



That's Just the Standard Language!

The Risks of Using Boilerplate
Clauses in Contracts



Introduction

- Don't assume that the "boilerplate" language that you are used to will be interpreted the same way by another country's courts!
 - We will discuss the courts' real-world application of:
 - Integration clauses
 - Damages clauses
 - Severability clauses
 - Choice of law / choice of forum clauses
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Perspectives and Panelists



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Integration Clauses:

- To what extent is the clause necessary?
- To what extent is it helpful?
- What are the limitations of the clause?
- Sample language



Integration Clauses, aka, “merger clauses” – the US Perspective

- Used to modify US parol evidence rules, which vary by state
 - Is the clause necessary or helpful? Depends on the US state –
 - A few states (Colorado, Illinois, Florida, Pennsylvania) use “four corners rule”, so default is to bar extrinsic evidence, even if no clause is added. Clauses are still very helpful.
 - Most states (including California and New York) would allow parol evidence to help interpret the contract – even if the contract is otherwise clear. Clauses become necessary.
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Integration Clauses, aka, “merger clauses” – the US Perspective

- Limitations: if the contract’s language is deemed “ambiguous”, then the Court will still use extrinsic evidence to interpret the meaning – even in a “four corners” state and even if there is an integration clause.
- Sample language: **“This Agreement, along with any exhibits, appendices, addenda, schedules, and amendments hereto, encompasses the entire and integrated agreement of the parties, and supersedes any and all previously written or oral understandings and agreements between the parties, respecting the subject matter hereof.** The parties hereby acknowledge and represent, by affixing their hands and seals hereto, that said parties have not relied on any representation, assertion, guarantee, warranty, collateral contract or other assurance, except those set out in this Agreement, made by or on behalf of any other party or any other person or entity whatsoever, prior to the execution of this Agreement. The parties hereby waive all rights and remedies, at law or in equity, arising or which may arise as the result of a party’s reliance on such representation, assertion, guarantee, warranty, collateral contract or other assurance, provided that nothing herein contained shall be construed as a restriction or limitation of said party’s right to remedies associated with the gross negligence, willful misconduct or fraud of any person or party taking place prior to, or contemporaneously with, the execution of this Agreement.”



Integration Clauses – aka, “entire agreement clauses” – the UK Perspective

- Primary purpose is to prevent the parties to a written agreement from claiming there are additional terms or “collateral agreements” made during contract negotiations.
 - Necessary or helpful?:
 - Valid tool for prudent commercial parties.
 - Provides parties with increased commercial certainty – it is acknowledgment that parties are not relying on anything other than the express terms of their contract.
 - In turn, this allows the Court to approach a dispute on basis that all contractual terms can be found within the document containing the clause.
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Integration Clauses – aka, “entire agreement clauses” – the UK Perspective

- Limitations
 - Does not operate to render inadmissible extrinsic evidence to prove terms as an aide to construction.
 - Does not exclude terms that would otherwise “be implied” into the agreement, if the clause is silent on their inclusion/exclusion.
 - Will not prevent a claim of rectification.
 - Sample language: *“This Agreement contains the entire and only agreement between the parties and supercedes all previous agreements between the parties respecting the subject matter hereof.”*
 - But a warning on language: do not presume an “entire agreement” clause to have the effect of excluding certain liabilities – such as for pre-contractual representations. Better to provide separately for further explicit exclusions (such as to implication of terms; misrepresentation etc).
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Integration Clauses – the French Perspective

- Integration clauses do not belong to the French legal tradition
 - French Courts have broad powers of interpretation
 - French contracts are not necessarily limited to their written content
- Integration clauses become more common
 - They are now often seen in French contracts
 - They are enforced by the Courts



Integration Clauses – the French Perspective

- It is however doubtful that an integration clause would avoid all interference of the Courts
- Language would be close to a US integration clause:

“This agreement constitutes the entire agreement and understanding between the parties with respect to its subject matter and supersedes any prior agreement, statement, representation, warranty or understanding with respect thereto. This agreement is being entered into without reliance upon any representation, warranty, statement or document of any kind whatsoever which is not expressly set forth or referred to herein.”



Integration Clauses – the German Perspective

- Presumption that the agreement is correct and complete
 - Necessary or helpful?
 - As the clause just slightly strengthens the presumption of general law that a written contract reflects completely and correctly the parties' agreement, this clause has rather little importance.
 - Integration Clauses are relatively rare in agreements on legal transactions in Germany and between German parties.
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Integration Clauses – the German Perspective

- The predominant opinion affirms in principle the validity of such clause. Arg.: Just a repetition of the allocation of burden of proof.
 - Limitation: Pursuant to German law, a clause changing the allocation of burden of proof to the detriment of the other party is void, in particular, if the other party has to affirm any facts. Consequently, the clause may not prohibit the proof of contrary; only a rebuttable presumption is valid.
 - Other opinion: Clause is void anyway as it may prevent the other party to refer to an oral side agreement.
 - Sample language: “This Agreement represents the entire agreement between the Parties concerning the subject matter of this Agreement and supersedes all earlier negotiations as well as verbal and written understandings between the Parties concerning the subject matter of this Agreement. There are no other side agreements to this Agreement.”
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Integration Clauses (Clause d'intégration) – the Luxembourg Perspective

- Rare in the Luxembourg context and stem from Anglo-Saxon practice.
 - Luxembourg contract law is based on general principles of freedom and willingness to contract (article 1134 of the Civil Code): “Agreements lawfully entered into take place of the law for those who made them”. Therefore, parties will be strictly bound by a contract’s terms.
 - **Is the clause necessary or helpful?**
 - Will be necessary and conducive for the contract’s interpretation and the parties’ intention to limit the analysis to exclusion of pre-contractual documents.
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Integration Clauses (Clause d'intégration) – the Luxembourg Perspective

- **Limitation:** The Civil Code implies principles of fairness and equitable dealing with contracting parties that may dilute the effect of the clause (article 1135). These principles may be used to dilute the complete exclusion of prior contractual documents.
 - **Language to avoid:** The clearer the defined scope is, will produce more certainty and facilitate the judge's interpretation work.
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Damages Clauses:

- To what extent can the clause be used to:
 - Increase damages?
 - Define damages?
 - Limit damages?
 - Sample language
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Damages Clauses – the UK Perspective

- Highly desirable to include – there is no downside.
- Beware if being used to limit damages:
 - May fall foul of Unfair Contract Terms Act
 - If broadly drafted may be deemed ineffective – the “Contra Proferentem” rule



Damages Clauses – the UK Perspective

- Usage to increase damages:
 - If sensible, can be invaluable.
 - Most useful where damages can be difficult to quantify, or difficult to prove.
 - Removes of the burden of proving loss, and renders irrelevant questions of remoteness, mitigation and contributory fault.
 - Language to use (or: “the cases of (1) *Cavendish Square Holding v Makbessi* and (2) *Parking Eye Limited v Beavis* [2015] UK SC 67”):
 - Try to draft as primary obligation rather than secondary obligation.
 - Within innocent parties legitimate interests?
 - Keep an eye on proportionality.
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French Damages Clauses

- General rule: full compensation of the damage, neither more nor less.
- As a principle, damages clauses are valid regarding contract liability
- Limitations:
 - Services agreements: the breach of “essential undertakings’ and gross negligence
 - Latent defects
 - Defective products
 - B2C contracts



Damages Clauses – the French Perspective

- Liquidated damages clauses are valid, but the Courts have the right to reduce the amount if it is deemed excessive, or increase it if it is deemed too low.
- Example of clause limiting damages:

“Under no circumstances shall party A’s liability arising out or in connection with this agreement or party A’s performance or asserted failure to perform hereunder exceed the purchase price of the product to which such liability relates.”



Damages Clauses – the German Perspective

- Contractual increase of liability is permitted in individual agreements unless it would transgress standards of public decency, e.g. takeover of a liability regardless of fault.
 - Liquidated damages are valid in principle because of the freedom of contract. In general terms and conditions there are limitations:
 - Lump sum may not exceed damages that might be expected in the normal course of the events.
 - The clause must explicitly provide the other party's right to prove that a damage has not occurred or is significantly lower than the lump sum.
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Damages Clauses – the German Perspective

- Contractual limitation of liability is permitted in principle (e.g. limitation of the scope; time limit).

Limitations:

- Liability for gross negligence cannot be excluded.
 - With regard to provisions in general terms and conditions, a limitation of liability is invalid if damage is caused to a person's life, body or health or in cases of gross negligence or intent.
 - Furthermore, there are numerous specific prohibitions in the special law of obligations.
- **Sample language:**
“Liability is limited to EUR 250,000 in the individual case, unless the liability is based on intent.”
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Damages clauses (les dommages et intérêts) – the Luxembourg Perspective

- Damages and penalties for failure to execute contractual obligations are governed by articles 1146 etc., 1152 and 1226 of the Luxembourg Civil Code and accordingly such clause are mostly enforceable.
- Parties can expressly stipulate in the contract the measure and quantum of damages (example: accepted market practice in real estate transactions).
- Attorney fees are allowable and can fixed contractually (also provided for under the article 240 NCPC, customarily limited damages are granted)

Extent limit damage: Clause limitation of damages are in, principle, valid and enforceable clauses and are common practice.



Damages clauses (les dommages et intérêts) – the Luxembourg Perspective

Extent damages can be increased:

- Risk of being interpreted as penalty clause. The Civil Code provides the judge with power to review the agreed amount and the judge can modify the amount if he/she hold it to be manifestly excessive or derisory. An excessive nature of a penalty clause could only result from the comparison of the actual loss suffered by the non-breaching party and the agreed amounts of compensation.

Language to avoid:

- Luxembourg courts favors direct/foreseeable damages-possibly to tie-in the damages to certain parameters
 - Tendency is to avoid unduly large awards.
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Damages Clauses – the US Perspective

- Allowable clauses that increase damages – perhaps attorneys’ fees clauses, depending on states’ laws
- Clauses that reduce damages:
 - Enforceability depends on state laws, content of clauses, whether trying to limit damages for breach of contract or for related torts, as well
 - e.g., arbitration clauses limiting punitive or treble damages are probably invalid
- Liquidated damages clauses that set the amount of damages – can be valid if they are an estimate, ***not a penalty***. Courts look at whether it was otherwise very difficult to calculate damages when the contract was drafted, and make sure the amount is not excessive.



Severability Clauses:

- To what extent is the clause necessary?
- To what extent is the clause helpful?
- What are the limitations of the clause?
- Sample language



Severability Clauses – the US Perspective

- In some states (e.g. DC) severability is allowable if one provision is against public policy, even without an explicit severability clause
 - In others (e.g., NY), if there is no clause: severability is generally “a question of intention, to be determined from the language employed by the parties, viewed in the light of the circumstances surrounding them at the time they contracted” – so use a clause to reduce ambiguity.
 - In some scenarios, a severability clause can save an otherwise unenforceable contract
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Severability Clauses – the US Perspective

- Limitations –
 - in some states (e.g. VA, WI), where public policy disfavors over-restrictive non-competition, non-solicitation, and nondisclosure contracts, a severability clause might not save an overbroad agreement.
 - If the invalid provision goes to the heart of the agreement, the court might not attempt to rewrite the agreement to save it
 - Sample language: “The provisions of this agreement are severable. If any provisions of this Agreement shall be held to be invalid or unenforceable for any reason, the remaining provisions shall continue to be valid and enforceable.”
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Severability Clauses –the UK Perspective

- Necessity: the common law doctrine of severance is likely to be applied by the Courts whether or not there is an express severance provisions.
 - But helpful? The application of the doctrine of severance by the Courts can be more restrictive than under an express clause. Including a severance clause may influence the Court's application of the doctrine.
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Severability Clauses –the UK Perspective

- Limitations or issues of severance clauses:
 - The doctrine is limited:- as a general rule, Courts will not make a new contract for the parties (i.e. will not apply severance if that would alter a contract's basic nature).
 - Do not blindly include: a severance clause may have results contrary to intention.
 - In many cases there is a fallback provision provided by law when a term in a contract fails (e.g. a liquidated damages clause being deemed a penalty).
 - Language: consider whether it is intended to provide for deletion in whole or in part of a clause – be careful not to create a blunt instrument.
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Severability Clauses –the French Perspective

- Severability might be set aside if the parties have made the whole agreement depend on clause which is held illegal
 - But French Courts tend to give effect to contracts whenever possible:
 - Based on several provisions of the Civil Code
 - An illegal clause might be simply set aside
 - An illegal clause might be replaced by another provision
 - A severability clause might help the Courts giving effect to a contract notwithstanding an illegal provision
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Severability Clauses –the French Perspective

- Severability clauses might not be effective all the time
 - Case law is rare
 - Analogy with severability clauses linking two different agreements
 - Language:

“If any provision of this agreement is illegal, invalid, or unenforceable under present or future laws, then, and in that event, it is the intention of the parties hereto that the remainder of this agreement shall not be affected thereby, and it is also the intention of the parties to this agreement that in lieu of each provision of this agreement a provision which is similar in terms to such illegal, invalid, or unenforceable provision as may be possible, and be legal, valid, and enforceable.”
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Severability Clauses –the German Perspective

- Exemption from sec. 139 German Civil Code saying that, in principle, if a part of a legal transaction is void the whole transaction is void (exception: Parties' intention deviates subject to interpretation).

- Necessary or helpful?

As the application of this legal provision is subject to high uncertainty, Severability Clauses are helpful in individual agreements.

However, with regard to general terms and conditions the same provision is stipulated by law and, thus, redundant.



Severability Clauses –the German Perspective

- Limitation:
 - German Federal Court (BGH) decided that Severability Clauses only allocate the burden of proof to the other party.
 - Therefore, in individual cases the whole agreement may be void despite the Severability Clause, e.g. if a fundamental clause is void and due to that the total character of the contract changes.
 - Sample language:

“In the event that one or more provisions of this Shareholders’ Agreement shall, or shall be deemed to, be invalid or unenforceable, the validity and enforceability of the other provisions of this Shareholders’ Agreement shall not be affected thereby. In such case, the Parties hereto shall agree to such valid and enforceable provision or provisions, which correspond as closely as possible with the commercial intent of the Parties. The same shall apply in the event that this Shareholders’ Agreement contains any unintended gap.”
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Severability Clauses (clause de divisibilité) – the Luxembourg Perspective

- **Helpful:** Case law on this matter is rare and therefore it is even more important to include a “severability clause” which will preserve the contract in case one of the clause are null and void.
 - Existing case law and Civil Code contract interpretation principles suggest that the courts will strive to find that null clauses would not invalidate the entire contract.
 - **Limitation:** If a certain clause is an essential clause of the contract, the “severability clause” effect could be nullified if that clause would be considered unlawful or the contract is null and void as a whole.
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Choice of Law / Choice of Forum Clauses:

- Practically speaking,
 - What happens if a case is filed in your jurisdiction that contains a foreign choice of law clause?
 - What happens if a case is filed in your jurisdiction that contains a foreign choice of forum clause?
 - Will a court be able to disregard the choice and in what circumstances?
 - Is there a practical difference if the contract contains a (domestic or foreign) choice of an *arbitral* forum?
 - Sample language
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Choice of Law / Choice of Forum Clauses – the US Perspective

- Foreign choice of law clause alone – the parties must inform the court of applicability of foreign law
 - Typically, each side will then submit opinions from foreign legal experts interpreting the foreign law
 - Court may perform a conflicts of law analysis on whether the foreign law differs from US law – if it decides there is no conflict, will just apply the US law
 - Foreign choice of forum – the court will carefully analyze the scope of the clause to see if the litigation should be dismissed so that it can be re-filed in the foreign forum
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Choice of Law / Choice of Forum Clauses – the US Perspective

- Getting dismissal under forum selection clause:
 - Have to move to dismiss using *forum non conveniens* doctrine, and court will still examine whether the chosen forum is “adequate” and whether public policy factors require that the litigation stay in US.
 - Court will carefully examine – is the forum choice ***exclusive***, and does it extend to ***all issues related to*** the agreement? If not, the case might stay in the US.
 - Part of a motion to dismiss, so may need to raise other grounds for dismissal, as well – but can try to triage motions to dismiss, if Court will allow.
 - Motion to compel arbitration can be simpler, in some ways – doesn’t need to be a full-fledged motion to dismiss.
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Choice of Law / Choice of Forum Clauses – the US Perspective

- **Sample choice of law:** This agreement and all amendments hereto shall be construed and enforced in accordance with, and the rights of the parties shall be governed by, the laws of the state of New York, without giving effect to its choice of law principles.
- **Sample choice of forum:** The parties irrevocably: (a) consent to the exclusive jurisdiction of the United States District Court for the Southern District of New York, or in the event that such court lacks jurisdiction, the Supreme Court of the State of New York for the County of New York, for any proceedings which may arise out of or relate to this Agreement (a “Proceeding”); (b) waive any objection to the convenience of any such court; and (c) waive any right to bring in any other court or forum any Proceeding.
- Will the court interpret a European-style forum selection clause using the law of that forum? Maybe – it’s worth a try. But better to use a US-style clause to begin with.



Choice of Law / Choice of Forum Clauses – the UK Perspective

- A foreign choice of law clause in isolation can survive, but:
 - Is that what you want? Foreign law must then be pleaded and proven as a fact (...increased time, cost and complexity of litigation)
 - Post Brexit: (1) don't ask; (2) you may face a successful challenge to the English Courts' jurisdiction.
 - In some circumstances, an express choice of law clause can be challenged, and “agreed” applicable law modified.
 - “Mandatory rules” may apply over and above law chosen by the parties.
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Choice of Law / Choice of Forum Clauses – the UK Perspective

- Foreign choices of forum clauses in the English Courts:
 - Easy for Defendant to challenge jurisdiction, although...
 - In certain types of cases (disputes relating to land, constitution of companies) jurisdiction clause will be ignored.
 - Post Brexit: defendant likely to have an easy challenge to jurisdiction.
 - Drafting:
 - Best to be specific both as to governing law, and to jurisdiction.
 - Be sure to specify “exclusive jurisdiction” if that is your wish.
 - Commencing Court proceedings where arbitration agreement exists:
 - Far easier to challenge Court’s jurisdiction (in comparison to issues re “foreign forum” clauses).
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Choice of Law / Choice of Forum Clauses – the French Perspective

- Choice of law clauses are enforceable before French Courts.
 - The parties will have to bring appropriate evidence on the applicable foreign law
 - Limitation: rules of international public order
 - Consumer protection rules
 - Pre-contractual information (franchise)
 - Brutal breach of business relationships
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Choice of Law / Choice of Forum Clauses – the French Perspective

- Choice of forum clauses are valid, subject to formal requirements
- Limitation: compulsory territorial jurisdiction of French Courts
 - Example: French Courts have compulsory jurisdiction for labor contracts
 - A choice of foreign forum or an arbitration clause is enforceable in disputes regarding brutal breach of established business relationships
- Language:

“The Parties agree that any dispute arising from the interpretation, the performance or the termination of the agreement, and the consequences thereof, shall be of the exclusive jurisdiction of the commercial court of Paris and shall be subject to French law.”



Choice of Law / Choice of Forum Clauses – the German Perspective

- If a case is filed that contains a foreign Choice of Law Clause, the German court has to apply foreign law. Before, the parties have to inform the court of the choice of law.
 - Limitations subject to the rules of private international law.
 - No choice of procedural law; the law of the forum (*lex fori*) applies.
 - If a case is filed that contains a foreign Choice of Forum Clause, the German court has to consider whether the Choice of Forum Clause is valid or not. If it is valid, the German court is not competent and has to decline jurisdiction. It can not transfer the case to the competent foreign court.
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Choice of Law / Choice of Forum Clauses – the German Perspective

- If a valid Arbitration Clause is agreed, the court is not competent. It may not transfer the case directly to the court of arbitration.
 - Sample language:
 - “This Agreement shall be governed by, and be construed in accordance with, the laws of the Federal Republic of Germany, without regard to principles of conflicts of laws. “
 - “Exclusive place of jurisdiction for all disputes arising from or in connection with this Agreement is Frankfurt am Main.”
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Choice of Law / Choice of Forum Clauses – the Luxembourg Perspective

- Applicable legal provisions (with reference to international transactions and commerce):
- **Jurisdiction:** REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in **civil and commercial** matters is applicable in Luxembourg (a.k.a the “Brussels Regime”).
- **Governing law:** REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 June 2008 on the law applicable to contractual obligations (Rome I).
- **Arbitration clauses:** Common and enforceable (note: the Brussels/Rome Regimes are not applicable). In the absence of specific stipulation the arbitration rules of the New Civil Code will be applicable. Therefore, arbitration clauses should be carefully drafted.



Choice of Law / Choice of Forum Clauses – the Luxembourg Perspective

- **Arbitral Awards:** Luxembourg is a signatory to Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention").
 - **In principle:** In the context of international commercial contracts foreign choice of law clauses are common practice and are enforceable in accordance with their terms.
 - **Limitations:**
 - May not lead to the avoidance of mandatory provisions (including public order or policy) of national law of the country with which the contractual performance is most closely connected (e.g. matters like taxation, consumer protection, insolvency law or pledge of securities).
 - Rules of private international law under the applicable legislation.
 - Local procedural rules are applicable.
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Choice of Law / Choice of Forum Clauses – the Luxembourg Perspective

- These clauses are essential for international legal agreements.
 - Clear and standard language on “exclusive” jurisdiction and choice of law would remove any doubt of the choice of law and jurisdictions.
 - Any intervention by a Luxembourg judge to alter the choice of law or jurisdiction would be very unlikely in contracts relating to commercial parties.
 - **From a practical and procedural standpoint:** it is necessary to invoke a choice of forum or jurisdictional objection at the outset of the litigation (“in limine litis”) to avoid an argument that one has consented to local Luxembourg jurisdiction.
 - **A foreign law clause:** If the judge accepted local jurisdictions and confronted with a foreign choice law clause and the judge is not familiar with that law the judge would refer to written legal opinions of foreign counsel.
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