MULTILATERALISM POST-BREXIT: DO THE HAGUE CONVENTIONS PRESERVE THE STATUS QUO OF JUDICIAL COOPERATION?

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Abstract

Considering the idiosyncrasies of the new legal landscape after Brexit, this article elaborates the UK's approach to jurisdiction agreements and judgments post-2020. In particular, it looks at the position under the Hague Convention on Choice of Court Agreements, to which the UK is now party in its own right, and also at the Hague Judgments Convention, in force since September 2023, which the UK signed only recently on 12 January 2024.

The main argument of the article is that the UK government needs a serious commitment to multilateralism to ensure legal certainty and enhance the UK's attractiveness as a leading dispute resolution hub. Hence, there should be swift accession to the Hague Judgments Convention. The Hague regime, coupled with the English common law rules and, where necessary, bilateral treaties, provides an optimal formula in the post-Brexit phase without tying the UK courts to the restrictive and often rigid Brussels regime.

Keywords: Brexit, jurisdiction, judgments, recognition, enforcement, Hague Choice of Court Convention, Hague Judgments Convention, common law, UK

Introduction

Assume an agreement – say a sale contract – between English and Italian parties. Post-Brexit, the parties need to know whether an English judgment on some aspect of the agreement will be enforced in Italy or vice versa: something which, in turn, depends on what the agreement says about jurisdiction. There may be an exclusive jurisdiction clause binding both parties, a similar clause (sometimes called "asymmetrical") binding one party only and entitling the other party to seise any other court, a non-exclusive jurisdiction clause, or no clause at all.

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Before Brexit, the matter was dealt with at the European level, with EU harmonisation of private international law having been relatively wide-ranging.[2] The answer depended on a combination of the Brussels regime, in the form of the recast Brussels regulation, and the Hague Convention on Choice of Court Agreements (the latter signed by the EU on its members' behalf).

Since Brexit, however, most of this has changed. This article studies the idiosyncrasies of the new legal landscape and discusses of the UK's approach to the enforcement of judgments within Europe post-2020. In particular, it looks at the position under the Hague Convention on Choice of Court Agreements ("HCCCA" from now on), to which the UK is now party in its own right, and also at the Hague Judgments Convention ("HJC" for short), in force since September 2023, which the UK is going to ratify soon.

The argument advanced here is that the UK government needs a serious commitment to multilateralism to ensure legal certainty and enhance the UK's attractiveness as a leading dispute resolution hub. There should be swift accession to the HJC, which has been in force since 1 September 2023. The Hague regime, coupled with the English common law rules and, where necessary, bilateral treaties, provides an optimal formula in the post-Brexit phase without tying the UK courts to the restrictive and often rigid Brussels regime.

The Brussels regime and its interaction with the common law pre-Brexit: A summary

During its EU membership, the UK courts had to apply two different jurisdiction regimes at the same time, meaning that English judges had to perform the difficult task of ensuring adherence and compatibility between the Brussels and common law rules. As articulated by Lord Goff of Chieveley, each jurisdiction is the fruit of a distinctive legal history and each reflects cultural differences.[3] The discrepancies between the common law rules and European jurisdiction provisions were never too easy to overcome; simultaneously, operating both at the same time was like mixing chalk and cheese or oil and water.[4]

The difference in approach was palpable. The common law, based on universal jurisdiction and flexible rules about service out jurisdiction coupled with a free-ranging doctrine of *forum non conveniens*, contrasted starkly with the dirigiste civilian Brussels regime dependent on closely defined legislative jurisdictional filters. Again, in a *lis pendens* situation, an English judge would rely on their inherent

[2] See generally the preface to Adrian Briggs, The Conflict of Laws, 4th edn (Oxford University Press, 2019).
[3] See *Airbus Industrie GIE v Patel* [1999] 1 AC 119, 141 (HL).
[4] See generally Adrian Briggs, 'The Hidden Depths of the Law of Jurisdiction' [2016] LMCLQ 237.

jurisdiction and assess which was natural and the most convenient forum with a closer link to the case, while Brussels rigidly privileged the court first seised -- unless there was an exclusive choice of court agreement, in which case the yet different rules of the HCCCA would apply.[5]

The rules of declining jurisdiction and preventing a case from being heard in an inappropriate court brought further divergences. English courts, basing themselves on Section 37(1) of the Senior Courts Act 1981, would traditionally use their inherent power to grant anti-suit injunctions[6] for restraining both violations of the claimant's legal rights and also anything they saw as a blatant abuse of a right to sue abroad.[7] This was anathema to the EU system, which saw such remedies as impairing the effectiveness of Union law and the full faith and credit that went with it.[8] The result was that while English courts could grant such orders regarding non-EU suits, they could not touch EU proceedings – even if, ironically, the foreign suit was in plain breach of an English exclusive jurisdiction clause.[9]

Brexit and its effects

Following the Brexit referendum in June 2016, the UK left the EU civil justice area on 31 January 2020.[10] It thereafter became a third country after 47 years of membership, resulting in the previous scheme of mutual and automatic recognition and enforcement of judicial tools between the UK and EU becoming the *status quo ante*.

Nevertheless, the UK's withdrawal from the Union did not affect underlying demographic factors or commercial relations: many European citizens still live, work in, or travel to the UK and vice versa, and

[5] Regulation (EU) No 1215/2012 of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), Article 31(2).

[6] The theory being that this did not impugn the jurisdiction of the foreign court, but merely ordered a litigant *in personam* not to invoke it. See *Axis Corporate Capital UK Ltd & Ors v Absa Group Ltd & Ors* [2021] EWHC 225 (Comm), where the Commercial Court granted an anti-suit injunction against the South African proceedings, which breached the English jurisdiction agreement. See also *Catlin Syndicate Ltd and others v Amec Foster Wheeler USA Corp and another* [2020] EWHC 2530 (Comm).

[7] *Spiliada Maritime Corporation v Cansulex Ltd* [1987] A.C. 460. See also *American Cyanamid Inc v Ethicon Ltd* [1975] AC 396; *Société Nationale Industrielle Aerospatiale (SNIA) v Lee Kui Jak* [1987] A.C. 871, 878. See also *Castanho v Brown & Root (U.K.) Ltd* [1981] A.C. 557.

[8] Case 185/07 *Allianz SpA v West Tankers Inc* [2009] ECR I-00663, para 29. See also Case 159/02 *Turner v Grovit* [2004] ECR I-3565, para 24; Case C-365/88 *Kongress Agentur Hagen GmbH Zeehage BV* [1990] ECR I-1845, para 20. See also T. Hartley, 'The Brussels I Regulation and Arbitration' (2014) 63 ICLQ 843, 859; Aygun Mammadzada, "The Rebirth of the European Anti-Suit Issue Post-Brexit", in *Damages, Recoveries and Remedies in Shipping Law*, Oxford Informa Law 2023.

[9] Case C-365/88 *Kongress Agentur Hagen GmbH Zeehage BV* [1990] ECR I-1845, para 20.

[10] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Getting ready for changes Communication on readiness at the end of the transition period between the EU and UK", COM (2020) 324, F2.

international companies and businesses have not abandoned their commercial relations. All this brings a need for new perspectives on civil and commercial disputes and their resolution.

Although some saw Brexit as crunch time for the City of London, saying that “many firms are already moving parts of their operations out of the UK and Europe” and “when they've gone, it's hard to see them coming back",[11] it now seems that Brexit has not seriously affected the inherent strengths of England as a forum of choice and the pervasiveness of English law.[12] England and Wales, as a global dispute resolution hub, offer many benefits for resolving disputes, whether through the court system or London arbitration, which will continue to exist.

Further, London, as a first-rate centre for arbitration, continues to be the international parties’ resort for resolving their commercial disputes: indeed, Brexit has not affected the New York Convention 1958 (“NYC” hereinafter), which gives effect to English awards in 172 jurisdictions and vice versa.[13] Hence, while assessing their relations and dispute resolution clauses in light of the reshaped legal landscape, parties might also want to replace their jurisdiction agreements with London arbitration clauses.[14]

In short, it can be assumed that commercial parties will still negotiate English law and choice of court (or London arbitration) agreements as a logical conclusion. In fact, the UK’s worldwide reputation as a universally renowned jurisdiction stems from the high quality, commercial expertise, and pragmatic approaches of judges, the rule of law, transparency, independence, and efficiency and reliability of

[11] The City UK chief executive Miles Celic; “Brexit 'crunch time' for City of London” 21 September 2017, accessed 28 November 2021.

[12] For the related discussions see Giesela Rühl, “Building Competence in Commercial Law in the Member States”, Study for the JURI Committee, PE 604.980, September 2018 ; Giesela Rühl, “Settlement of international commercial disputes post-Brexit, or: united we stand taller” in Jörn Axel Kämmerer and Hans-Bernd Schäfer (eds), Brexit: Legal and Economic Aspects of a Political Divorce (Edward Elgar, 2021); Xandra E. Kramer and John Sorabji, "International Business Courts in Europe and Beyond: A Global Competition for Justice?" [2019] 12(1) Erasmus Law Review 1; Erlis Themeli, Civil Justice System Competition in the European Union: The Great Race of Courts (Eleven International Publishing, 2018); Marta Requejo Isidro, “International Commercial Courts in the Litigation Market” [2019] Max Planck Institute Luxembourg for Procedural Law, Research Paper Series, N° 2019(2).

[13] See Thomson Reuters Practical Law Dispute Resolution, The Impact of Brexit on Dispute Resolution Clauses: Revised Survey, The impact of Brexit on dispute resolution clauses – survey report | Practical Law (thomsonreuters.com) accessed 11 September 2023. As reaffirmed by Lord Justice Gross, ‘London arbitration ought to be wholly unaffected by Brexit’. According to the survey conducted in 2018, 29% of the respondents considered arbitration instead of litigation, 43% of whom favoured arbitration remained in England. See Speech by Lord Justice Gross: London Common Law & Commercial Bar Association Annual Lecture, "The Civil Justice System in a time of change", January 2019, Lord Justice Gross reflects on mutually supportive role of courts and arbitration | Practical Law (thomsonreuters.com), accessed 11 September 2023.

[14] ibid.

the judicial system.[15] The flexibility of the English common law compared with code-based jurisdictions is a further attractive feature. In common law, courts are usually concerned about the most real connection as cemented by *forum non conveniens*, and judges have discretionary powers while deciding on the grounds for declining jurisdiction. In contrast, civil law courts would look out for predictability and the *lis pendens* doctrine would often give priority to the court first seised.

It should be noted that a good deal of empirical research evidences the universality and pervasiveness of English jurisdiction and choice of law clauses. Data suggested that in 2018, the UK was Europe's largest legal services market (valued at approximately £35 bn in 2018). 75% of over 800 claims issued at the Admiralty and Commercial Court involved at least one foreign party, and in 53% of the cases, all parties were international. In 2019, 77% of over 600 such claims were international in nature, whilst in half of the cases, all parties were international. Along the same lines, between December 2018 and March 2019, among the total number of 841, there were 631 international cases at the Commercial Court, 336 of which were entirely international.[16] Further, 55 percent of the 808 litigants using the London Commercial Courts were non-UK residents, and litigants from Europe counted 544 and 564 in 2019-2020 and 2018-2019 respectively. Compared to the relevant statistics in 2017-2018, which covered 456 litigants, there was a visible increase in the numbers in 2019-2020.

What empirical evidence we have bears this out. The most recent annual report[17] reasserts that London's reputation as the world's leading hub for foreign litigants continues to be sturdy, with the number of nationalities at 75 (the fourth consecutive year it has been above 70). The report further shows that there has been a limited change in the proportion of the EU-27 countries represented in the London Commercial Courts. The EU represented 12% of litigants this year versus 11.5% last year, and 16 countries from the EU were represented, compared to 15 last year.

Europe and the future: the Hague Conventions

[15] See: Report published by the Law Society, England and Wales: A World Jurisdiction of Choice, 2019. See also: World Justice Project Rule of Law Index 2019; the UK was ranked the 12th out of 126 countries and jurisdictions.
[16] For the Data sourced from: Civil Justice statistics quarterly: January 2018 to March 2019, civil-justice-statistics-quarterly-Jan-Mar-2019.pdf (publishing.service.gov.uk), accessed 11 September 2023. See also: Report published by TheCityUK, Legal excellence, internationally renowned, 2019, Legal excellence, internationally renowned: UK legal services 2022 | TheCityUK, accessed 11 September 2023.
[17] See Commercial Courts Report 2022, Commercial Courts Report 2022 - Portland (portland-communications.com), accessed 11 September 2023. See also Commercial Court annual report (https://www.judiciary.uk/guidance-and-resources/commercial-court-annual-report-2021-2022-is-now-available/), accessed 11 September 2023.

Giving effect to English jurisdiction agreements in Europe and vice versa thus remains in the interests not only of the UK but of the EU states that remain its serious trading partners and aim to expand international business: as leading commercial judge Sir Geoffrey Vos has pithily put it, 'It is generally in the interests of all nations to enter into reciprocal enforcement mechanisms.'[18]

To a limited extent, such mutual recognition remains available despite Brexit. Within the EU, English judgments, being those of a third country, can still be recognised and enforced under national laws, unless any international treaty applies. Conversely, judgments given in EU Member States can be recognised in England by beginning fresh legal proceedings on a foreign debt under the common law or registering the foreign judgment under the Foreign Judgments (Reciprocal Enforcement) Act 1933 or the HCCCA if there is an exclusive jurisdiction agreement.[19]

But we need more than this; this is where the Hague Conventions come in. Indeed, this is accepted by the EU, showing that on both sides of the English Channel, multilateralism is likely to be the salient feature of judicial cooperation in the post-Brexit phase. While opposing the UK's request to rejoin the Lugano Convention, the EU Commission stated that the EU's consistent policy concerning third countries without a special link to the internal market was "to promote cooperation within the multilateral Hague Conventions framework".[20]

General overview of the Hague treaties

The achievement of the Hague Conventions has been a turning point in the dispute resolution landscape. We can begin with the HCCCA. The Convention was agreed upon in 2005 as a normative tool rationalising the original project on the recognition and enforcement of judgments that was initiated in 1992.[21] The focus of the original project narrowed down to increase the effectiveness of

[18] Sir Geoffrey Vos, the Chancellor of the High Court of England and Wales, 'The Future for the UK's jurisdiction and English law after Brexit', Munich, 13 May 2019, at 4 and 9, HEADING (judiciary.uk), accessed 11 September 2023.

[19] The 1933 Act applies to final and binding money judgments given in Austria, Belgium, France, Germany, Italy and the Netherlands due to the bilateral agreements with the UK.

[20] Communication from the Commission to the European Parliament and the Council, "Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention", COM (2021) 222 final.

[21] As the initiative of the United States, in May 1992, Edwin Williamson, the legal adviser at the United States Department of State suggested to the Secretary-General of the Hague Conference on Private International Law to negotiate a multilateral convention on the recognition and enforcement of judgments worldwide. See Letter from Edwin D. Williamson to Georges Droz, The Hague Conference on Private International Law, 5 May 5, 1992, accessed 26 November 2021. See also Ronald A. Brand and Paul M. Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (Cambridge University Press, 2008), 6. See also Schulz

exclusive choice of court agreements in a business-to-business context. The HCCCA provides as follows: (a) the court exclusively chosen shall have jurisdiction to decide a dispute to which the agreement applies, (b) any other court than the chosen one shall suspend or dismiss the proceedings, and (c) a judgment given by the chosen court shall be recognised and enforced in any other Contracting State.

With the principle of party autonomy, the Convention promised to reduce costs for parties and courts, facilitate business planning, and relieve overburdened court systems.[22] However, the Convention could not safeguard all types of litigants; it excluded certain civil and commercial matters from the scope and did not provide any jurisdictional grounds except for the exclusive jurisdiction agreements, leaving many non-exclusive choice of court clauses out of the scope. Hence, there was a need for more than a treaty regulating only one jurisdictional ground. As a result of reconsidering "the feasibility of a global instrument on matters relating to jurisdiction and the recognition and enforcement of judgments in civil and commercial matters"[23], the HCCH adopted the HJC in June 2019 – 27 years after the idea was floated.

According to the HJC, a judgment given by the court of a Contracting State (state of origin) shall be recognised and enforced in another Contracting State (requested state).[24] The HJC defines the perimeter of "eligible judgments" circulating under the Convention.[25] Indeed, this brings a dilemmatic charm of the Convention: the absence of direct jurisdictional grounds leaves more room for applying the national laws and less interference with domestic varieties. Indeed, by light harmonisation the Convention hits a balance with the public policy of the states while coordinating national divergences. As part of the Conference's attempts to build bridges between states without affecting national substantive, light harmonisation has the potential to attract more ratifications to the Convention

(n 273) 244-246. See also See Preliminary Document No. 17 of May 1992, "Some Reflections of the Permanent Bureau on a General Convention on Enforcement of Judgments" in Acts & Proceedings of the Seventeenth Session, I, Hague Conference on Private International Law (SDU Publishers, 1995) 231; 'Some Reflections of the Permanent Bureau on a General Convention on Enforcement of Judgments', Preliminary Document No 19 of November 1992, in Proceedings of the Seventeenth Session, Vol I (SDU Publishers, 1995) 263; Preliminary document (supra 26).

[22] Ibid.

[23] Working Document, No 2 of April 2012 for the attention of the Council on General Affairs and Policy of the Conference. See also: The Garcimartín-Saumier Report, paras 3-6; Working Document No 76 REV of June 2016, "2016 preliminary draft Convention" (Special Commission on the Recognition and Enforcement of Foreign Judgments; Working Document No 170 REV of February 2017, "February 2017 draft Convention" (Special Commission on the Recognition and Enforcement of Foreign Judgments; Working Document No 236 REV of November 2017, "November 2017 draft Convention" (Special Commission on the Recognition and Enforcement of Foreign Judgments.

[24] HJC, Article 4.1.

[25] Garcimartin & Samuer Report, paras 134 and 326.

instead of becoming a utopian fantasy. Further, in addition to the minimum standard presented by the HJC, the Convention demonstrates a liberal spirit by acknowledging the recognition and enforcement under national law or other treaties as long as there is no conflict with an exclusive basis regarding rights in immovable property.[26] In this way, the Convention gets a spot for applying the common law rules where necessary.

While the HCCCA had been described as "a sort of mini version of the NYC for the enforcement of court judgments"[27], the adoption of the HJC might become a game-changer in the international dispute resolution landscape by augmenting the enforceability of judgments and bringing the HCCH closer to its ideals (discussed below). In fact, during the negotiation process, the HCCH aimed at guaranteeing the effectiveness of court judgments, drawing lessons from the success of the NYC in achieving the effectiveness of arbitral awards.

The HCCCA applies to exclusive choice of court agreements concluded in international civil and commercial matters.[28] For jurisdictional purposes, a case is international if the parties are not resident in the same Contracting State and all the relevant elements except for the location of the court are not connected only with that State.[29] In this context, the Contracting States may declare that they will not apply the Convention to wholly foreign cases where except for the location of the chosen court, there is no connection between that State and the parties or their dispute.[30] To date, no such declaration has been made by any Contracting State. Therefore, an English exclusive jurisdiction agreement concluded by a Dutch seller and an Italian buyer would bring an international case for the purposes of the HCCCA.

For the purposes of recognition and enforcement, a case is international if the judgment is foreign.[31] The latter is subject to a possible declaration of a State to authorise its courts to refuse to recognise or enforce a judgment given by the chosen court if the case is wholly domestic to the State where recognition and enforcement are requested.[32] So far, none of the Contracting States have made any

[26] Article 15 states that subject to Article 6, the HJC does not prevent the recognition or enforcement of judgments under national law. According to Article 6, notwithstanding Article 5, a judgment that ruled on rights in rem in an immovable property shall be recognised and enforced if and only if the property is situated in the State of origin.
[27] Michael Hwang SC, "Commercial Courts and International Arbitration – Competitors or Partners?" [2015] 31 Arbitration International 193, 199.
[28] HCCCA, Article 1.1.
[29] HCCCA, Article 1.2. See also Hartley/Dogauchi Report, para 11.
[30] HCCCA, Article 19. See also Hartley/Dogauchi Report, paras 229-230.
[31] HCCCA, Article 20.
[32] Hartley/Dogauchi Report, paras 231-233.

such declaration. In the above example, recognition and enforcement of a judgment given by the exclusively designated English court in Italy would bring the case to the substantive scope of the HCCCA.

Judgments resulting from the cases that are not international for the recognition or enforcement purposes under the HCCCA or not rendered by the exclusively designated court could get recognised or enforced under the HJC as long as there is an international case within the meaning of the latter, grounds for the recognition or enforcement exist, and there is not any reason for refusal. Recognition and enforcement of an English judgment against the defendant habitually resident in Italy would bring the HJC into play provided the UK ratifies the Convention.[33]

Both Conventions apply to international business-to-business cases having excluded certain civil and commercial cases from the scope. The excluded matters are similar; among others, the Conventions do not apply to the status and legal capacity of natural persons, maintenance obligations, family law matters, wills, succession, insolvency, carriage of passengers and goods.[34] Yet, the HJC might be much broader in its scope containing more indirect jurisdictional grounds when compared to the HCCCA. Unlike the HCCCA, the HJC applies to employment and consumer contracts, physical injuries, damage to tangible property, rights *in rem* and leases of immovable property, antitrust (competition) matters, emergency towage and emergency salvage, maritime matters, such as marine insurance, shipbuilding, or ship mortgages and liens.[35] On another note, whereas the HCCCA applies to the validity of the copyright and related rights and their infringement, the HJC excludes all intellectual property matters.[36] In this regard, the HJC has taken a retrograde step in comparison with the HCCCA.

Unlike the HCCCA, the HJC applies to judgments on consumer and employment contracts and to avoid inconsistencies between the instruments excludes any such judgments given by the designated court.[37] While the HCCCA applies to insurance and reinsurance matters, the HJC does not mention such contracts at all. Considering the latter applies to marine insurance, possibly neither insurance nor reinsurance is excluded.

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[33] Further, both treaties give an option to the Contracting States to declare that their courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if parties were resident in the requested State, and their relationship and all other elements relevant to the dispute, rather than the location of the court of origin, were connected only with that requested State. See HCCCA, Article 20, and HJC, Article 18.

[34] HCCCA, Article 2 and HJC, Article 2.

[35] HJC, Article 2; Garcimartin/Samuer Report paras 44 and 55.

[36] HCCCA, Article 2.2; HJC Article 2.1(m).

[37] HJC, Article 5.2.

The treaties also give an option to the Contracting States not to apply the Conventions to particular matters.[38] Both the EU and the UK declared not to apply the HCCCA to certain insurance contracts meaning that a significant range of commercial parties cannot utilise the advantages offered by the Convention.[39] In this regard, the unilateral application of common law is able to bridge the gap.

Overall, the Hague system ensures broader safeguards for businesses to better handle transaction and litigation risks. It goes without saying that the international business market is prone to various challenges that the commercial parties should be aware of. Indeed, market players are susceptible to the risks associated with the counterparties in the form of non-performance, delays, or breaches leading to legal disputes and judicial proceedings. As a package, the treaties ensure certainty for the parties by guaranteeing the effectiveness of their choices, the resolution of their disputes, and the enforceability of the decisions. Therefore, international litigation becomes more predictable and reliable. Further, the treaties compel defendants' performance by including non-monetary judgments in the coverage of the recognition and enforcement policy.[40] Hence, with the broader grounds of recognition and enforcement, the instruments establish a generous legal environment and accommodate litigants' access to justice.

Exclusive relationship of the Conventions

The Preamble of the HJC specifically emphasises its complementarity to the HCCCA. In fact, the genesis of the instruments and their same origins bring their companionship to contribute to judicial cooperation in the post-Brexit age. Originating from the same project[41] is the real crux of the interoperability of the sister Conventions. Both share the same goals to ensure legal certainty, promote effective access to justice, and facilitate rule-based multilateral trade and investment, and mobility, through judicial cooperation. Through the shared objectives and values, the instruments add to global justice and mutually promote each other's effectiveness and implementation.

[38] HCCCA, Article 19; HJC, Article 18.
[39] According to the declarations that are available on the Conference's website, both the EU and the UK declared that they will apply the HCCCA only to i.e., a reinsurance contract, where the choice of court agreement is entered into after the dispute has arisen, the choice of court agreement is concluded between a policyholder and an insurer, both of whom are, at the time of the conclusion of the contract of insurance, domiciled or habitually resident in the same Contracting State, where the choice of court agreement relates to a contract of insurance which covers one or more of the large risks, etc.
[40] D Goddard and P Beaumont, "Recognition and Enforcement of Judgments in Civil or Commercial Matters" in P Beaumont and J Holliday (eds), *A Guide to Global Private International Law* (Hart Publishing 2022) 411; see also Beamount, supra no 23, 131.
[41] See above.

Another shared feature of the treaties is liberalism: both aim to achieve light harmonisation without affecting national substantive rules and internal rule of law.[42] International regulation and coordination of different legal systems may encounter challenges associated with territorial sovereignty, public policy, and overriding mandatory rules of the states.

To maintain national diversities, i.e., the HCCCA entitles the law of the chosen court to determine the substantive validity of a jurisdiction agreement.[43] As part of the substantive validity, the parties' capacity to conclude the agreement is a matter for the law of the State of the court seised and the requested State.[44] Furthermore, the HCCCA authorises the court seised and the court requested to decide on whether giving effect to a jurisdiction agreement and resulting judgment would be incompatible with the public policy of its state respectively.[45] Likewise, the HJC entitles the court requested to refuse the recognition and enforcement of a judgment if that would be manifestly incompatible with the public policy of its State.[46]

Certainly, the intention is not to become an imaginary illusion. Indeed, minimum harmonisation promises a prospect of success. With a pragmatic approach, the Hague Conference aimed to enhance ratifications. However, light harmonisation comes at a cost. On the one hand, in the absence of the unified validity rules under the HCCCA, the validity of an exclusive jurisdiction agreement is subject to different domestic rules and national courts' interpretations. In this context, the possibility of *renvoi*[47] or double *renvoi* might also be the case which would bring more complexities and inconsistencies. For instance, following the choice of the Mexican court, Mexican law might send the matter of substantive validity to be determined by Portuguese law. Portuguese law might address some details of the question back to Mexican law. Such "judicial mental gymnastics"[48] not only would risk the effectiveness of the HCCCA but also mitigate potential abuses, forum shopping, parallel proceedings, and inconsistent judgments.

[42] This is in line with the sovereign equality of the states as stated by the UN Charter Article 2(1).
[43] HCCCA, Articles 5(1), 6(a) and 9(a).
[44] HCCCA, Articles 6(b) and 9(b).
[45] HCCCA, Articles 6(c) and 9(e).
[46] HJC, Article 7.1(c).
[47] *Renvoi* ("send back" or "to return unopened" in French) is an element of conflict of laws rules and entails consideration of the law of another state by a forum court. Unlike the HCCCA, the 2015 Hague Principles on Choice of Law in International Commercial Contracts excludes the application of *renvoi*. See Article 8.
[48] Adrian Briggs, "Forum conveniens and the impecunious claimant: Lubbe v Cape plc." (2000) 71 British Yearbook of International Law 435, 465-468.

Similarly, without a unified definition of public policy under the Conventions, recognition and enforcement of a judgment would be contingent upon national laws and practices. Further, the overriding mandatory rules of each Contracting State are different. Last but not least, the language of the provisions on the refusal to recognise and enforce a judgment is rather discretionary. In fact, the substantive validity rules might compel the court to apply foreign conflict of laws rules and the public policy exception might expand in ways cutting against the general thrust of the Hague system.[49]

Party autonomy and the Hague Conventions

The rather crucial aspect of the exclusive relationship and complementarity of the instruments revolves around the party autonomy principle. As suggested, the treaties together bring a "Hague system" for choice of court agreements.[50] The Conventions establish a legal regime based on a uniform set of core rules on recognising and enforcing foreign judgments given by the designated court. While the recognition and enforcement policy of the HCCCA covers judgments given by the exclusively chosen courts, the HJC applies to judgments rendered by a court specified in an agreement concluded or documented in writing or by any other means of communication which renders information accessible to be usable for subsequent reference, other than an exclusive choice of court agreement.[51] By duplicating the definition given to an exclusive jurisdiction agreement by the HCCCA, the HJC determines convergence and divergence and, hence, manifests complementarity between the instruments.[52]

Relevant to this point, there is a fine line between the treaties. According to the HCCCA, a choice of court agreement shall be deemed exclusive unless the parties have expressly provided otherwise.[53] If the parties have designated the court or courts of a HCCCA Contracting State, which has also ratified the HJC and they haven't explicitly mentioned exclusivity or claimed to the contrary, the HCCCA might apply by default provided all other conditions are met.

Indeed, by applying only to exclusive jurisdiction clauses, the HCCCA leaves out a great majority of agreements (non-exclusive jurisdiction agreements) which are characteristic of international commercial, particularly financial relations. Therefore, the exclusivity presumption explained in the

[49] Brand and Herrup, supra no 29, 47.
[50] See Beamount, supra no 23.
[51] HJC, Convention, Article 5.1(m).
[52] HJC, Convention, Article 5.1(m); HCCCA Article 3(a). See also: Garcimartin/Samuer Report, para 215.
[53] HCCCA, Article 3(b).

previous paragraph might bring more agreements into its coverage. On a side note, there is still a potential for an abusing party if they insist on non-exclusivity to delay the proceedings. To avoid such abusive tactics or divergences, both treaties provide rules on their uniform interpretation.[54] Courts would interpret the conventions compatibly, giving regard to their objectives, international character, and complementary nature to each other, and would aim to promote uniformity in their application. Indeed, the latter necessitates ratification of both by a State bringing a combined application of them by the national courts.

Additionally, further uncertainties might arise regarding the interpretation of asymmetrical jurisdiction agreements binding only one party.[55] Against opposing approaches in academia[56] and contrasting *obiter* of the judges[57] on the exclusivity of asymmetrical clauses, which were presumably affected by post-Brexit realism, the adoption of the HJC has brought some clarity to the issue by the recognition and enforcement of judgments given by non-exclusively designated courts. In this regard, the HJC seeks to avoid gaps between the two instruments.[58] Having covered non-exclusive jurisdiction agreements by the HJC unlike the HCCCA (which covers only exclusive choices as already explained), the Hague system ensures protection for the full range of party autonomy and access to justice. As suggested, with the conclusion of the HJC, Article 22 of the HCCCA which gives an option to the Contracting States to make reservations for the recognition and enforcement of judgments given by non-exclusively chosen courts could already be regarded as "a dead letter".[59]

[54] HCCCA, Articles 23 and 26(1); HJC, Articles 20 and 23.

[55] The distinction between exclusive and non-exclusive jurisdiction agreements is important for identifying the applicable regime, also, it indicates whether there is a breach of the contractual obligation and if any remedies will be consumed. The matter has been long debated in light of the substantive, procedural, or hybrid nature of the choice of court agreements, construction issues, parties' intention, and drafting techniques which should be evaluated comprehensively; and there is a great deal of academic commentaries on the non-exclusive nature of asymmetrical jurisdiction agreements.

[56] In this regard, Briggs has presented a practical approach stating that the "binary distinction" of choice of court agreements is not helpful. See Adrian Briggs, "The Subtle Variety of Jurisdiction Agreements" [2012] 3 Lloyd's Maritime and Commercial Law Quarterly 364, 376.

[57] Cranston J in *Commerzbank v Liquimar* [2017] EWHC 161 (Comm) and Jacobs J in *Etihad Airways PJSC v Flother* [2019] EWHC 3107 stuck to the coherence between the HCCCA and BRR and assumed the exclusive nature of asymmetrical designations. Unlike the first instance judges, LJ Henderson at the Court of Appeal observed non-exclusivity and exclusion of such clauses from the scope of the HCCCA. In his remarks, LJ Henderson relied upon the Explanatory Reports as well as Diplomatic Minutes at the Permanent Bureau. See *Etihad Airways PJSC v Flother* [2020] EWCA Civ 1707. For the relevant discussions also see Beamount, supra no 23, 127-129.

[58] Garcimartin/Samuer Report, para 216.

[59] Presumably, to avoid a risk of parallel proceedings and inconsistent judgment, the HCCCA did not stipulate non-exclusive jurisdiction agreements as a direct jurisdictional ground. This option widens the application scope of the HCCCA concerning the recognition and enforcement but not jurisdiction. See HCCCA, Article 22. See also See Beamount, supra no 23.

It is also worth noting that, the Hague treaties leave matters such as the interpretation and scope of an agreement to national laws which might bring diverse positions in different jurisdictions. Therefore, it remains to be seen how the judges would cope with the question in practice. To avoid possible divergences in practice and abusive tactics by parties, the treaties provide rules on their consistent application and uniform interpretation.[60] Only if both treaties are ratified by a state, jurisdiction agreements would be protected, further, courts would interpret the conventions compatibly, giving regard to their objectives, international character, and complementary nature, and would aim to promote uniformity in their application. The same is true for the UK and English courts. When the UK accedes to the HJC, judges would accommodate asymmetrical designations under the HJC. And, indeed, only upon an adequate sum of accessions, sufficient case law and communications between the national authorities would bring harmonisation and consistency.

Further, having achieved the complementary instruments as the major international breakthrough, the Conference's focus has now turned back to the international jurisdiction of courts. Since 2021, the HCCH has continued its work to achieve the last component of the original Jurisdiction Project. The Conference now is willing to regulate jurisdictional grounds including concurrent (parallel) proceedings. If achieved, the instrument would be immensely useful to avoid the 'chaotic state' and fill the remaining gaps in the HCCCA and HJC. Also, a complete jigsaw of the Hague treaties would bring certainty for asymmetrical jurisdiction agreements.

The unresolved problem of parallel proceedings

Assume the following scenarios: (a) there is an English jurisdiction agreement between a Dutch buyer and an Italian seller, and the latter brings proceedings before a court in Milan, (b) the parties have not concluded any jurisdiction agreement and there are ongoing Dutch proceedings whilst the Dutch buyer brings a claim in Italy, (c) the parties have not concluded any jurisdiction agreement and an Italian judgment has been brought to England for the recognition and enforcement against the Dutch buyer's branch located in London; however, concurrent proceedings on substance are pending in Rotterdam.[61] Indeed, as seen in the above scenarios, the risk of parallel proceedings is a critical issue in private international law, which is often accompanied by potential injustice and uncertainties due

[60] HCCCA, Articles 23 and 26(1); HJC, Articles 20 and 23.

[61] Such cases might be a result of the court's breach of the obligation to stay the proceedings (see para 67) or an interlocutory application for the recognition of a judgment while the same claims between the same parties are pending before the court first seised.

to conflicting judgments, wastes, and delays in the process. Hence, declining jurisdiction is an inevitable element in achieving legal certainty.

As mentioned, civil and common law jurisdictions are characterised by their long-established legal traditions of dealing with *lis pendens* situations.[62] Provided the proceedings were initiated before Brexit and the Brussels regime were still applicable, a court in the civil law jurisdiction would be concerned about whether the lis pendens rules apply and whether there are identical proceedings between the same parties on the same subject matter or related actions.[63] Accordingly: (a) a court in Milan would apply the "first come, first serve" rule unless the English jurisdiction agreement is exclusive[64] -- indeed, if the English court was seised on the basis of an exclusive jurisdiction agreement, the Italian court would be obliged to stay the proceedings.[65] Further, as after Brexit and the transitional period, the UK has become a third state, the Italian court may consider an English exclusive jurisdiction clause while deciding on whether a stay is necessary for the proper administration of justice[66]; (b) the general *lis pendens* rule would apply and the Italian court would be obliged to stay the proceedings in favour of the existing Dutch proceedings[67]; and (c) the English court would recognise and enforce the Italian judgment and avoid the risk of irreconcilable judgments. In the same scenario, if the court in Rotterdam had concluded a judgment that was brought to England for recognition and enforcement, the judge would have been concerned about whether the latter was irreconcilable with the earlier Italian judgment as a ground for refusal of recognition.[68]

Based on the common law, the English court: (a) would by default give effect to the English jurisdiction agreement unless there are strong arguments to stay the proceedings in favour of the Italian legal

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[62] See the discussions above on page 2.

[63] Relevant to this, see *Simon v Tache* [2022] EWHC 1674 (Comm) where the English High Court considered the application of the Brussels regime to parallel proceedings in transitional cases.

[64] If both States are EU Member States, the general *lis pendens* rules (The Brussels Recast Regulation ("BRR" from now on) , Article 29) apply, and the court second seised should stay the proceedings until the court first seised decides that it has no jurisdiction. In the case of an exclusive jurisdiction agreement, any other court shall stay the proceedings until the time when the court seised on the basis of an exclusive jurisdiction agreement decides that it has no jurisdiction (BRR, Article 31(2)).

[65] BRR, Article 31(2). See also *Van Heck v Giambrone & Partners Studio Legale Associato* [2022] EWHC 1098 (QB). The High Court confirmed that as the Italian court which was first seised based on a claim for a declaration of non-liability had dealt with the jurisdiction issue conclusively under its procedural law, there was no pending "lis" for the purposes of the *lis pendens* rules to be considered by the English court that was seised subsequently on the substance. See also *HanseYachts AG v Port d'Hiver Yachting SARL and others* (Case C-29/16), where the European Court of Justice held that the interlocutory proceedings in one Member State did not engage the lis pendens rules of the Brussels regime and did not bring any cause for the stay of the substantive legal proceedings in another Member State.

[66] BRR, Articles 33-34 and Recital 24.

[67] BRR, Article 29.1.

[68] BRR, Article 45.1(d).

proceedings[69]; (b) would consider different factors connecting the case to a convenient or the most appropriate jurisdiction on the basis of the *forum non conveniens* doctrine as well as the expenses[70]; and (c) would decide on the recognition and enforcement of the Italian judgment following a legal action brought by the claimant on that judgment unless the defendant presents a ground of defence to the contrary. The latter is subject to the possible application of the Brussels, Lugano, or Hague regimes and whether the proceedings were instituted before or after Brexit (and the transitional period).

True, both systems have their own merits and acceptable reasons to apply different doctrines while exercising their jurisdiction. Yet, it is highly regrettable that the Hague system has not achieved a balance between the two systems. Indeed, such a failure raises doubts about legal certainty and the full success of the multilateral regulation.

The Hague Conventions do not include any express provisions on parallel proceedings. The second fundamental rule of the HCCCA restrains the exclusively chosen court from dismissing the proceedings, even on the ground that the dispute should be decided in a court of another State. This means the Convention precludes the application of either *forum non conveniens* or *lis pendens,* although national law authorises these doctrines.[71] On this note, in the first hypothetical scenario mentioned above, if the ongoing Italian proceedings are in breach of an English exclusive jurisdiction agreement, Article 6 of the HCCCA will apply. Accordingly, the Italian court shall stay or dismiss the

[69] The common law courts may decline to exercise jurisdiction based on a jurisdiction agreement if the party suing at the non-contractual forum (claimant) can show strong reasons not to enforce that agreement. Such a strong reason might be a foreign court other than the chosen one which has already seised and has jurisdiction over all the parties and matters in dispute. This is the 'Brandon test' which was first established by Brandon J. in *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 (Brandon J). In *Donohue v Armco Inc* [2002] 1 All ER 749, Armco brought the proceedings in New York in spite of they had concluded the exclusive jurisdiction agreement in favour of the English courts. When Donohue applied for an anti-suit injunction restraining New York proceedings, the House of Lords refused to issue such a remedy taking into account the ongoing proceedings in New York and forum non conveniens reasons. In this respect, "the interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in issue". See *Donohue v Armco Inc* [2002] 1 All ER 749, para 34. See also *Bouygues Offshore SA v Caspian Shipping Co* [1998] 2 Lloyd's Rep 461. Recently, having regard to the 'Brandon test' the Nigerian Court of Appeal declined to enforce an exclusive English jurisdiction agreement, and a stay was not granted. See: Chukwuma Okoli, "The Nigerian Court of Appeal declines to enforce an Exclusive English Choice of Court Agreement", 27 November 2021, <https://conflictoflaws.net/2021/the-nigerian-court-of-appeal-declines-to-enforce-an-exclusive-english-choice-of-court-agreement/> accessed 20 October 2023.

[70] See *Klifa v Slater & Anor* [2022] EWHC 427 (QB) where the English High Court provided guidance on the application of *forum non conveniens* in cross-border cases post-Brexit.

[71] HCCCA, Article 5(2). See also Hartley/Dogauchi Report, para 134.

proceedings. Since there is no such regulation of parallel proceedings by the Convention, the common law will apply to procedural matters of declining the jurisdiction.

On the other hand, while precluding the exclusively chosen court from staying the proceedings in favour of the more appropriate forum, it is intriguing that, the HCCCA practically opens doors for *forum non conveniens* through optional declarations. Accordingly, a State may declare that its courts may refuse to determine disputes to which an exclusive jurisdiction agreement applies if there is no connection between that State and the parties or dispute except for the location of the chosen court.[72] Thus, if a court considers that it has no connection with the parties or the dispute, it may refuse to take jurisdiction as an inappropriate forum. As the serious champion of the *forum non conveniens* doctrine, the UK has not made any such declaration. Presumably, courts in England and Wales would not be driven to rely on convenience grounds where all the involved are the Hague Contracting States.

It is worth noting that neither the HCCCA nor the HJC provides any rulings similar to what is called the general lis pendens rules. That is to say, if there are cases involving substantive proceedings pending in the different Hague Contracting States in the absence of an exclusive jurisdiction clause as in the second scenario illustrated above, no solution can be found in the treaties except for the potential application of the national laws.

Although the HCCCA does not regulate parallel proceedings, it does not deny the possibility of conflicting judgments. According to Article 9(g), a judgment given by the exclusively designated court may be refused if it is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, only if the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

Similar to the HCCCA, the HJC provides that recognition or enforcement may be refused if the judgment is inconsistent with a judgment given by a court of the requested State in a dispute between the same parties; or if the judgment is inconsistent with an earlier judgment given by a court of another State between the same parties on the same subject matter, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.[73] If the HJC would apply to the third scenario that is illustrated above (assuming the UK ratifies the Convention and it applies both to the EU and UK), a judgment given by the court in Rotterdam between the same parties

[72] HCCCA, Article 19.
[73] HCCCA, Article 9(f) and 9(g); HJC, Articles 7.1(e) and 7.1(f).

and on the same subject matter might be refused to be recognised and enforced by the English court if it is inconsistent with the earlier Italian judgment.

Notably, the HJC steps further by also providing rulings on the postponement or refusal of the recognition or enforcement, if proceedings between the same parties on the same subject matter are pending before a court of the requested State.[74] The peculiarity of the relevant provision entails further preconditions, such as the court of the requested State must be seised first and there must be a close connection between the dispute and the requested state. Such a formulation of the *lis pendens* ground reminds us of the provisions of the BRR on pending proceedings at the third states.[75] While the above-mentioned provisions of the HJC should be appreciated, parallel proceedings cannot be grounds for refusal unless the specified preconditions are met. Apart from the language of the HJC, which gives discretion to the court, the exercise of this discretion depends on applying the *forum non conveniens* elements, which might bring extra uncertainties due to diverse interpretations. In fact, meeting such a high threshold might be troublesome and practically ineffective. On this note, the HJC also states that a refusal on the above-mentioned grounds does not prevent another application for the recognition or enforcement of a judgment. The latter might bring an additional risk of parallel proceedings and duplicate judgments.

Additionally, the HJC accommodates *forum non conveniens* by allowing the defendant to object to the exercise of the jurisdiction before arguing on the merits. Indeed, the latter is very different than objecting to jurisdiction. By acknowledging the possible application of *forum non conveniens* grounds in accordance with the national laws, the Convention demonstrates the common-law orientation of the Hague system.

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[74] HJC, Article 7.2.

[75] According to Article 33 of the BRR, when a Member State court is seised of an action involving the same cause of action and between the same parties as the proceedings in a third State court, the court of the Member State may stay the proceedings if: (a) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and (b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice. Further, Article 34 of the BRR states that when a Member State court is seised of an action that is related to the action in a third State court, the court of the Member State may stay the proceedings if: (a) it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings; (b) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and (c) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice. Recital 24 of the BRR states that In consideration of the proper administration of justice, a Member State court should assess all the circumstances of the case, i.e., connections between the facts of the case and the parties and the third State concerned, the stage to which the proceedings in the third State have progressed by the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgment within a reasonable time.

On another note, to promote certainty, access to justice, and effective global circulation of judgments regardless of national diversities, the Convention avoids reliance on *forum non conveniens* for refusing to recognise and enforce judgments.[76] Despite the fact that the procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment are subject to the law of the requested State, the courts of the requested State cannot refuse to recognise or enforce a judgment on the ground that they should be sought in another State.[77] Such a compromising effort aims to ensure light harmonisation without disturbing the functioning of the national laws.

Relevant to this topic, the Hague system is neutral about the remedies upon a breach and parallel proceedings. The HCCCA does not expressly state any consequences of breaching exclusive jurisdiction agreements; it does not apply to interim measures of protection, including anti-suit injunctions. Accordingly, it neither requires nor precludes the domestic courts from granting or refusing interim measures of protection.[78] The Hartley/Dogauchi Report also confirms that those measures help to achieve the objectives of the HCCCA and the effectiveness of jurisdiction agreements, however, they do not fall into its scope.[79] Indeed, an interim measure of protection is not considered a judgment within the meaning of either the HCCCA or HJC.[80] Therefore, it is up to the courts of the Contracting States whether to grant injunctions. Admittedly, the recognition or enforcement of such measures is also a matter of national laws.[81]

It is true to say that, post-Brexit the common law partisanship to anti-suit injunctions has been revived which is evident from the fact that the English courts have granted measures to restrain judicial proceedings in the EU Member States.[82] In this regard, the Hague system has lifted the "European-oriented" or "civil law-based" restrictions on the UK courts and restored the long-standing liberty of

[76] In the US arbitration practice, there have been contrasting authorities regarding the application of forum non conveniens as a defense to the recognition and enforcement of awards. See *Monegasque de Reassurances SAM v. Nak Naftogaz of Ukraine,* 311 F.3d 488 (2d Cir. 2002) ("*Monde Re*"); *TMR Energy Ltd v. State Property Fund of Ukraine* ("*TMR Energy*"), 411 F.3d 296 (D.C. Cir. 2005).

[77] HJC, Article 13.2. For the relevant commentaries also see Garcimartin/Samuer Report, para 319.

[78] HCCCA, Article 7. The delegates (Paul R Beaumount (United Kingdom), Trevor C Hartley (co-Reporter), K Kovar (United States), David Bennett (Australia), Gottfried Musger (Austria)) during the sessions also submitted that the HCCCA did not restrain the national courts from issuing anti-suit injunctions. See: Minutes No 9 of the Second Commission Meeting of Monday 20 June 2005 in Proceedings of the Twentieth Session of the Hague Conference on Private International Law (Permanent Bureau of the Conference, Intersentia, 2010) 622, 623-624; See also Mukarrum Ahmed, The Nature and Enforcement of Choice of Court Agreements: A Comparative Study (Hart Publishing, 2017), 243.

[79] Hartley/Dogauchi Report, para 160.

[80] HCCCA, Article 3.1(b); HJC, Article 4(1).

[81] For some relevant comments see Hartley/Dogauchi Report, paras 160-162.

[82] See *QBE Europe SA NV v Generali España de Seguros y Reaseguros* [2022] EWHC 2062 (Comm); *Ebury Partners Belgium SA v Technical Touch BV* [2022] EWHC 2927 (Comm). For more discussion see also Mammadzada, supra no 6.

English judges.[83] Accession to the HJC will further enhance the inherent jurisdiction of the English courts to issue common law remedies.

Interplay and balance between the Conventions

Admittedly, the Hague system aims to provide 'joint' multilateral regulation. Possible interactions between the HCCCA and HJC might be associated with cases where there is an exclusive jurisdiction agreement, and the recognition and enforcement of a judgment could potentially be covered by either or both. Provided both of the Conventions are ratified by a state, national courts would examine whether there is an overlap between the application scopes of the treaties, i.e., except for a choice of court agreement, there might be a factor connecting the judgment to another state or possible jurisdictional ground under the HJC including a non-exclusive jurisdiction agreement or there might be refusal grounds set by both or either convention. Complementarity of the treaties necessitates their uniform application and consistent interpretation. According to the Garcimartin/Samuer Report, there is no inconsistency between the two instruments.

The following hypothetical examples might present a clear picture of the exclusive relationship:

a) Assume both the state of origin and the requested state are Contracting States of the HCCCA and HJC. The state of origin whose court has been exclusively designated is also where the person against whom recognition or enforcement is sought habitually resides. The judgment can be recognised and enforced under either or both instruments. If there is a ground of

[83] In the recent case, relying on the evidence before it, the Court of Appeal confirmed that even though the French court could not grant an anti-suit injunction as part of its procedural toolkit or had a philosophical objection to issuing such injunctions (as was referred at the first instance by Bright J in *SQD v QYP* [2023] EHWC 2145 (Comm)), it had no objection in principle to an anti-suit injunction granted by another court under its procedural rules. See *Deutsche Bank AG v RusChemAlliance LLC* [2023] EWCA Civ 1144. See also *UniCredit Bank GmbH v Ruschemalliance* [2024] EWCA Civ 64, where the Court of Appeal confirmed that the English Court could grant an anti-suit injunction in support of a foreign-seated arbitration if one of the jurisdictional gateways could be established (the claim was in respect of a contract governed by English law). These judgments validate English courts' strong tendency towards party autonomy and expansive powers to uphold arbitration agreements which are excluded from the scope of both the HCCCA and HJC. To compare, where there is no concern of arbitration, the English court can order an anti-suit injunction to restrain a person from pursuing proceedings in a foreign jurisdiction only if it is a natural forum and has a sufficient interest in, or connection with the matter in question to justify the indirect interference with the foreign court. See *Airbus Industrie GIE v Patel* [1999] 1 AC 119, 141 (HL). See also *Société Nationale Industrielle Aerospatiale v. Lee Kui Jak* [1987] A.C. 871.

refusal under one of the instruments, the judgment can still be recognised and enforced under the other.[84]

On the other hand, there is nothing to prevent a national court from refusing to recognise or enforce that judgment; indeed, the court's discretion parallels its obligation under both instruments. If the national court considers that the judgment should not be enforced, it won't give effect to it. Therefore, ratifying both of the Conventions would promote their compatible interpretation.

On the other hand, if a judgment is given on rights *in rem* over immovable property, the HCCCA would not be applicable.[85] The judgment would be recognised and enforced under the HJC only if the property is situated in the State of origin.[86]

b) In another example, State A, the defendant's state of origin and habitual residence, and State B, the requested state, are both Contracting States of the HJC. State B and State C (whose courts have been designated by the parties) are HCCCA Contracting States. The courts of State B may refuse to recognise or enforce the judgment given by State A since it is contrary to the exclusive choice of court agreement in favour of the courts of State C.[87] Such incompatibilities might be avoided only if a state is a Contracting Party to both Conventions.

c) Assume all the facts are the same as in the previous scenario and following the refusal of the recognition and enforcement by the court of State B based on HJC 7(1)(d), the claimant goes to State D, which is also a Contracting State to the HCCCA (but not the HJC), and the court decides to apply Article 9(g) of the treaty.[88]

According to the Explanatory Report, both Conventions aim to promote mutual recognition and enforcement; therefore, the requested state should give effect to the judgment.[89] However, the Conventions by the wording "may refuse" determine the discretion of a court

[84] In this regard, the Garcimartin/Samuer Report states that since the grounds for refusal are not mandatory but permitted, the judgment must be given effect under either instrument, preventing recognition or enforcement.
[85] HCCCA, Article 5.2(l).
[86] HJC, Articles 5.1(i) and 6.
[87] Article 7.1(d) of the HJC provides a ruling on the refusal of the recognition and enforcement if the proceedings in the country of origin were contrary to the choice of court agreement. For the relevant discussions see also below.
[88]
[89] Garcimartin & Samuer Report, para 378.

rather than an obligation, which might result in multiple judgments given effect in different states. If State D has ratified both Conventions, its courts will aim for consistent interpretation in the best case.[90]

d) In another scenario, parties might have drafted an asymmetrical jurisdiction agreement, and a foreign judgment might have been rendered by a court in State A. As things stand, the HJC would be relevant in this case as long as all the involved states have ratified the Convention.

The UK and the Hague Conventions

It is true that the Hague treaties contribute to certainty in the post-Brexit legal landscape by complementing common law. Allegedly, Brexit and non-accession to the Lugano Convention have become an accumulator to strengthen the functionality and regulatory power of the Hague Conventions. Likewise, the development of private international law has been a binary aftermath of Brexit.

A) The UK and the HCCCA

The HCCCA has applied to and in the UK by virtue of its EU membership since 1 October 2015. On 28 September 2020, the UK deposited its instrument of accession to ensure the continued application of the HCCCA from 1 January 2021.

The HCCCA determines two key points of reference as to the timeline of its application. According to Article 16, the Convention applies to the exclusive choice of court agreements concluded after entering into force for the State of the chosen court. Accordingly, the HCCCA would apply only if i.e., a Dutch seller and an Italian buyer agreed to conclude an exclusive English jurisdiction agreement after 1 October 2015. Further, the HCCCA does not apply to proceedings instituted before it entered into force for the State of the court seised. This means that i.e., if there are ongoing proceedings in Denmark, the Danish court shall suspend and dismiss the proceedings in favour of the exclusively designated English court as required by Article 6, only if those proceedings were instituted after 1 September 2018 – after the Convention came into force in Denmark.

[90] There might be a mechanism for monitoring whether another state court renders any judgment, or any jurisdiction agreement exists between the parties before the case goes to the state's courts or a decision is given. The Hague Conference has set up a special section dedicated to case law under the HCCCA. Such a repository tracking the judgments recognised and enforced under the HJC would be useful.

The rules on the temporal scope of the Convention presented an awkward problem post-Brexit. The UK Government's position is that the HCCCA has continued to apply to the UK since 1 October 2015 without interruption and has been given force in the national law from 1 January 2021 by the Private International Law Act 2020. After the transition, exclusive jurisdiction agreements concluded on 1 October 2015 designating courts of the UK or EU Member States are governed by the HCCCA. On the other hand, the Commission states that the HCCCA applies between the EU and the UK to exclusive jurisdiction agreements concluded after the UK became a party in its own right – from 1 January 2021.

Suppose a dispute arises between an English seller and a German buyer who negotiated an exclusive English jurisdiction clause on 6 March 2016 – before Brexit. The BRR would have applied if the legal proceedings were instituted on 11 October 2016 – before Brexit. In the second scenario, where the proceedings were instituted on 3 September 2020 – during the transition period, the BRR would have been the applicable regime.[91] If an English jurisdiction agreement was concluded on 6 March 2016 between a seller who is resident in Israel and a German buyer and the proceedings were instituted on 3 September 2020 – during the transition period, the English court would have applied the HCCCA provided all other conditions are met.[92]

In contrast, the German court (i.e., the seised court) or any other court of another Member State might not apply the HCCCA to these proceedings and the resulting judgment since the jurisdiction agreement was concluded before the date when the UK re-joined the Convention in its own right. In the latter case, the EU Member State courts would apply the national laws to recognise and enforce the jurisdiction agreement and resulting judgment. While the Commission's position might justify the European courts' possible standpoint, reasonable arguments are repelling such a position:

First of all, the Vienna Convention on the Law of Treaties requires to interpret a treaty in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[93] Divergences between the two positions and different judicial practices shall be overcome by interpreting the HCCCA based on soft law and good faith. Further, the HCCCA aims to create a legal regime that would provide certainty and ensure the effectiveness of

[91] See the Withdrawal Agreement. See also HCCCA, Article 26(6). Accordingly, the Convention shall not affect the application of the rules of the REIO that is a Party to this Convention – the BRR in this case.
[92] According to HCCCA, Article 26(6)(a), if one of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation the Convention shall override the rules of a Regional Economic Integration Organisation that is a Party to this Convention.
[93] See Vienna Convention on the Law of Treaties 1969, Article 31.

exclusive choice of court agreements.[94] Only continuing application of the HCCCA would bring certainty and effectiveness.

Secondly, unless the treaty otherwise provides or parties otherwise agree, termination of a treaty does not affect any right, obligation, or legal situation of parties created through the treaty's execution before its termination.[95] Article 33 of the HCCCA does not provide otherwise.

Thirdly, in the Instrument of Accession presented to the Depository, the UK restates that the HCCCA entered into force for the UK on 1 October 2015. Since then, the UK has been a Contracting State without interruption. Likely, while the ratification date of the HCCCA by the UK is 28 September 2020, the date of the entry into force of the HCCCA for the UK is still shown as 1 October 2015 in the Status table, which is regularly updated by the HCCH.[96]

Moreover, the Commission's Notice to Stakeholders contains advisory not mandatory guiding notes. It is up to the domestic courts to interpret Article 16(1) of the HCCCA. Relevant case law established by the English and national courts would contribute to resolving uncertainties arising out of the temporal scope of the HCCCA. The matter might eventually be referred to the CJEU on the European side. Having mutual objectives to ensure access to justice and achieve harmonisation and certainty, the HCCH, EU Commission, and UNIDROIT might establish a Special Commission and joint working/expert groups to exchange views and clarify such complexities. Furthermore, since there is already a serious deal of Hague acquis, it is likely and reasonable that a Hague Court might be established ultimately, and the Contracting States might refer relevant questions to the Court.

In the meantime, parties should seek proper legal advice and get familiar with the national laws of states where prospective recognition and enforcement might take place. Whereas legal proceedings initiated before the end of the transition period would be covered by the BRR, the optimal way to secure the effectiveness of jurisdictional choices and resulting judgments after 1 January 2021 would be to renegotiate and restate respective clauses.[97] It is worth noting though, that the importance of the issue is diminishing every passing day with fewer straddle cases.

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[94] HCCCA, Preamble.

[95] Vienna Convention on the Law of Treaties 1969, Article 70.

[96] HCCCA status table, HCCH | #37 - Status table, accessed 11 September 2023.

[97] The Commission also urged businesses to be aware that judgments handed down by a UK court might no longer be swiftly enforceable in the EU and, therefore, to consider the situation while assessing their contractual choices of jurisdiction. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, "Getting ready for changes Communication on readiness at the end of the transition period between the EU and UK", COM (2020) 324, F2.

B) The UK and the HJC

Following the removal of the Brussels regime, the UK's application to rejoin the Lugano Convention has effectively been stymied. For the moment therefore is still pending since the EU, unlike all other EFTA states, has not given its consent. Without any other arrangement, the recognition and enforcement of foreign judgments are subject to diverse private international law rules: national laws of each Member State. In the UK, this means either the common law rules, the Administration of Justice Act 1920, the Foreign Judgments (Reciprocal Enforcement) Act 1933, or (in the limited cases where they apply) those of the HCCCA.

The UK signed up for the HJC only recently – on 12 January 2024 and is likely to ratify it soon. Indeed, the UK government believes that acceding to the HJC would be "an important vehicle to drive the UK's PIL Strategy"[98] and, therefore, has been taking serious steps to ratify the HJC.[99] By ratifying the HJC, the UK government would both harmonise the recognition and enforcement rules in their armoury and also greatly increase the global effectiveness of UK judgments: indeed, this would at least partly restore many of the advantages the UK previously obtained from its membership of the Brussels and Lugano regimes.

Further, it should not come as a surprise that it was only last year when the Shanghai Maritime Court first time ever recognised and enforced an English court judgment in Mainland China.[100] Therefore, beyond the relations with the EU, as more states ratify the Convention and if both the UK and China become the Contracting States, the HJC will also contribute to the UK's international judicial cooperation with the other Contracting States, and certainly to the global acceptability of its judgments as opposed to the existing patchwork of national laws. Moreover, as the HJC leaves room for national laws, courts can also combine the flexible common law provisions with the Convention where relevant.

Particular attention should be put on the language of the text which is optional rather than mandatory and evidence that there might be different interpretations and discretion of the courts while applying the legal framework to particular cases.

[98] The Consultation paper, para 1.3, Consultation on the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Hague 2019) - GOV.UK (www.gov.uk), accessed 11 September 2023.

[99] A UK-wide public consultation paper on the possible ratification of the Convention ran from 15 December 2022 to 9 February 2023.

[100] See *Grand China Logistics Holding (Group) Co. Ltd v Spar Shipping AS* [2015] EWHC 718 (Comm).

All in all, accession to the HJC will therefore serve the UK's commercial interests and prosperity and enhance the UK's attractiveness as a leading dispute-resolution hub. As stated by Lord Bellamy KC at the signing ceremony, "joining the Hague Convention marks a significant step forward for the UK within private international law and strengthens our appeal to businesses as a centre for dispute resolution.[101] In fact, parties would decide rationally to commence proceedings in a Hague Contracting State and forecast the effectiveness of a judgment. So, it can bring certainty and predictability for successful litigants and significantly reduce enforcement costs. In addition, presumably, the UK's ratification might also boost more accessions to the HJC across the world.

In accordance with Article 28, the HJC finally entered into force only on 1 September 2023 – a year after Ukraine's and EU's ratifications. Yet, for each state ratifying the Convention, it shall come into force only after the expiration of twelve months as provided in Articles 28 and 24(2). Furthermore, the Convention shall apply to the recognition and enforcement of judgments if, at the time the proceedings were instituted in the State of origin, the Convention had effect between that State and the requested State. To greatly benefit from the advantages of the HJC, the UK must ratify the Convention as reasonably promptly as possible. That is very close to the horizon.

Final observations

The Hague system is the only means to achieve multilateral regulation of international commercial litigation post-Brexit. Yet, it might be quite complex. Multilateral treaties do not provide an entire solution to every issue on their own. Common idiosyncrasies of the Conventions, be it the material, geographical or temporal scope, or the silent treatment of particular matters necessitate extra means of regulation. As discussed, the Conventions are still not truly global when it comes to the ratification status. Furthermore, they leave particular matters to be decided under diverse national laws. There are no uniform procedural rules and the provisions on the recognition and enforcement often give discretion to national courts rather than mandatory obligations. In this regard, some distaste towards the treaties has been expressed in academia.[102]

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[101] Press Release, http://UK citizens and businesses to be spared time and money on cross-border legal disputes - GOV.UK (www.gov.uk) , 12 January 2024, accessed 23 January 2024.

[102] Born argues that due to the "grave defects" states should not ratify the HCCCA and the members should immediately withdraw from it. He further claims that limitations and exceptions of the HCCCA would leave enforcement of jurisdiction agreements with significant uncertainties when compared to a substantial "enforceability premium" of international arbitration agreements. See Gary B.Born, "Why States Should Not Ratify, and Should Instead Denounce the Hague Choice Of Court Agreements Convention" Part I, II and III, 18 June 2021, accessed 29 November 2021. See also Gary B.Born, International Commercial Arbitration (3rd edn,

Nevertheless, as discussed above, the effectiveness of the multilateral regulation by the Hague system requires a fine balance between pragmatism and harmonisation. Given the fact that the Hague system operates at the international level where comity precedes trust, the Hague Conference presumably aimed at lighter harmonisation. By leaving room for the national laws, allowing opt-outs and exclusions the Conference envisaged to balance national diversities and ease more ratifications to the Conventions. Indeed, strict harmonisation would trigger accomplishing these goals.

Overall, effective multilateral regulation necessitates the unilateral application of national laws. The UK's most effective way to fill the vacuum in the changed legal landscape is to combine the multilateral Hague treaties with the common law. Such a strategy would realise a pragmatic approach and promote harmonisation. While common law is the default regime applicable to judicial instruments, the HCCCA contributes to effectiveness in combination with the domestic rules since the UK is a Contracting State. To comply with its serious commitment to access to justice and to maintain its position as a leading dispute resolution hub, the UK should ratify the HJC to get the effective jurisdictional limbo at hand. The UK should accede to the HJC as reasonably promptly as possible since it will come into application only 12 months after the ratification.

The combination of the Hague system with English law would promote the UK's position as a leading dispute resolution hub while reinforcing the long-established party autonomy values of the common law. Further, by restoring the traditional liberty of the English judges and maintaining common law concepts, the Hague system would also contribute to the development of the UK private international law post-Brexit.

As a Contracting State on its own, the UK should become more active at the Hague Conference and play a leading role in drafting the Jurisdiction Convention to accommodate and further augment the common law concepts and strive for a balance with the civil law virtues. In this way, multilateral regulation brings favourable prospects for enhancing international judicial cooperation and the global enforceability of judicial instruments. It also builds a path for the UK's collaboration with the key actors in the field, including HCCH, EU Commission, and UNIDROIT given the fact that the Hague Conventions drew lessons from the existing regional regimes and arbitration practice. Moreover, the UK's active

Kluwer Law International, 2020). See also Gary B.Born, Rutledge, Peter B., International Civil Litigation the United States Courts (6th edn, Wolters Kluwers, 2018), 442, 459 and 1017.

engagement in the promotion of the Conventions would promote further ratifications by its global trade partners and ultimately bring the true success of the Hague system.