

# eBay and Skype: International Contractual Choice of Neutral Countries for Dispute Resolution

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Parties to international contracts frequently choose third party countries for the law governing their contracts, the venue for hearing disputes, and/or the type of dispute resolution (court or arbitration). The parties often select a recognised and neutral hub such as London or Singapore. Many jurisdictions uphold these choices in contracts. An example is the November 2009 London judgment involving Skype and its co-founders, Niklas Zennstrom and Janus Friis. This arose in the battle by the co-founders to acquire Skype back from eBay.

## Background: eBay, Skype and the Skype co-founders

The Skype co-founders wanted to buy back Skype from eBay. But eBay intended to sell Skype to other investors.

Skype was using software, critical for the Skype operation, licensed by Joltid Ltd, a company ultimately owned by the two co-founders.

Joltid claimed that Skype was using the software in breach of the licence agreement.<sup>1</sup>

This led to two court cases, one in the US and one in the UK:

- In the UK, Skype sued Joltid seeking orders confirming its use of the software was legitimate;
- In the US, Joltid sued (a) Skype and also (b) eBay and the proposed investors, claiming breach of US copyright.

In the UK case, Skype successfully applied to stop the proceedings against it in the US, on the basis of

<sup>1</sup> In particular, it was modifying source code when it only had the right to use the object code.

the following clause (a clause that is typical of many such contracts):<sup>2</sup>

**Governing Law and Jurisdiction.** Any claim arising under or relating to this Agreement shall be governed by the internal substantive laws of England and Wales and the parties submit to the exclusive jurisdiction of the English courts.

Very soon after this judgment, all parties settled their disputes. eBay sold the majority of its stake in Skype to most of the original investors, along with a 14% stake to Skype. They also settled the litigation.

## Choice of law and jurisdiction

Skype is a Luxembourg-based company and Joltid Ltd is based in the British Virgin Islands. Like many parties to international contracts, they chose a neutral country not only for the venue of the court but also the applicable law. In this instance they chose an internationally recognised centre for dispute resolution: London.

This deliberate choice of a neutral country, with no particular connection with either party, was significant in the court's decision. Having made the choice, generally that decision can't be revisited. The more neutral the choice of jurisdiction relative to the parties, the more likely the choice would be upheld.

For example, when considering whether the US or England was the most convenient forum<sup>3</sup>, the fact that the dispute was heavily connected to the US did not outweigh the fact the parties had chosen England. Other factors usually won't outweigh that choice.

Much of copyright law is territory-specific: the fact that an English court would be deciding a US copyright law issue did not stop the English court being the appropriate forum.

### Arbitration

Broadly, similar considerations apply to choice of arbitration as well. Each country will have different considerations but, for some jurisdictions, the courts are more likely to recognise a contractual choice of arbitration in a different country than the choice of a court in a different country.<sup>4</sup>

### Each situation is jurisdiction-specific

This highlights that the legal position should be checked, particularly where large sums are at stake.

### Disputes “related to” the agreement

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<sup>2</sup> *Skype v Joltid* [2009] EWHC 2783 (Ch)

<sup>3</sup> The forum conveniens part of the decision. Note that there is an unresolved question as to when and how forum conveniens applies under EU law

<sup>4</sup> While there are some common themes in private international law, jurisdictions do have differing approaches (for example, in their courts, by reason of their international arbitration laws, accession or otherwise to international Conventions, etc.

The clause noted above, typical of such clauses, covers not only claims “under” the agreement but also claims “related to” the agreement. This case confirms that the court will not seek to narrowly interpret these clauses. It's assumed that businesspeople would expect all disputes to be resolved in the same proceeding. So, a clause such as this covers “every dispute except a dispute as to whether there was ever a contract at all”.<sup>5</sup> That is so unless the contract clearly indicates otherwise.

As a result, the claim by Joltid against Skype in relation to US copyright law breach came within the governing law/jurisdiction clause. The case against eBay and the investors could continue in the States (the English court couldn't stop that). However, the US-based case against Skype had to be stopped.<sup>6</sup>

### Conclusion

While each situation is jurisdiction-specific (for example, some courts will not enforce a foreign judgment), this case is an example of where courts will uphold the choice by the parties as to applicable law and venue for dispute resolution.

Choice of a neutral location can meet the concerns of both parties, rather than using the jurisdiction of one party rather than the other.

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<sup>5</sup> *Skype v Joltid* at Para 14-17, citing *Fiona Trust v Privalov*.

<sup>6</sup> In coming to this conclusion the Court considered an EU-specific Council Regulation but similar conclusions would be drawn in many non-EU countries.

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