

The ‘Manifest Injustice’ Clause in Article 4 of the Hague Convention on Private International Law: Applicability in International Commercial Contract Disputes

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Abstract

This paper critically examines the ‘manifest injustice’ clause in Article 4 of the Hague Convention on Choice of Court Agreements, focusing on its applicability in international commercial contract disputes. The clause serves as a safeguard to ensure fairness in choice of court agreements by allowing courts to set aside agreements that result in unjust outcomes for one of the parties. The paper explores various contexts in which this clause applies, such as situations involving unequal bargaining power, fraud, duress, coercion, procedural injustice, and unconscionable terms. It also discusses the significant legal challenges associated with its application, including the lack of a clear definition, variability in judicial interpretation, conflicts with the principle of party autonomy, and evidentiary burdens. The paper concludes that while the ‘manifest injustice’ clause is a critical tool for promoting fairness in international commerce, its effectiveness depends on the development of clearer guidelines and more consistent jurisprudence to harmonize its interpretation across jurisdictions, thereby enhancing its role in ensuring justice and equity in cross-border contractual relationships.

Keywords: manifest injustice, Hague Convention, choice of court agreements

1. Introduction

As globalization deepens, international commercial contracts have become a cornerstone of cross-border trade and investment. However, these contracts often involve parties from different jurisdictions, each with its own legal systems and procedural rules, making dispute resolution highly complex. The 2005 Hague Convention on Choice of Court Agreements seeks to enhance legal certainty and predictability in cross-border transactions by establishing a unified framework for enforcing choice of court agreements. A key provision of this framework is the ‘manifest injustice’ clause in Article 4, which serves as a vital safeguard to ensure fairness in the enforcement of such agreements. By allowing courts to review and potentially invalidate choice of court clauses that are deemed manifestly unfair, the provision aims to prevent stronger parties from imposing unjust terms through unequal bargaining power or improper means. However, the lack of a clear definition of ‘manifest injustice’ poses significant challenges to its application in practice, prompting a critical examination of its effectiveness in promoting fairness in international commercial contracts.

2. The ‘Manifest Injustice’ Clause in Article 4

Article 4 of the Hague Convention on Choice of Court Agreements introduces the concept of ‘manifest injustice’ as a key safeguard against the misuse of choice of court agreements in international commercial contracts. This provision asserts that a court designated by the parties to a contract will generally have exclusive jurisdiction over disputes arising from that contract. However, this exclusive jurisdiction is subject to an important exception: if the chosen court is found to be ‘manifest injustice’ to one of the parties, the agreement can be challenged and potentially set aside. This clause reflects a delicate balance between respecting party autonomy—the freedom of

parties to choose their own dispute resolution forum—and protecting against potential abuses of that autonomy.

2.1 Scope and Interpretation of ‘Manifest Injustice’

The term ‘manifest injustice’ is deliberately left undefined in the Hague Convention, allowing courts the flexibility to interpret its meaning based on the specific circumstances of each case. This lack of a precise definition is intended to provide a broad protective umbrella that covers various forms of injustice that could arise in international commercial contracts. In practice, ‘manifest injustice’ is generally understood to encompass situations where the choice of court agreement is imposed in a manner that leads to an inequitable or unconscionable outcome for one of the parties. This could include cases where the choice of court agreement is the result of fraud, duress, coercion, or significant power imbalances between the contracting parties. Courts may consider several factors when determining whether a choice of court agreement constitutes manifest injustice. These factors include the relative bargaining power of the parties, the transparency of the negotiations leading to the agreement, the presence of any undue influence or coercion, the fairness of the terms themselves, and whether there was a genuine and informed consent by both parties. For example, if a powerful multinational corporation imposes a choice of court agreement on a smaller, less experienced business under terms that are heavily weighted in the corporation’s favor, a court may find such an agreement to be manifestly unjust. This flexibility in interpretation ensures that the ‘manifest injustice’ clause can adapt to the diverse contexts in which international commercial disputes may arise.

2.2 Rationale Behind the ‘Manifest Injustice’ Clause

The inclusion of the ‘manifest injustice’ clause in Article 4 serves several critical purposes in international commercial law. It seeks to protect weaker parties from exploitation by preventing stronger parties from using their superior bargaining power to dictate unfair jurisdictional terms. In the context of international contracts, there is often a significant disparity in resources, legal knowledge, and negotiation strength between the parties involved. Without a safeguard such as the ‘manifest injustice’ clause, a stronger party could exploit these disparities to impose a choice of court that is highly advantageous to them and detrimental to the other party, thereby undermining the principles of equity and justice. The ‘manifest injustice’ clause ensures that the choice of court does not result in a denial of justice. If a court is selected that is geographically remote, linguistically challenging, or culturally unfamiliar to one of the parties, that party may be severely disadvantaged in presenting their case. For example, requiring a small business from one country to litigate in a distant jurisdiction where they have no access to local legal expertise could be deemed manifestly unjust. The clause thus aims to guarantee that all parties have a fair and reasonable opportunity to argue their case in a forum that does not inherently disadvantage them. The clause acts as a counterbalance to the principle of party autonomy, which is a foundational tenet of contract law. While the Hague Convention generally supports the freedom of parties to choose their forum for dispute resolution, the ‘manifest injustice’ clause recognizes that this autonomy should not be absolute. It establishes a mechanism by which courts can intervene when party autonomy has been exercised in a way that contravenes basic principles of fairness and justice. This balancing act is essential to maintaining the legitimacy of international commercial contracts and upholding confidence in the legal frameworks that govern cross-border transactions.

2.3 Legal and Practical Challenges in Applying the Clause

Despite its importance, the application of the ‘manifest injustice’ clause in Article 4 presents several legal and practical challenges. The absence of a precise definition creates a degree of uncertainty, as courts must rely on their own interpretations and discretion to determine what constitutes ‘manifest injustice.’ This can lead to inconsistent decisions across jurisdictions, undermining the goal of uniformity that the Hague Convention seeks to promote. Additionally, proving ‘manifest injustice’ often involves a complex evidentiary process, requiring detailed examination of the circumstances surrounding the formation of the contract, the conduct of the parties, and the fairness of the terms. This evidentiary burden can be particularly difficult to meet in international cases, where access to relevant documents, witnesses, and other evidence may be limited by geographical, legal, or logistical barriers. There is a tension between the protection offered by the ‘manifest injustice’ clause and the principle of party autonomy. While the clause aims to prevent abuse, its application may be perceived as infringing on the right of parties to freely negotiate and decide their own terms, including the choice of forum. This tension underscores the complexity of balancing fairness with freedom of contract in the global commercial arena.

3. Applicability of the ‘Manifest Injustice’ Clause in International Commercial Contracts

The ‘manifest injustice’ clause in Article 4 of the Hague Convention on Choice of Court Agreements plays a vital role in ensuring fairness in international commercial contracts by providing courts with the authority to invalidate choice of court agreements that are unjust to one of the parties involved. Its applicability extends to various scenarios where the balance of fairness in the agreement may be compromised, and each scenario

warrants careful judicial consideration. Below, we delve deeper into the key situations in which this clause can be applied.

3.1 Inequality of Bargaining Power

The ‘manifest injustice’ clause is crucial in contexts where there is a marked disparity in bargaining power between the contracting parties. In international commerce, contracts often involve entities with varying degrees of resources, expertise, and negotiating leverage. For instance, a large multinational corporation may negotiate a contract with a small or medium-sized enterprise (SME) or an individual trader who lacks the same level of bargaining power or access to legal advice. In such cases, the stronger party may exploit its position to impose a choice of court clause that favors its interests, such as selecting a forum that is more familiar, convenient, or lenient to its legal strategies. The clause allows the disadvantaged party to challenge such clauses on grounds of manifest injustice, thereby promoting equitable treatment and preventing abuse. Courts applying the clause may consider factors like the sophistication of the parties, their relative economic strength, the availability of legal counsel during negotiations, and the transparency of the contractual terms. In practice, if the evidence demonstrates that the choice of court was not a result of genuine negotiation but was effectively imposed by the stronger party, the agreement could be set aside or modified to ensure a fairer balance between the parties.

3.2 Fraud, Duress, or Coercion

The ‘manifest injustice’ clause is directly applicable when a choice of court agreement is obtained through fraudulent means, duress, or coercion. Fraud occurs when one party intentionally deceives another into agreeing to a choice of court clause, while duress involves threats or pressure that effectively force a party to consent to the clause against their will. Coercion, meanwhile, may encompass both economic and psychological pressures exerted on the weaker party. In these cases, the clause empowers courts to invalidate the choice of court agreement, protecting parties from being bound by jurisdictional terms to which they did not genuinely or voluntarily agree. Courts will typically examine the circumstances surrounding the formation of the contract, including whether there was evidence of deceit, undue pressure, or other coercive tactics that compromised the consent of the affected party. The presence of such elements justifies the application of the ‘manifest injustice’ clause to prevent parties from being unjustly disadvantaged by jurisdictional terms they were compelled to accept.

3.3 Procedural Injustice

Procedural injustice arises when a choice of court agreement imposes substantial procedural disadvantages on one of the parties, affecting their ability to participate effectively in the legal process. This may occur when a party is required to litigate in a foreign jurisdiction where they face significant logistical, financial, or cultural barriers. For example, a party may have to litigate in a jurisdiction where they have no access to legal representation, lack familiarity with the local language or legal procedures, or face prohibitive travel costs and other expenses. The ‘manifest injustice’ clause enables courts to scrutinize choice of court agreements that create such procedural obstacles. Courts may assess whether the agreement unfairly limits a party’s access to justice, whether it creates an undue burden that was not reasonably foreseeable at the time of contracting, or whether it would effectively deny the party a fair opportunity to present their case. If such factors are present, the clause can be invoked to mitigate procedural injustices and ensure that both parties have a reasonable opportunity to litigate their disputes.

3.4 Unconscionable Terms

The clause is also applicable where the terms of the choice of court agreement are deemed unconscionable. Unconscionability refers to a situation where the terms of an agreement are so one-sided that they shock the conscience or are grossly unfair to one of the parties. This might occur if the chosen court is overwhelmingly advantageous to one party due to its familiarity with the court’s procedures, favorable legal standards, or logistical convenience, while imposing severe hardships on the other party. Unconscionability can also arise when one party was not adequately informed of the implications of the choice of court agreement. For instance, if one party fails to disclose critical information about the chosen forum’s rules, costs, or potential biases, the other party may be misled into agreeing to terms they would not have accepted with full knowledge. The ‘manifest injustice’ clause allows courts to invalidate or modify such agreements to prevent exploitation and ensure that the choice of court is genuinely fair and reasonable to both parties.

3.5 Ensuring Fairness in Choice of Court Agreements

Article 4 of the Hague Convention aims to establish a fair and just framework for choice of court agreements by setting a standard that courts must use when evaluating their enforceability. To ensure fairness, courts are tasked with examining several factors that could indicate manifest injustice. These factors include:

- **Circumstances of Agreement Formation:** Courts assess the conditions under which the agreement was

made, including the conduct of negotiations, the presence or absence of legal counsel, and whether any undue pressure or deception was involved.

- **Relative Bargaining Power:** Courts evaluate whether there was a significant imbalance in the bargaining power of the parties and whether this imbalance was exploited to impose an unjust choice of court clause.
- **Transparency and Understanding:** Courts consider whether the terms of the agreement were transparent and whether both parties had a clear understanding of the implications of the choice of court clause. Any lack of transparency or inadequate disclosure could signal manifest injustice.
- **Impact on Access to Justice:** Courts analyze whether the chosen court would create significant barriers to a party's ability to access justice, such as prohibitive costs, lack of local legal representation, or procedural unfamiliarity.

By enforcing these standards, courts can strike a balance between upholding the principle of party autonomy and preventing the misuse of choice of court agreements to the detriment of justice. However, the effective application of the 'manifest injustice' clause also requires clear guidelines and consistent judicial interpretation to avoid uncertainty and to protect parties from unfair jurisdictional outcomes.

4. Legal Challenges in the Application of the 'Manifest Injustice' Clause

The application of the 'manifest injustice' clause in Article 4 of the Hague Convention on Choice of Court Agreements is essential to ensure fairness in international commercial contracts. However, its practical implementation poses several significant legal challenges. These challenges stem from ambiguities in the clause's definition, variances in judicial interpretation, tensions between party autonomy and protection, and the difficulties associated with meeting the evidentiary burden. Understanding these challenges is crucial for assessing the clause's effectiveness and its impact on international dispute resolution.

4.1 Lack of Clear Definition

One of the primary legal challenges lies in the absence of a precise definition of 'manifest injustice' within the Hague Convention. The drafters of the Convention intentionally left the term undefined to allow for flexibility in judicial interpretation across various jurisdictions. However, this vagueness has created significant uncertainty regarding what constitutes 'manifest injustice.' For instance, while some courts may interpret 'manifest injustice' narrowly, focusing solely on cases involving fraud, duress, or coercion, others may adopt a broader interpretation that encompasses any situation where the balance of fairness is compromised, including procedural disadvantages or unforeseen hardships. The lack of a standardized definition can undermine the predictability and consistency of the Convention's application. Parties to international commercial contracts may face uncertainty about whether a choice of court agreement will be upheld or invalidated in different jurisdictions. This uncertainty can discourage parties from using choice of court clauses, potentially reducing the effectiveness of the Convention in promoting legal certainty and predictability in international commerce. To mitigate this challenge, there is a need for further guidance or jurisprudence that provides more clarity on the scope and application of the 'manifest injustice' clause.

4.2 Variability in Judicial Interpretation

The flexibility in interpreting 'manifest injustice' leads to significant variability in how national courts apply the clause. Courts in different jurisdictions may interpret the clause in line with their own legal principles, cultural attitudes, and judicial philosophies. For example, courts in common law jurisdictions may emphasize the importance of party autonomy and be more reluctant to invalidate choice of court agreements, while courts in civil law jurisdictions may focus more on ensuring fairness and equity between the parties, even if it means limiting party autonomy. This variability can result in divergent outcomes in similar cases, creating a lack of uniformity in the enforcement of choice of court agreements. Such inconsistencies can be problematic for international commercial parties, who often seek predictability and stability in their contractual relationships. A choice of court clause that is upheld in one jurisdiction may be invalidated in another, leading to forum shopping, increased litigation costs, and prolonged disputes. Addressing this challenge requires greater harmonization of judicial interpretations, possibly through international dialogue, judicial cooperation, or the development of interpretive guidelines by international bodies.

4.3 Conflict with Party Autonomy

The 'manifest injustice' clause inherently conflicts with the principle of party autonomy, a cornerstone of contract law and international commercial practice. Party autonomy allows contracting parties the freedom to determine the terms of their agreement, including the choice of forum for dispute resolution. However, the 'manifest injustice' clause introduces a limitation on this autonomy by empowering courts to set aside or modify choice of court agreements deemed unjust. This tension raises a fundamental legal challenge: how to balance the

respect for party autonomy with the need to protect parties from potentially unjust agreements. On the one hand, too much judicial intervention could undermine the freedom of parties to contract and disrupt the expectations established at the time of agreement. On the other hand, inadequate protection against manifestly unjust agreements could lead to significant inequities, particularly in cases involving disparities in bargaining power, coercion, or fraud. Resolving this tension requires a careful and nuanced approach by courts, which must assess each case on its merits and consider both the parties' autonomy and the principles of fairness and justice. This balance is legally complex and contentious, often leading to divergent opinions on how much deference should be given to party choices versus judicial oversight.

4.4 Evidentiary Burden

The burden of proving 'manifest injustice' rests on the party challenging the choice of court agreement. This evidentiary burden is often high and can be difficult to meet, particularly in the context of international disputes. The challenging party must provide substantial evidence demonstrating that the choice of court agreement was the result of inequality, coercion, fraud, or other factors that render it unjust. Gathering such evidence in international cases presents multiple challenges. Parties may need to obtain documents, testimonies, and other forms of evidence from multiple jurisdictions, each with its own legal rules and procedures governing evidence collection and admissibility. Moreover, logistical barriers such as language differences, geographical distances, and access to witnesses can further complicate the evidentiary process. Additionally, the cost of obtaining and presenting such evidence can be prohibitively high, especially for smaller parties who may lack the financial resources of larger, more powerful entities. The high evidentiary threshold can deter parties from pursuing a challenge based on 'manifest injustice,' even when they have a legitimate claim. This challenge could be alleviated through international cooperation mechanisms that facilitate cross-border evidence gathering, as well as by adopting more flexible evidentiary standards in cases where manifest injustice is alleged.

4.5 Inconsistent Application and Enforcement

Beyond the direct challenges of interpretation and evidentiary burdens, there are also concerns related to the inconsistent application and enforcement of the 'manifest injustice' clause. Different legal traditions and procedural rules can lead to varied approaches to enforcing judgments, even when 'manifest injustice' is established. Some jurisdictions may have stricter standards for enforcement, requiring extensive proof of unfairness, while others may take a more lenient approach. The enforcement of foreign judgments can also be impeded by domestic laws that may not fully align with the Hague Convention's provisions, particularly in jurisdictions that have not ratified the Convention or where local laws provide for different grounds for refusal of enforcement. This inconsistency creates additional layers of legal complexity and uncertainty, potentially reducing the effectiveness of the 'manifest injustice' clause in providing a uniform standard of fairness across jurisdictions.

4.6 Judicial Discretion and Potential Bias

Another significant challenge is the reliance on judicial discretion in interpreting and applying the 'manifest injustice' clause. While judicial discretion is essential for ensuring that decisions are tailored to the unique facts of each case, it can also introduce subjectivity and potential bias. Judges may interpret the same facts differently based on their personal beliefs, cultural contexts, or legal training, leading to inconsistent outcomes. This variability can be especially pronounced in cases involving international parties, where judges may be influenced, consciously or unconsciously, by perceptions of foreign parties or by national interests. For example, a court in one jurisdiction may be more inclined to protect domestic parties from perceived unfair foreign choice of court clauses, while a court in another jurisdiction may prioritize upholding international agreements to maintain its reputation as a reliable venue for international business.

5. Conclusion

The 'manifest injustice' clause in Article 4 of the Hague Convention on Choice of Court Agreements is a vital mechanism for ensuring fairness in international commercial contracts by providing a safeguard against the misuse of choice of court agreements. It addresses the need to protect parties from coercion, fraud, and significant imbalances in bargaining power, thereby maintaining the integrity of cross-border contractual arrangements. However, the clause's potential to effectively fulfill its purpose is constrained by several challenges, including the absence of a precise definition, the variability in judicial interpretation, conflicts with the principle of party autonomy, and substantial evidentiary burdens that complicate its application in practice. To enhance the clause's effectiveness, international legal bodies, national courts, and scholars must work together to establish clearer guidelines and more consistent jurisprudence that can harmonize its interpretation and application across different jurisdictions. Such efforts could help mitigate uncertainty, prevent forum shopping, and ensure that choice of court agreements serve their intended function of providing a fair and just mechanism for resolving international commercial disputes, thereby reinforcing the overall reliability and

predictability of the global legal framework.

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