jurisdiction agreements to be implied and if so, under what circumstances.

It would seem that fairness and reasonableness are the criteria applied by the US courts when faced with the question of whether jurisdiction agreements can be

[131] *United Overseas Bank Ltd v Tjong Tjui Njuk* [1987] SLR (R) 275; *Sun-Line (Management) Ltd v Canpotex Shipping Services Ltd* [1985–1986] ILR (R) 695 [1986] SGHC 16 (Rajah J).

[132] Chapter 12 of the Laws of Malta 1995.

[133] *P. Portelli v. J. Portanier Mifsud pro. et. noe*., decided by the Commercial Court on 14 May 1957 (per T. Gouder) Vol.XL.iii.1226 and *E. Mirabelli noe. v. S. Mifsud u A. Mifsud n*oe, decided by the Commercial Court on 9 April 1992 (per J. Camilleri), Vol.LXXVI.iv.652.

[134] HL Buxbaum, "The Interpretation and Effect of Permissive Forum Selection Clauses Under US Law" (2018) 66 *American Journal of Comparative Law* 127, 133.

[135] JF Coyle, "'Contractually Valid' Forum Selection Clauses' (2022) 108 *Iowa Law Review* 127, 133–34.

[136] SC Symeonides, "What Law Governs Forum Selection Clauses" (2018) 78 *Louisiana Law Review* 1119, 1151. See also Buxbaum (n 134) 147.

implied. In *Carnival Cruise Lines v Shute*, it was noted that the existence of consent is "subject to judicial scrutiny for fundamental fairness".[137] In *Basura v US Home Corp*, it was observed that "the lack of a perfected written arbitration agreement does not conclusively establish the absence of an agreement to arbitrate".[138] *Craig v Brown Root Inc* offers some clarity on implied jurisdiction agreements, wherein an agreement was implicit by dint of the fact that an arbitration agreement was sent to the employee's home address but was not returned by the employee, despite the latter's protestations that the agreement had not been received.[139] The Court subsequently held that:

> General principles of contract law determine whether the parties have entered a binding agreement to arbitrate … This means that a party's acceptance of an agreement to arbitrate may be express … or implied-in-fact where, as here, the employee's continued employment constitutes her acceptance of an agreement proposed by her employer.[140]

Conversely, in *Gorlach v Sports Club Co,*[141] an employer demanded that employees should sign a new employee handbook, which contained an arbitration agreement. Gorlach refused to sign, but continued working for the employer. The California Court of Appeal held that because Gorlach had never signed the arbitration agreement, the existence of this agreement between the parties could not be implied. The Court distinguished *Craig* from *Gorlach* in that *Craig* involved an employer imposing a unilateral agreement on employees, without requiring them to sign. Conversely, in Gorlach, the requirement for a signature meant that the agreement was not effective until signed by the parties.[142] This reasoning was followed in *Bayer v Neiman Marcus Holdings, Inc*.[143]

The US approach bears striking similarities to that of the English courts, to the extent that general contract law determines whether or not an agreement is valid and whether it can be implied from the parties' conduct. Nevertheless, the threshold for the implication of jurisdiction agreements seems to be lower under US law. It is therefore doubtful whether a jurisdiction agreement would have been implied by the English courts in *Craig*. Certainly, consent would not be assumed or implied if the Brussels-Lugano regime were to apply.

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[137]499 US 585 (1991), p 595.
[138]98 Cal App 4th 1205, 1216 (Cal Ct App 2002).
[139](n 34).
[140]*Ibid*, 420.
[141]209 Cal App 4th 1497 (Cal Ct App 2012).
[142]*Ibid*, 81.
[143]No 11-17920 (9th Cir Jul 3, 2014). See also *Mitri v Arnel Management Co* (2007) 157 Cal App 4th 1164.

D. Should implied jurisdiction agreements be enforced?

1. *Business efficacy and commercial expectations*

The preceding section presents a micro-global overview of the approaches of courts in different parts of the world to implied jurisdiction agreements. Having observed the divergence in national and international approaches, it is also apt to appraise the justification and rationale for the recognition or rejection of this concept.

Party autonomy is universally recognised as a fundamental principle of private international law, and there is a broad consensus that it should be upheld to the greatest extent possible.[144] In this light, it may be contended that the notion of implied jurisdiction agreements should be considered permissible within both national and international frameworks, particularly if the underlying philosophy for implying terms is to give effect to the unexpressed intentions of the parties involved. As noted by Lord Neuberger, the very essence of implying terms is to bridge gaps in contracts by taking into account the presumed intentions of the contracting parties.[145]

In holding that under English law, the courts could imply a jurisdiction agreement, Lord Collins was relying on the business efficacy and officious bystander analogy, which is used to imply contractual terms.[146] A practical application of the business efficacy logic can be seen in cases where the courts have held that a jurisdiction agreement between contracting parties may be extended to another closely related contract between the same parties, even if the latter contains no specific jurisdiction agreement.[147] In this way, the challenges of parallel proceedings (or fragmentation of disputes) and irreconcilable judgments could be minimised. It may also align with the parties' commercial expectations, as rational businessmen would not wish to litigate in separate courts, except if they have expressly stipulated as such in their contract.[148] This provides parties with contractual certainty, convenience, and sound administration of justice.

The cases of *Terre Neuve Sarl v Yewdale* Ltd[149] and *Etihad Airways PJSC v Flother*[150] exemplify the complexities surrounding the application of business

[144]See generally, Mills (n 4).
[145]Lord Neuberger, "Express and Implied Terms in Contracts", a speech delivered at the School of Law, Singapore Management University, 19 August 2016 <https://www.supremecourt.uk/docs/speech-160819-02.pdf> accessed 10 June 2023.
[146]*Vizcaya* (n 6), [58] (Lord Collins), citing Lord Neuberger in *Marks & Spencer Plc* (n 127), [15–31].
[147]*Terre Neuve Sarl v Yewdale Ltd* [2020] EWHC 772 (Comm); *Etihad* (n 31).
[148]*Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40 [7] and [13] (Lord Hoffman); *UBS AG v HSH Nordbank AG* [2009] EWCA Civ 585 [2009] 2 Lloyd's Rep 272 [84] (Lord Collins); *Trust Risk Group SpA v AmTrust Europe Ltd* [2015] EWCA Civ 437, paras [44–49]. Cf *Axis Corporate* (n 31), [49], [50–62].
[149](n 147).
[150][2019] EWHC 3107 (Comm).

efficacy and commercial expectation logic in contractual interpretation. These cases involve issues related to the incorporation and implication of terms, which have been the subject of extensive deliberation in the English courts over the past decade.[151] The central question emerging from these considerations is how commercial expectations or business efficacy should be ascertained. Should the parties' subjective intentions be taken into account, or should objective criteria be applied? Additionally, defining who qualifies as a reasonable businessperson and determining the appropriate standard to evaluate such reasonableness pose further challenges. Besides, the approach adopted by continental judges in interpreting and implying terms differs from that of their English counterparts.[152] The absence of uniform interpretative techniques that could be applied across civil and common law jurisdictions compounds these complexities. Consequently, these divergent approaches often give rise to uncertainty and unpredictable outcomes.

Another key problem with using the principles of implied terms of business efficacy and commercial expectations as the bases for the concept of implied jurisdiction agreements is that it violates the widely accepted principle of separability of the forum selection clause from the contract. The principle of separability means that a forum selection agreement is treated as independent of other contractual terms. This principle of separability is endorsed in Article 25(5) of Brussels Ia and Article 3(d) of the Hague Choice of Court Convention 2005.

2. *The choice of law analogy*

The concept of implied choice of law is widely established in private international law.[153] It is recognised under the Hague Principles,[154] Rome I Regulation,[155] Mexico City Convention,[156] Asian Principles,[157] the OAS

[151]See Lord Neuberger (n 127). See further R Austern-Baker, *Implied Terms in English Contract Law* (Edward Elgar Publishing, 2023).

[152]For the divergent approaches to contractual interpretation and implication of terms between common law and civil courts, see F Gélinas (ed), *Trade Usages and Implied Terms in the Age of Arbitration* (Oxford University Press, 2016), which contains excellent chapters on the practices of national courts in England, France, Belgium, and Italy, amongst others.

[153]See generally, GJ Bouwers, *Tacit Choice of Law in International Commercial Contracts – A Global Comparative Study* (Schulthess, 2021); D Girsberger and others, "General Comparative Report: Global Perspectives on the Hague Principles", in *Choice of Law in International Commercial Contracts: Global Perspectives on the Hague Principles* (Oxford University Press, 2021), paras 1.222–1.272; CSA Okoli, "The Significance of a Forum Selection Agreement as an Indicator of the Implied Choice of Law in International Contracts: A Global Comparative Analysis" (2023) 28 *Uniform Law Review* 1–29.

[154]Art 4.

[155]Art 3.

[156]Inter-American Convention on the Law Applicable to International Contracts 1994, Art 7.

[157]Art 3(3).

Guide,[158] OHADA Preliminary Draft,[159] and African Principles,[160] as well as being applicable in many common law, mixed, and civil law countries.[161] It is arguable that the underlying principle of implied choice of law can also be applicable in the context of an implied jurisdiction agreement.

While there is a clear distinction between jurisdiction and choice of law, both concepts are related.[162] Globally, the interrelationship between jurisdiction and choice of law is recognised. For example, in determining an implied choice of law for a contract, the most significant (though not decisive) factor appears to be a choice of forum agreement.[163]

The EU supports a consistent approach in determining jurisdiction and choice of law. For example, Recital 7 to both the Rome I and Rome II Regulations[164] provides for such a consistent approach. Although, the CJEU has cautioned

[158]Part 8.

[159]Art 575(1).

[160]See generally Art 5(2)-(4). See JL Neels, "The African Principles on the Law Applicable to International Commercial Contracts – A First Drafting Experiment" (2021) 25 *Uniform Law Review* 426, 431. JL Neels and EA Fredericks, "The African Principles of Commercial Private International Law and the Hague Principles", in Girsberger and others (n 153), [8.09–8.11].

[161]See generally Bouwers (n 153) and Girsberger and others (n 153), [1.222–1.272], citing others; Okoli (n 153).

[162]CSA Okoli, *Place of Performance: A Comparative Analysis* (Hart Publishing, 2020), Ch 5; EB Crawford and JM Carruthers, "Connection and Coherence between and among European Instruments in the Private International Law of Obligations" (2014) 63 *International and Comparative Law Quarterly* 1; F Pocar, "Some Remarks on the Relationship between the Rome I and Brussels I Regulations", in F Ferrari and S Leible (eds), *The Law Applicable to Contractual Obligations in Europe* (Sellier European Law Publishers, 2009), 343; E Lein, "The New Rome I/Rome II/Brussels I Synergy" [2008] 10 *Yearbook of Private International Law* 177; Z Tang, "The Interrelationship of European Jurisdiction and Choice of Law in Contract" (2008) 4 *Journal of Private International Law* 35; C Forsyth and P Moser, "The Impact of the Applicable Law of Contract on the Law of Jurisdiction under the European Convention" (1996) 45 *International and Comparative Law Quarterly* 190; P Hay, "The Interrelation of Jurisdiction and Choice-of-law in United States Conflicts Law" (1979) 28 *International and Comparative Law Quarterly* 161; R Garnett, "Determining the Appropriate Forum by the Applicable Law" (2022) 71 *International and Comparative Law Quarterly* 589–626; J Fawcett, "The Interrelationship of Jurisdiction and Choice of Law in Private International Law" (1991) 44 *Current Legal Problems* 39. Cf M Hook, "The Choice of Law Agreement as a Reason for Exercising Jurisdiction" (2014) 63 *International and Comparative Law Quarterly* 963–75.

[163]Art 4 of the Hague Principles (commentary 4.11–12); Recital 12 to the Rome I Regulation; art 7(2) of the Inter-American Convention on the Law Applicable to International Contracts; Arts 5(3) and (4) of the draft African Principles; Art 3(3)(2) of the Asian Principles on Private International Law; Part 8 of the OAS Guide. This approach is also reflected in the legal systems of some common law and civil law countries alike. See generally Okoli (n 153).

[164]Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-contractual Obligations ("Rome II").

against applying this concept without thought,[165] it is an approach that has been featured in the Opinions of Advocate Generals in the EU[166] and also used in the UK when it was an EU Member State.[167] In addition, Recital 12 to Rome I provides that:

> An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.[168]

In English common law, the relationship between jurisdiction and choice of law is well established. Although the applicable law (as currently determined by a "statutory cloning"[169] of Rome I and Rome II)[170] does not automatically determine the existence or exercise of a court's jurisdiction, the applicable law of a contract is very important because it is a significant factor (and could also be decisive where it is an express choice of law). Thus, an English court will take the applicable law into account at the interlocutory stage, in order to determine the existence or exercise of its traditional common law jurisdiction rules where there is a foreign element.[171]

[165]C-45/13, *Kainz v Pantherwerke AG*, EU:C:2014:7 [20].
[166]AG Trstenjak in Case C-533/07, *Falco Privatsfi Tung and Another v Weller-Lindhort*, EU:C:2009:34 [68] – [69]; AG Trstenjak in C-585/08*, Pammer*, EU:C:2010:740 [7], [48], [55], [72] and [73]; AG Trstenjak in C-29/10, *Koelzch*, EU:C:2010:789 [10], [70–79], [99]; AG Wahl in C-350/14, *Lazar v Allianz SpA*, EU:C:2015:586 [4]. [48–49].
[167]*Allen v Deputy International Ltd* [2014] EWHC 753(QB) [13] (Stewart J); *Ertse Group Bank AG, London Branch v JSC 'VMZ' Red October & Or*s [2015] EWCA Civ 379 [90–92], [96]; *Committeri v Club Mediterranee Sa Generali Assurances Iard S*a [2016] EWHC 1510 [33], [40–49]; *FM Capital Partners Ltd v Marino* [2018] EHWC 1708 (Comm) [490–497]; *Hillside (New Media) Limited v Biarte Baasland* [2010] EHWC 1941 (QB) [28].
[168]For a detailed analysis of the legislative history of this provision, see M McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (Oxford University Press, 2015), paras 9.78–9.103.
[169]To borrow the words of Andrew Dickinson in A Dickinson, "Realignment of the Planets – Brexit and European Private International Law" (2021) *IPRax [Praxis des Internationalen Privat- und Verfahrensrechts – International Private and Procedural Law*] 213, 218.
[170]See Law Applicable to Contractual Obligations and Non-Contractual Obligations (amendment, etc) (EU Exit) Regulations 2019 ("The Regulations").
[171]*Four Seasons Inc v Brownlie* [2017] UKSC 80 [77]; *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5 [46]; *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, 481 (Lord Goff); *Novus Aviation Limited v Onur Air Tasimaciik AS* [2009] EWCA Civ 122 [77]; *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2005] EWHC 1887 [72], [86] (approved on appeal in *Dornoch Ltd v Mauritius Union Assurance Co* [2006] EWCA Civ 389); *Macsteel Commercial Holdings (Pty) Ltd v Thermasteel v (Canada) In*c [1996] CLC 1403, 1407 (Sir Thomas Bingham MR), 1408 (Millet LJ); *The Nile Rhapsody* [1992] 2 LLR 399, [1994] 1 LLR 382 (CA); *Irish Shipping Ltd v Commercial Union Assurance Co Plc and Another* [1990] 2 WLR117, 229 (Staughton LJ); *Seashell Shipping Corp v Mutualidad de Seguros De Instituto Nacional De Industria* ("Musini") *("Magnum") ex "Tarraco*

However, if the parties do not expressly stipulate the applicable law of their contract, it is usually difficult to ascertain whether the court can imply the choice of law of those parties, or whether the parties have in fact made any choice of law at all.[172] The prevailing global response to this problem has been to apply a strict standard, specifying the following language as implying a choice of law: "apparent",[173] "clearly demonstrated",[174] "must be evident",[175] "clearly evident",[176] "certain and evident",[177] "appear clearly",[178] "manifestly clear",[179] "inferred with certainty",[180] "unambiguous",[181] "properly inferred",[182] "not readily implied",[183] "clearly inferred",[184] and "without reasonable

Augusta" [1989] 1 Lloyd's Law Rep 47; *Charm Maritime Inc v Kyriakou* [1987] 1 Lloyd's Rep 433; *Britannia Steamship Insurance Association Ltd & Ors v Ausonia Assicurazioni SPA* [1984] 2 Lloyd's Rep 98.

[172]*Enka* (n 114), [35]; *Jones v Kernott* [2011] UKSC 53 [65] (Lord Collins); CSA Okoli and GO Arishe, "The Operation of the Escape Clauses in the Rome Convention, Rome I Regulation and Rome II Regulation" (2012) 8 *Journal of Private International Law* 513, 524–29; Collins and Harris (eds) (n 20), paras 32-007, 32-082, 32-087.

[173]Art 19(1) of the Civil Code of United Arab Emirates (Federal Law No 5 of 1985).

[174]Rome I Regulation, Art 3; Hague Convention on the Law Applicable to Contracts for International Sales of Goods 1986, Art 7(1); OHADA Preliminary Draft Uniform Act 2015, Art 575(1). Although the addition of the word "demonstrated" has been criticised for being inappropriate as procedural proof in a choice of law context (JL Neels, "The Role of the Hague Principles on Choice of Law in International Commercial Contracts in the Revision of the Preliminary Draft Uniform Act on the Law of Obligations in the OHADA Region" (2018) *Journal of Contemporary Roman-Dutch Law* 464, 469; JL Neels and EA Fredericks, "Tacit Choice of Law in the Hague Principles on Choice of Law in International Contracts" (2011) *De Jure* 101, 106 it is submitted that this standard for the implied choice of law is still stringent.

[175]Art 7 of the Mexico City Convention.

[176]Swiss Private International Law Act 2018, Art 116(2).

[177]Civil and Commercial Code of Argentina 2015, Art 2651.

[178]Hague Principles, Art 4; Asian Principles, Art 3(3)(1); OAS Guide, Part 8; Paraguayan Law 5953 on the Law Regarding the Applicable Law to International Contracts 2015. Art 4 of the Hague Principles was the first to use the wording "appear clearly", and the other laws referred to in this footnote were inspired by that provision.

[179]Art 5(2) of the African Principles See Neels (n 158) 431; Neels and Fredericks (n 158), paras 8.09-8.11.

[180]Civil Code of Quebec 1991, Art 3111.

[181]Hague Sales Convention 1955, Art 2(2); Russian Civil Code of 2002, Art 1210(2).

[182]See the Australian cases of *John Kaldor Fabricmaker Pty Ltd v Mitchell-Cotts Freight (Australia) Pty Ltd* (1989) 18 NSWLR 172, 186; *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 188 CLR 418, 441. See also the Canadian cases, *O'Brien v Canadian Pacific Railway Company* (1972) CanLII 807 (SKCA) [14]; *Snap-on-Tools Canada Ltd v Korosec* (2002) BCSC 1844 (CanLII) [10].

[183]See the South African case, *Improvair (Cape) (Pty) Ltd v Establissements Neu* 1983 2 SA 138, 145.

[184]See the Indian case, *National Thermal Power Corporation v Singer Company* (1992) SCR (3) 106, 118. See also, Australian Law Reform Commission Report 58 on Choice of Law (28 May 1992) 84.

doubt".[185] Some significant factors that can indicate an implied choice of law by the parties include a choice of forum clause, a standard form contract (such as Lloyds Marine Insurance in England) which is assumed to be governed by a particular law, a previous course of dealings between the parties (indicating that a particular law applies to the contract), an express choice of law in a related transaction, or a reference to particular laws of a country.[186]

The fact that the notion of implied choice of law is widely recognised is arguably a good reason for courts to accept the concept of an implied jurisdiction agreement. However, in this context, the present authors submit that the principle of jurisdiction and choice of law must be kept conceptually distinct. It is evident that contracts are not concluded in a vacuum but must be governed by a particular law, and certain factors may naturally be indicative of the law intended by the parties in the absence of choice, for example, a reinsurance contract concluded using Lloyds Standard Forms. Nevertheless, the choice of law analogy cannot be transposed to jurisdiction.

As discussed in Section B, jurisdiction involves the exercise of state powers over litigants. It is generally accepted that a court should not exercise jurisdiction over a non-resident defendant whose action is not closely connected to the forum, nor over a defendant who has not submitted to the court's jurisdiction by contractual agreement. Thus, as reiterated in numerous cases, a jurisdiction agreement cannot be implied simply because the parties have chosen the law of a particular forum.[187] This seems to be settled. The factors of an implied choice of law, as

[185]Act No 43/2000 Iceland, Art 3, para 1.

[186]M Giuliano and P Lagarde, Report on the Convention on the Law Applicable to Contractual Obligations ("Giuliano–Lagarde Report") [1980] OJ C282/1, 17.

[187]*Vizcaya* (n 6), [58]; *Reiss Engineering Co Ltd v Isamcor* 1983 1 SA 1033 (W) 1039 A-B) (South Africa); *Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Bhd* (1976) 2 MU 154; *Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd* (1986) 1 MLJ 177, as referred to in RH Hickling and MA Wu, *Conflict of Laws in Malaysia* (Butterworths, 1995) 165, footnote 11: "[T]he High Court held that although the parties had agreed that Singapore law would govern any dispute, it did not oust the jurisdiction of the Malaysian courts to try the action."; The Uruguayan General Act on Private International Law 2020, Art 46 states that the parties' agreement on the selection of a certain law does not necessarily entail the selection of a specific forum. In the US, "a choice of law clause without more does not operate as a forum selection clause. However, the Supreme Court has held that a choice of law clause is evidence of purposeful availment of the selected state's benefits and protections for jurisdictional purposes" (SC Symeonides and NB Cohen, "United States of America: American Perspectives on the Hague Principles", in Girsberger and others (n 153), [68.19], citing *Burger King Corp v Rudzewicz*, 471 US 462, 482 (1985)). See also Magnus (n 67), para 43. In Indonesia, choice of law plays a dominant (or even decisive) role in determining the existence of a court's jurisdiction. See J Lumbantobing and BS Hardjowahono, "Indonesia: Indonesian Perspectives on the Hague Principles", in Girsberger and others (n 153), [25.10], note 32; PP Penasthika, *Unravelling Choice of Law in International Commercial Contracts: Indonesia as an Illustrative Case Study* (Eleven Publishers, 2022), 152–57, 175–76.

enumerated in the preceding paragraph, are equally available as possible grounds for specific (special) jurisdiction. As such, they add no value to the debate. This point is underscored by Andrew Henshaw QC (sitting as a judge of the High Court) in *Coward v Ambrosiadou*[188] when responding to the request to imply a jurisdiction agreement: "there is no necessity to imply a jurisdiction agreement", since jurisdiction can always be established based on the connecting factors that are deemed sufficient under the law of the relevant forum.[189] This important point will be expanded in the next section.

3. *International jurisdiction and the recognition of foreign judgments*

Courts are often asked to exercise adjudicatory jurisdiction over a dispute, due to the existence of jurisdiction agreements, whether express or implied. These jurisdiction agreements may also feature in applications for service out of jurisdiction,[190] stays of proceedings,[191] and the recognition and enforcement of foreign judgments.[192] It may be deduced therefrom that implied jurisdiction agreements can serve as a basis for establishing both direct jurisdiction (where a court directly exercises its jurisdiction over a dispute) and indirect jurisdiction (where a court is deciding whether or not to recognise and enforce a foreign judgment).

From a private international law perspective, various thresholds are applied to direct and indirect jurisdiction. These different thresholds reflect the complexities and nuances involved in establishing jurisdiction in cross-border disputes. In many countries, the principles governing direct jurisdiction are firmly established in their constitutions and other public law statutes. There may equally be policy considerations that motivate courts to exercise jurisdiction on grounds that might not be universally accepted or permissible. These policy reasons can include providing access to the domestic courts for their own nationals or attracting international commercial litigation to the forum. Such policy considerations can influence the approach adopted by courts in determining the permissibility of certain jurisdictional grounds. However, when courts are called upon to assess the propriety of jurisdictional grounds in the context of recognising and enforcing foreign judgments, different considerations come into play. For instance, common law courts (excluding Canada and possibly the US) may exercise adjudicatory long arm jurisdiction based solely on the contracts executed or performed by a defendant in the forum but when enforcing foreign judgments, these courts

[188][2019] EWHC 2105 (Comm).
[189]*Ibid*, para 169.
[190]In England, see CPR 6.33(2B)(b). See also *Canara Bank v MCS International* [2022] EWHC 2012 (Comm) [41].
[191]See generally, *The Owners of Cargo Lately Laden on Board the Ship or Vessel 'Eleftheria' v 'The Eleftheria' (Owners*) ("The Eleftheria") [1969] 1 Lloyd's Rep 237. This authority is influential in the common law world.
[192]See text accompanying footnotes 125–31.

only recognise residence, presence, or submission as permissible jurisdictional grounds.[193]

The enforceability of judgments is indeed a crucial aspect of cross-border litigation. While securing a favourable judgment is a significant achievement, its practical value lies in the ability to enforce it, particularly in jurisdictions outside the one in which the judgment was obtained. This highlights the inherent connection between jurisdiction and judgments. In this regard, cross-border business entities must be very strategic during and after contractual negotiations, making informed decisions with the awareness that these decisions will affect the profit that they are likely to make from their investments, where they should sue, the applicable law, and whether the judgments from the ensuing litigation can be enforced.

The pursuit of certainty and predictability in the legal frameworks governing cross-border transactions is indeed crucial for business entities to make informed decisions. This underscores the philosophy behind the jurisdictional grounds in the Brussels-Lugano regime and the jurisprudence of the CJEU. International jurisdictional grounds are interpreted restrictively. For example, defendants are expected to be sued in their place of domicile. If they must be sued elsewhere, it must be at a forum where they have specifically agreed to be sued, or if their transactions are strongly connected to that forum. The preamble to Brussels Ia is succinct on this matter:

> The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor.[194]

The common law grounds for indirect jurisdiction are even more restrictive than the Brussels-Lugano framework. Only residence, presence, and submission (whether by contract or voluntary appearance) are recognised.

The above quote from the preamble to Brussels Ia reiterates that jurisdictional grounds must be "well-defined". Defendants must be clear on where and when they are answerable to claims in foreign lands. Parties often use jurisdictional agreements to mitigate the risk of being forced to litigate in an unwanted forum. Thus, the consent to be sued in a non-natural forum must be clearly established. Consequently, the concept of an implied jurisdiction agreement lacks the certainty required by cross-border litigants. Moreover, it is difficult to find globally established criteria for implying jurisdiction agreements. As evidenced in *Vizcaya*, while the Court identified conduct that did not constitute an implied

[193]Collins and Harris (eds) (n 20), paras 14-058-14-068.
[194]Recital 15.

jurisdiction agreement, it was more difficult to enumerate the specific conduct that would have constituted contractual submission.

The concept of an implied jurisdiction agreement is complex and greatly dependent on the specific circumstances of each case. Within a specific legal system, one decision might not be cited as an authority since different judges could adopt varying considerations and interpretations when determining whether certain conduct amounts to consent for jurisdiction. This ambiguity can lead to prolonged legal proceedings, resulting in a significant waste of time and resources for the parties and the courts.

It could therefore be stated that there is insignificant value, if any at all, in the recognition of implied jurisdiction agreements. Even if a foreign court has established that consent could be implied, the issue will not be considered *res judicata*. A court addressed for recognition and enforcement would review that aspect of the judgment to establish the existence of genuine consent. Ultimately, the final question on consent can only be answered by the court addressed. The need to review the merits on jurisdictional grounds contradicts the emerging judicial economy policy that is enshrined in most judgments involving recognition and enforcement frameworks, such as the HCCH 2019 Judgments Convention. In this multilateral framework, jurisdictional grounds are carefully and clearly drafted, so that what is expected of the court addressed is to verify the connection with the foreign court and tick the relevant boxes, without needing to go into the merits of the judgments.

Article 5 of the HCCH 2019 Judgments Convention contains a list of acceptable jurisdictional grounds, which are equally available as jurisdictional gateways in most civil and common law countries. If the parties fail to clearly demonstrate consent to submit to the jurisdiction of a court, jurisdiction may still be founded on close connections, such as the defendant's residence or the place of contractual performance. If ratification of the Convention grows, there may be absolutely no necessity to imply a jurisdiction agreement, as the grounds set out in Article 5 are wide enough to cover such cases. Therefore, the concept of implied jurisdiction is an unnecessary distraction from an otherwise settled area of law.

Additionally, the use of breach of an implied jurisdiction agreement as a basis for denying the recognition and enforcement of a foreign judgment also gives rise to complexities and uncertainties in international commercial transactions. International commercial parties would bear significant risks on the portability of the recognition and enforcement of their judgments in foreign jurisdictions, which would harm the efficacy of international business transactions globally.

4. *Implied jurisdiction agreements and third parties*

The concept of implied jurisdiction agreements is further complicated when contractual rights are transferred to third parties. Parties may wish to resort to this principle as a means of side-stepping the doctrine of privity of contract – a

point of practical significance. For example, a Nigerian Court of Appeal was faced with a scenario where there was an express choice of court agreement in a loan contract, whereas a very closely related contract of guarantee by a third party had no express choice of court agreement.[195] The Court held, inter alia, that for a contract to confer jurisdiction on a court, the wording must be clear and explicit and devoid of any ambiguity.[196] Therefore, the Court declined to extend the jurisdiction agreement to the contract of guarantee, which involved a third party who was the company's alter ego (the company was the debtor) and guarantor under the contract. By way of comparison, in the US, an implied jurisdiction agreement has previously been used to enforce choice of court agreements against third parties, based on the close relationship between the parties in a global transaction. This relationship existed between a debtor (party) and the guarantor's spouse (non-party), and between a corporation (party) and its president (non-party).[197] In addition, under French law, where Brussels Ia and the Lugano Convention are inapplicable,

> a chain of contracts for the sale of goods (with Party A and Party B as manufacturer and distributor respectively, and Party B and Party C as distributor and retailer respectively) may give rise to an implied contract between the manufacturer (Party A) and the retailer (Party C).[198]

Another comparison may be drawn from the choice of law context, where EU reporters envisaged that an express choice of law in a contract could implicitly govern a related contract between the same parties.[199] However, some English judges[200] and common law scholars[201] have extended this doctrine to third

[195] *Kashamu v UBN* (2020) 15 NWLR (Pt 1746), 90.
[196] *Kashamu* (*ibid*), 114–15 (Ogbuinya JCA). Noted in CSA Okoli, "Analysis of Choice of Court Agreements in Nigeria in the Year 2020" (2021) 21 *Dutch Journal of Private International Law* 292–305.
[197] See for example, *Firefly Equities LLC v Ultimate Combustion* Co 736 F Supp 2d 797 (SDNY 2010); *Lipcon v Underwriters of Lloyd's London* 148 F 3d 1285 (11th Cir 1998); *Coastal Steel Corp v Tilghman Wheelabrator Ltd*, 709 F2d 190 (US CA 3rd Cir 1983). However, the Canadian courts were reluctant to apply this doctrine in cases like *Baran v Pioneer Steel Manufacturers Limited* 2021 Carswell BC 813 [120]; *Aldo Group Inc v Moneris Solutions Corp* 2013 ONCA 725, 118 OR (3d) 81, affirming 2012 ONSC 2581 [46–49].
[198] Mills (n 4) 169.
[199] Giuliano–Lagarde Report (n 186).
[200] *Golden Ocean Group Ltd v Salgaocar Mining Industries & Anor* [2012] EWCA Civ 265 [47–49]. See also, *Star Reefers Pool Inc v JFC Group Ltd* [2011] EWHC 339 (Comm) [23]. Cf *World Fuel Services Corp v "Nordems"* (The) 2010 FC 332 (FC) (Can LII).
[201] Collins and Harris (eds) (n 20), paras 32-090, 32-113(10). Cf CSA Okoli, "The Significance of the Doctrine of Accessory Allocation as a Connecting Factor under Article 4 of Rome I Regulation" (2013) 9 *Journal of Private International Law* 449, 477; Fentiman (n 58), para 5.108.

parties who are not privy to the main contract. Hence, in a contract of guarantee, the law governing the loan contract could implicitly govern a contract of guarantee. The key question here is whether the principle of an implied jurisdiction agreement side-steps the doctrine of privity of contract. In other words, should a jurisdiction agreement confer rights or impose obligations on third parties? The general answer to this question is no.[202]

One CJEU decision that holds is that under Article 25 of Brussels Ia and Article 23 of the Lugano Convention, a jurisdiction agreement (express or implied) cannot be enforced against third parties without their consent.[203] Choice of court agreements in EU law can only confer rights or impose obligations on third parties where they have succeeded to the right of the original contracting party.[204] There are also decisions of some EU Member State courts to support this position. For example, in one German case, it was held that "a choice-of-court clause concluded between a main debtor and a creditor cannot be extended to a third-party guarantor of the main debt who has not subscribed to that clause".[205] In addition, English courts at the time of applying Article 23 of the Brussels I Regulation (now Article 25 of Brussels Ia) have equally applied a stringent approach, holding that the English courts would not pierce a company's corporate veil to recognise the controller of the company (who is not privy to the contract) as a contracting party for the purpose of enforcing a part of the contract that gives exclusive jurisdiction to the English courts.[206]

In some common law countries, like England,[207] Nigeria,[208] Canada,[209] and Australia,[210] a jurisdiction agreement generally cannot confer rights or impose

[202]Cf V Black and SGA Pitel, "Forum-Selection Clauses: Beyond the Contracting Parties" (2016) 12 *Journal of Private International Law* 26.
[203]C-543/10 *Refcomp SpA v Axa Corporate Solutions Assurance SA & Ors* EU:C:2013:62 [10–11].
[204]C-71/83 *Tilly Russ and Ernest Russ v NV Haven & Vervoerbedrijff Nova and NV Goeminne Hout* EU:C:1984:217 [24]; *Trasporti* (n 41), [41]; C-387/98, *Coreck Maritime GmbH v Handelsveem BV and Others* EU:C:2000:606 [23–24]; *Profit* (n 77), [33]–[36]; C-519/19, *Ryanair DAC v DelayFix* EU:C:2020:1023 [46–47]. See also the Opinion of Advocate General Collins in C-346/22, *Maersk*, EU:C:2023:889. At the time of writing, no CJEU ruling has been given on this subject.
[205]BGH, 11 November 2010, VII ZR 44/10 – Unalex DE-1976. Cited in Garcimartin (n 68), para 9.80.
[206]*VTB Capital* (n 171); *Antonio Gramsci Corp v Recoletos Ltd* [2013] EWCA Civ 730. Noted in CSA Okoli, "English Courts Address the Potential Convergence between the Doctrines of Piercing the Corporate Veil, Party Autonomy in Jurisdiction Agreements and Privity of Contract" (2014) 3 *Journal of Business Law* 252–61.
[207]*Donohue v Armco Inc* [2001] UKHL 41 [27], [60] (Lord Bingham, Lord Hobhouse and Lord Scott). See further, Briggs (n 4) paras 6.64–6.69.
[208]*Unipetrol Nigeria Ltd v Prima Alfa Enterprises (Nig) Ltd* (1986) 5 NWLR 532, 537 (Ademola JCA); *TOF Energy* (n 43) 37–38 (Affen JCA).
[209]*Aldo Group* (n 197) 2581 [46–49].
[210]*Incitec Ltd v Alkimos Shipping Corp* (2004) 138 FCR 496; [2004] FCA 698 [47].

obligations on third parties.[211] A key rationale for this might be that it would be unjust, contrary to good faith, and lead to uncertainty for a third party or stranger, if obligations were enforced on them in a choice of court agreement to which they were not privy.[212] A curious reader may now question why there are different approaches to jurisdiction and choice of law in the context of implying terms as a means of side-stepping the doctrine of privity of contract. As previously argued, the considerations involved in determining choice of law differ considerably from those of jurisdiction. Consequently, the rule for implying a choice of law does not align well within the context of jurisdiction agreements. It is suggested that if certainty and predictability are to be maintained, the doctrine of implied jurisdiction should not be applied to third parties who have not expressly agreed to be bound by a jurisdiction agreement under the main contract.

5. *Remedies for breach of the implied jurisdiction agreement?*

At common law, a court can stay its proceedings where there is a breach of a foreign jurisdiction agreement.[213] Anti-suit injunctions restraining the commencement or continuation of foreign proceedings may also be issued in common law courts like those of England, Canada, Singapore, Australia, and New Zealand, in order to enforce jurisdiction agreements.[214] Damages can also be awarded in common law courts, for example, in England and Australia,

[211]Cf Black and Pitel (n 202) for an analysis of a more liberal approach on third parties enforcing a forum selection clause in countries such as the US.

[212]See also A Briggs, "The Subtle Variety of Jurisdiction Agreements" (2012) *Lloyd's Maritime and Commercial Law Quarterly* 364, 376–81; Fentiman (n 58) 90–95.

[213]See generally, *The Eleftheria* (n 191).

[214]For English cases, see *Donohue* (n 207) [24]; *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35 [2013] 1 WLR 1889; *The Angelic Grace* [1995] 1 Lloyd's Rep. 87 (CA); *OT Africa Line Ltd* (n 73); *Ebury Partners Belgium SA v Technical Touch BV* [2022] EWHC 2927 (Comm); *Continental Bank v Aeakos Compania Naviera* [1994] 1 WLR 588. For a Canadian case see *OT Africa Line Ltd v Magic Sportswear Corp* [2007] 1 Lloyd's Rep. 85 (Federal Court of Appeal Canada). For a recent Singaporean case, see the Court of Appeal's decision in *Sun Travel & Tours v Hilton International Manage (Maldives)* [2019] SGCA 10 [67]–[68] upholding the decision of the first instance court on the same parties reported in [2018] SGHC 56 [47]–[54]. See further, T Raphael and B McRae, *The Anti-Suit Injunction* (Oxford University Press, 2nd edn, 2019), paras 19.49–19.59. For Australian cases, see *CSR v Cigna Insurance Australia* (1997) 146 ALR 402, 434 (HCA); *Great Southern Loans Pty Ltd v Locator Group Pty Ltd* [2005] NSWSC 438 [34]–[39]; *Alkimos Shipping Company v Hind Leer Chemicals* [2004] FCA 969 [25]; *MRT Performance v Mastro Motors* [2005] NSWSC 316 [24]–[25]; *Rectron Australia v Lu* [2014] NSWSC 1367 [57]; *Insurance Commission of Western Australia v Woodings* [2017] WASC 122 [17]. For a New Zealand case, see *Product Development Solutions v Parametric Technology Corporation* [2013] NZHC 33 [46]. See further, Raphael and McRae (*ibid*), paras 20.26–20.28.

against a party who breaches a jurisdiction agreement.[215] These key remedies could be effectively utilised in the event of an express choice of court agreement. However, what is the propriety of these remedies where the parties dispute the existence of a jurisdiction agreement in the first place? Three possible arguments may be advanced.

Firstly, these remedies should not be granted in the absence of an express choice of court agreement, because to do so would introduce uncertainty and be unfair to the party who has not expressly consented to such an agreement. Secondly, the remedies should be granted where the court can imply a jurisdiction agreement, since implied jurisdiction agreements, just like express choice of court agreements, promote party autonomy. Thirdly, these remedies should only rarely be granted, since a reasonable balance must be secured when determining the parties' rights and liabilities, to achieve the goals of legal certainty and predictability. This article subscribes to the first view. Until the question of genuine consent is firmly established, the grant of these remedies becomes questionable. It may be equally unjust to award damages or restrict defendants from pursuing foreign proceedings if they have not expressly committed to refrain from litigating abroad. These remedies are often available in cases where exclusive jurisdiction clauses are in place. It is very difficult to imply an "exclusive" jurisdiction agreement. A higher threshold of proof ought to be required if defendants are to be "punished" through these remedies. Therefore, they should hardly apply where the existence of an agreement to litigate in a forum is disputed.

E. Conclusion

This paper has assessed national and international approaches to the principle of an implied jurisdiction agreement. While it might have been assumed that the validity of implied jurisdiction agreements is not open for debate, given that leading and authoritative texts in the common law jurisdictions (such as Dicey, Morris and Collins) have previously adopted a definite position on their impermissibility, Lord Collins reignited the debate in his decision in *Vizcaya*.

At the level of adjudicatory jurisdiction, where the question of an implied jurisdiction agreement usually crops up, it has been suggested that courts could imply or infer consent from the parties' conduct, using standard objective guidelines for the implication of terms, for example, the business efficacy or officious

[215]For English cases, see *Union Discount Co Ltd v Zoller* [2001] EWCA Civ 1755 [18]; *Starlight Shipping Company v Allianz Marine & Aviation* ("The Alexandros T") [2013] UKSC 70; *Barclays Bank v Ente* [2015] EWHC 2857 [127–128]; *Barclays Bank v Ente* [2015] EWCA Civ 1261 (Comm) [35–36]; *AMT v Marzillier* [2017] UKSC 13. For Australian cases, see *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd (No 2)* [2015] NSWSC [32–33]; *Commonwealth Bank of Australia v White (No 2 of 2004)* [2004] VSC 268 [5]; *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724 [53]; *Compagnie des Messageries Maritime v Wilson* (1954) 94 CLR 577, 587.

bystander tests. These tests are widely used in common law jurisdictions. There is also evidence of the implication of terms in civil law traditions, even though this is less prominent than in common law jurisdictions. Besides, civil law jurisdictions combine both subjective and objective criteria. While it has been impracticable to draw up an exhaustive list of conduct that can amount to an implicit jurisdiction agreement, two key circumstances have been suggested: the previous course of dealings between the parties and trade usages. It has also been suggested that the principle could be useful for consolidating claims from closely related contracts.

This paper advocates a cautious approach to the principle of implied jurisdiction agreements. This is because it is complex and misaligned with the needs of cross-border litigants. In international commercial litigation business entities require legal certainty and predictability. The lack of clarity and predictability that surround the criteria for implying jurisdiction agreements undermines the certainty sought by people entering cross-border contracts. The potential for jurisdictional controversies can complicate and protract the litigation process, thereby impeding the efficient resolution of cross-border disputes.

Beyond the uncertainty that arises from the nature of the concept, an implied agreement over jurisdiction is also unsuitable as a ground for establishing international jurisdiction over foreign defendants. Here, there is a consensus emerging from the harmonisation projects of the HCCH. The Judgments Convention 2019 in Article 5 sets out permissible grounds for international jurisdiction, which include jurisdiction agreements. The policy of the HCCH, reflected in the Judgments Convention and Choice of Court Convention, does not imply jurisdiction agreements. The texts are often sufficiently detailed to provide cross-border litigants with the necessary legal certainty for making informed decisions about the appropriate forum for litigation, and the global circulation of judgments from that forum.

Given these considerations, it becomes apparent that promoting clear and explicit jurisdiction agreements, as supported by the extant international legal frameworks would provide a more predictable basis for resolving cross-border disputes.

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