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A User's Guide to the Hague Convention on Choice of Court Agreements

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A User's Guide to the Hague Convention on Choice of Court Agreements

The Hague Convention on Choice of Court Agreements seeks to promote the use of exclusive choice of court agreements in international contracts by requiring effect to be given both to such agreements and to the judgments of courts nominated thereunder.

On 1 October 2015 it will enter into force for the first time. Whilst, initially, its effect will be limited to the EU Member States (excluding Denmark) and Mexico, the Convention will increase in significance to the extent that more States become party to it. In this guide we examine how the Convention works and what it means for parties choosing dispute resolution mechanisms.

This guide was published in September 2015 with a view to the above and is, accordingly, up to date as of the time it was published.

1. Introduction

1.1 What is the Hague Convention on Choice of Court Agreements?

In 2005, the Hague Conference on Private International Law finalised the text of the Hague Convention on Choice of Court Agreements (the "**Convention**"). The aim of the Convention is to promote international trade and investment by encouraging judicial co-operation in the field of jurisdiction and the recognition and enforcement of judgments. The Convention is also accompanied by an official Explanatory Report by Professors Hartley and Dogauchi (the "**Report**"). The Report constitutes an important interpretative aid to the Convention.

Copies of the Convention, the Report and a status table[1] are available at the Choice of Court section of the Hague Conference's website. [2]References to "Articles" in this guide are to articles in the Convention, unless otherwise stated.

The Convention generally applies only to *exclusive* choice of court agreements (which, under the Convention, has a very particular, technical, meaning).[3] The Convention aims to achieve its goals by increasing certainty for users of such choice of court agreements[4] in international contracts. It does this in two ways.

First, it obliges States party to the Convention ("**Contracting States**") to give effect to such an agreement made in favour of a Contracting State; whether that be itself (i.e. to accept jurisdiction as the chosen forum) or another Contracting State (i.e. to decline jurisdiction as the non-chosen forum).

Second, judgments from a court in a Contracting State designated by such a clause will be entitled to recognition and enforcement in other Contracting States under the terms of the Convention.

In that latter respect, although some regional (such as within the EU) and bi-lateral arrangements exist, the Convention forms the first (potentially) world-wide instrument. Depending on how many States ratify the Convention in future, it is therefore possible that it may, in the long-term, facilitate the creation of a recognition and enforcement regime for court judgments as between the Contracting States, similar to that which exists in the arbitration context under the New York Convention.

1.2 Why do I need to know about the Convention now?

The Convention is appearing on the horizon because, following the EU's deposit of its instrument of acceptance to the Convention in June 2015,[5] it is set to enter into force in respect of Mexico and the EU Member States (excluding Denmark)[6] on 1 October 2015.

In the short term, the Convention will therefore only apply before the courts of those States to (potentially) govern the jurisdictional effect of an exclusive choice of court agreement in favour of any of them, and the recognition and enforcement of judgments as between them.[7] To the extent that the Convention is relevant to any such matters, it should also be noted that the transitional provisions of the Convention mean that it will only apply to exclusive choice of court agreements in favour of an EU Member State or Mexico concluded on or after 1 October 2015.[8]

Despite this initial limited effect, as more countries join the Convention (both the US, in 2009, and Singapore, this year, have signed the Convention but neither have yet ratified it)[9] it is only likely to become an instrument which grows in practical significance.

It therefore makes sense for commercial entities (and their legal advisors) who choose to litigate in the EU Member States or Mexico, or who are concerned with the recognition and enforcement of judgments between those States, to develop an awareness of the Convention now. Similarly, others will need to do the same if, as, and when, any State relevant to their dealings becomes party to the Convention. This guide seeks to help understanding of how the Convention works.

1.3 What do I really need to know?

If choosing a court on the basis of an exclusive choice of court agreement which also falls within the Convention's scope, it should be appreciated that the Convention does provide a new treaty basis upon which the chosen court may[10] be required to assess the effect of the clause and which may differ from pre-existing rules. In the case of such agreements in favour of EU Member State courts this is, for reasons discussed below,[11] fortunately not a significant issue. For other States which subsequently join the Convention there may, however, be some differences.[12] That being said, commonly chosen jurisdictions do usually give effect to such clauses, as is the Convention's aim, so, at least from their perspective, any such impact is more likely to be more one of detail, rather than an absolutely fundamental shift in approach.

Instead, the area of greater interest to commercial parties is likely to be the Convention's provisions on recognition and enforcement of judgments. Commercial parties are used to considering the potential ease of enforcement of a judgment in their assessment of whether court litigation is an appropriate dispute resolution mechanism. The most problematic situation in that respect is where there is no available recognition and enforcement regime for court judgments between the jurisdiction, whose courts would otherwise be the desired forum, and the place where any judgment is most likely to require recognition and enforcement (frequently the place where the counterparty is domiciled, being the place where the majority of its assets are likely to be).

In such circumstances, local law at the prospective place of recognition and enforcement will determine the issue, which will require knowledge of that law, and may even mean that a choice of the jurisdiction of the preferred court is inappropriate. It is when otherwise faced with the potential of recognition and enforcement under local law, therefore, that counterparties are likely to most frequently focus on whether the Convention provides an available, and suitable, instrument to facilitate the recognition and enforcement of judgments from their preferred court, and thus, in turn, its viable selection as a dispute resolution forum.[13]

The Convention is a very technical instrument. However, where a commercial party wants to obtain the benefit of the Convention's recognition and enforcement regime, the following will be the key considerations which will need to be established, assuming that the choice of court agreement is concluded or documented in writing[14] and valid[15] before the chosen court.

First, that the relevant choice of court agreement falls within the definition of "*exclusive choice of court agreement*" (**see 2.1**) in the Convention. This carries a particular, technical, meaning which means that many forms of choice of court agreement which might be assumed to fall within such a meaning do not.

If this definition is not met then there is a facility under the Convention for its provisions on recognition and enforcement to be applied to a judgment given by a court of a Contracting State designated in an otherwise non-exclusive choice of court agreement. These are complicated, however, and detailed consideration would need to be given to their effect before relying on the same. It should be noted, also, that it is a threshold condition that both the Contracting State of the designated court and the Contracting State in which recognition and enforcement might be desired have entered a declaration to this effect – which may significantly limit the practical scope of these provisions.[16]

Second, that the Convention is in force in the State of the chosen court (**see 2.2**).

Third, that the Convention is in force, or coming into force, in the State in which recognition and enforcement is desired (**see 2.2)**.

Fourth, that the contract, and likely disputes thereunder, do not fall within one of the excluded categories in the Convention (**see 2.3**).

Finally, that there are no declarations made by either the Contracting State of the designated court, or the Contracting State in which recognition and enforcement is likely to be desired which may adversely affect its operation (**see 4.1**).

The Convention is a highly technical instrument so, even for those who are solely interested in recognition and enforcement issues, familiarity with the areas outlined above will be necessary. The rest of this guide examines those areas and the overall operation of the Convention more generally.

2. The Basic Scope of the Convention

For the Convention to apply, a case must fall within its scope. In this respect, there are a number of key preconditions.

2.1 Exclusive choice of court agreements

The Convention only applies to situations concerning an "*exclusive choice of court agreement*" . This is defined in Article 3(a) as an agreement which "*…designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts*" (an "**ECCA**").

There are two key requirements in this definition

2.1.1 The designated court

The chosen court must be either the courts of one Contracting State generally (e.g. "*the courts of Germany*") or one or more specific courts of one Contracting State (e.g., respectively, "*the Commercial Court of Paris*" or "*either the Commercial Court of Paris or the Commercial Court of Lyons*").[17]

In relation to a Contracting State which consists of a number of territorial units with different systems of law, Article 25 generally facilitates the treatment of those territorial units as separate States for the purpose of the Convention.[18] As the Report clarifies (at paragraph 107), a choice of the courts of one such territorial unit will therefore meet the requirement under discussion.[19]

2.1.2 The designation must be to the exclusion of any other courts

A clause which in any way permits proceedings before any other courts is *not* an ECCA within Article 3(a) ("*…to the exclusion of the jurisdiction of any other courts*").[20]

Whilst it is not possible to give an exhaustive list of illustrations, examples of the types of clause which will not be ECCAs for the purposes of the Convention because they are *not* clauses which are to *the exclusion of any other court* include:[21]

> A choice of court agreement which designates the courts of two, or more, States (whether or not that jurisdiction is itself expressed as being exclusive and whether or not all are the courts of Contracting States).

> A choice of court agreement which designates the courts of one Contracting State but which also permits proceedings to be brought in any other court which would otherwise have jurisdiction.

> A choice of court agreement which designates the courts of a Contracting State as the exclusive jurisdiction for Party A but permits Party B to bring proceedings in any other court which would otherwise have jurisdiction (i.e. an "*asymmetrical*" jurisdiction clause of the type common in financing documents).

It is therefore very important to appreciate that the concept of an ECCA has a *specific technical meaning* under the Convention. If the choice of court agreement in question does not meet this definition then the Convention will not apply to it and so, for example, any consequent judgment will not obtain the benefit of the Convention's recognition and enforcement provisions.[22]

Where it is important for the Convention to apply it will, therefore, be necessary to avoid proceeding on the basis of an assumption that any particular form of clause is an ECCA (for example, standard/industry forms drafted without the Convention specifically in mind) and to be sure that the clause provides for exclusive jurisdiction in favour of the courts of one Contracting State (or one or more specific courts of one Contracting State) *only*.

One limited exception to the above is the aforementioned facility under the Convention for a Contracting State to apply the Convention's provisions on recognition and enforcement to judgments given by a court of a Contracting State designated in an otherwise non-exclusive choice of court agreement. These complex provisions are discussed below (see 4.1.4), but note that they also require reciprocal declarations to have been made, which limits their practical importance.[23]

A final practical issue is, what about the status of choice of court agreements which co-exist in a contract with an arbitration clause? Assume that the parties have agreed to arbitrate but with an option to litigate exercisable by one party.[24] Assume also that the choice of court agreement within that arrangement otherwise meets the requirements of an ECCA.[25] If litigation is then (validly) commenced pursuant to that choice of court agreement, the question then becomes whether the existence of the agreement to arbitrate precludes it from being regarded as an ECCA under the Convention on the basis that an arbitral tribunal constitutes "*any other court*"? The better answer would seem to be "*no*" for two reasons. First, arbitration is excluded from the Convention and its entire thrust is aimed at State adjudicatory bodies. It is therefore very difficult to see how an arbitral tribunal can be "*any other court*" for the purpose of the Convention. Second, there is evidence in the *travaux préparatoires* that indicates that Article 3(a) *was not amended* so as to preserve the application of the Convention in such circumstances.[26]

Nonetheless, it has been suggested that, as a matter of pro-arbitration policy (itself reflected in Article 2(4)), it may be better for such arrangements to not be treated as involving an ECCA.[27] And, of course, the ultimate resolution of this issue may fall to be determined in the courts of any Contracting State in which enforcement of a judgment is later required. Accordingly, before reliance is placed on the effectiveness, under the Convention,[28] of the choice of court aspect of such an arrangement a prudent approach may be, in addition to the usual local law analysis of the same, carefully to consider whether a hybrid arbitration & litigation clause is really necessary in the circumstances. If it is, then, before proceeding, also consider whether there is any adverse authority on this point in the relevant Contracting States (i.e. that designated in the ECCA, and in which recognition and enforcement of a court judgment may later be required).

2.2 Timing aspects of the Convention

Article 16 governs the transitional aspects of the Convention's entry into force. It sets out two important provisions.[29]

First, in relation to choosing a court, the Convention only applies to ECCAs concluded after its entry into force for the Contracting State of the chosen court.[30] So, in relation to an ECCA in favour of the courts of Mexico, or an EU Member State, the Convention can only apply if it has been concluded on 1 October 2015 or later.[31] It will therefore be necessary to check that the Convention is in force in the relevant Contracting State at the time of conclusion of the ECCA.

Second, the Convention only ever applies to proceedings instituted in a Contracting State after its entry into force in that State[32]. So, this is why it will be necessary to check, if assessing whether recognition and enforcement of a judgment under the Convention will be possible in a particular State, that the Convention is in force in that State (i.e. to make sure that the Convention will apply to the recognition and enforcement proceedings in the destination Contracting State).This observation, however, is subject to a small degree of flexibility in one particular set of circumstances, which may arise if and when further States join the Convention. This is as follows:

Assume the Convention is already in force for State A. Assume also that State B, a State where recognition and enforcement is likely to be desired, is not yet party to the Convention but has deposited its instrument of ratification, approval, accession or acceptance. It will then be known that the Convention will come into force in State B on the first day of the month following the expiry of three months after the deposit of that instrument. [33]

Now assume that the ECCA in favour of the courts of State A (in which the Convention is in force) is concluded before the Convention comes into force in State B. Will the Convention still apply to recognition and enforcement proceedings in State B? The answer is yes, provided that: (i) the Convention was in force in State A when the ECCA in favour of State A's courts was concluded and that (ii) the recognition and enforcement proceedings in State B are commenced after the Convention is in force in State B. [34]

Accordingly, the practical impact is that in the limited circumstances discussed above (i.e. where the Convention is in force in State A and it is *known* that it will come into force in State B), it may not, from the perspective of recognition and enforcement under the Convention in State B, strictly speaking, be necessary to wait before the Convention *actually comes into force* in State B before concluding the ECCA in favour of the courts of State A. Since a judgment from State A may well, pursuant to the above observations, end up being enforceable under the Convention in State B.

This is subject to two caveats. First, if a dispute arises, judgment is obtained in State A and recognition and enforcement proceedings are commenced in State B *before* the Convention has come into force in State B then those proceedings in State B would not be governed by the Convention. So, before taking the above approach, a view would need to be taken as to the likelihood of this happening in the period before the Convention comes into force in State B and the potential consequences if it did. Second, it may be prudent to check that the ECCA in favour of State A would be given effect in State B under its local law so as to dismiss any *substantive* proceedings commenced in State B before the Convention comes into force in State B. Such action could otherwise frustrate any later judgment from the chosen court and, until the Convention comes into force in State B, its Convention obligation under Article 6 to dismiss substantive proceedings on the basis of the ECCA will not yet be active.

2.3 Subject matter scope and excluded matters

2.3.1 International cases

The Convention is not intended to regulate purely domestic cases. So, its jurisdictional effects will not apply in the limited circumstances where the parties are resident[35] in the same Contracting State and all other elements relevant to the dispute (aside from the location of the chosen court) are connected only with that State.[36] By contrast, for the purposes of recognition and enforcement of judgments a case is international simply where it involves a foreign judgment.[37] Of course, in cross-border transactions where the Convention is considered at the drafting stage, there will be little difficulty meeting the first requirement and the second is entirely uncontroversial. Accordingly, we do not consider this requirement in any further detail here.

2.3.2 Civil and commercial matters

The Convention applies in "*civil or commercial matters*".[38] This formulation is common in international civil litigation conventions and is necessary in order to exclude, for example, public and criminal law measures. As with the "*international case*" requirement, however, it will usually be the case, in a commercial or financing transaction, that this general requirement will be met.

2.3.3 Specifically excluded matters

Of more relevance is the fact that the Convention excludes a number of specific civil and commercial matters from its scope. Its provisions on jurisdiction and the recognition and enforcement of judgments do not, therefore, apply to such matters. First, ECCAs in consumer or employment contracts are excluded.[39]

Second there are a number of matters[40] which are excluded to the extent that the matter in question is the object of the proceedings.[41] Those of particular relevance to commercial practitioners may include:

- Insolvency.
- Carriage of passengers or goods.
- Anti-trust/competition.
- Rights in rem in immovable property, and tenancies of immovable property.
- The validity, nullity or dissolution of legal persons, and the validity of decisions of their organs.
- Various matters concerning the validity or infringement of IP rights
- The validity of entries in public registers.
- Arbitration.[42]

Note that insurance and reinsurance contracts do fall within the scope of the Convention but, more particularly, provision is made for this to remain so even if the insurance contract relates to a matter to which the Convention does not apply.[43]

2.4 What happens if a case falls outside the Convention's scope?

Where this is so, then, within the Contracting States, the effect to be given to any relevant choice of court agreement, and the recognition and enforcement of a judgment from the relevant designated court, will simply be determined by whatever rules would ordinarily apply to such matters in the relevant Contracting State(s). This will, therefore, be the case where, for example, a case concerns a matter specifically excluded from the Convention, or involves a choice of court agreement that does not fall within the definition of ECCA discussed above[44] (and relevant declarations under Article 22 do not exist). In the case of choice of court agreements which do not meet the definition of an ECCA, the key point to remember is that it is only ECCAs which are within the Convention's basic scope, not all choice of court agreements of whatever form[45].

3. The Effect of the Convention

Where an ECCA falls within the scope of the Convention, the effect before Contracting States is two-fold. First, Contracting States are obliged to give jurisdictional effect to the ECCA. Second, they are obliged to recognise and enforce a judgment given by the designated Contracting State court. These form the "core" of the Convention's scheme.

3.1 Jurisdictional effects (Chapter II of the Convention)

The chosen and non -chosen courts in Contracting States are placed under the following obligations.

3.1.1 The chosen court

Article 5 confers jurisdiction on the court or courts of a Contracting State designated in the ECCA unless the ECCA is "*null and void under the law of that State*" (for these purposes "*law of that State*" includes its conflict of laws rules as to what the law applicable to such issues is).[46] This is the main exception to the requirement that the chosen court must hear the case. It is a rule intended to cover matters of substantive validity[47] and its effect is to import what would otherwise be the position on such matters before the chosen court if determining the question under its local laws (including conflict of laws rules). What falls within this rule is, however, left undefined[48] (and may therefore warrant a broad approach should potential issues under the applicable law be identified at the drafting stage).

What is clear, however, is that this rule does not extend to formal requirements. These are set out by Article 3(c) which establishes minimal formal requirements which must be met. Article 3(c) requires the choice of court agreement to be in writing or any other means of communication which renders information accessible. These requirements are both necessary and sufficient, so no further (national law) requirements of a formal nature may be imposed. It is not envisaged that meeting these requirements will cause problems in most cases for self-evident reasons.

The rule on substantive validity also does not extend to the principle of separability of a choice of court agreement, which is expressly preserved by Article 3(d).

Finally, Article 5(2) precludes the designated court from declining to exercise jurisdiction on the basis that the dispute should be decided in the court of another State. As the Report makes clear, this provision excludes the ability of the designated court to stay proceedings, or otherwise refuse to hear them, on the grounds of *forum non conveniens* or *lis pendens* in any other court.[49]

3.1.2 The non-chosen court

The corollary of the above is that the courts of non-chosen Contracting States are obliged by Article 6 of the Convention to give effect to the ECCA by suspending or dismissing proceedings brought before them to which the ECCA applies. This is subject to a number of limited exceptions.[50]

In addition to Articles 5 & 6, Article 7 makes it clear that interim measures of protection are not governed by the Convention and so it does not affect whether they may be granted by, or requested from, a court.

3.2 Recognition and enforcement (Chapter III of the Convention)

The Convention's provisions on recognition and enforcement fall into three categories.

3.2.1 General obligation (Article 8) and general grounds of refusal (Article 9)

The general obligation of recognition and enforcement placed on Contracting States is set out by Article 8(1). A judgment (as defined by Article 4[51]) given by a court of a Contracting State designated in an ECCA[52] shall be recognised and enforced in other Contracting States in accordance with the rules in Chapter III of the Convention, and such may be refused only on the grounds specified in the Convention. The remainder of Article 8 adds further detail to this obligation.

Pursuant to Article 8(2), the court addressed may not review the merits of the judgment of the court of origin. It is, however, bound by any findings of fact on which the court of origin based its jurisdiction - unless the judgment was given by default.[53]

A judgment shall only be recognised if it has effect in the Contracting State of origin, and shall be enforced only if it is enforceable in the Contracting State of origin (Article 8(3)). Further, provision is made for recognition and enforcement to be postponed or refused if the judgment is subject to review in the Contracting State of origin or if the time limit for seeking ordinary review has not expired (Article 8(4)).

Whilst Article 8 therefore sets out the essential parameters of the obligation to recognise or enforce a judgment, Article 9 sets out seven grounds upon which the same may be refused. The grounds are limited in scope and largely reflect those which are applicable to the recognition and enforcement of arbitration awards under the New York Convention.[54] Should one of the grounds apply in any given case, refusal of recognition and enforcement is discretionary.[55]

3.2.2 Ancillary provisions (12-15)

In addition to Articles 8 and 9 which are of general application, Articles 12-15 deal with a number of more specific matters relating to recognition and enforcement. In summary:

Article 10 concerns preliminary questions on excluded matters. Where a matter excluded from the scope of the Convention by Article 2(2), is determined as a preliminary question this, prima facie, remains within the scope of the Convention[56]. Article 10, however, modifies this position by setting out rules which disapply the Convention's provisions as to recognition and enforcement to such a ruling and also, to a more limited extent, when a judgment is otherwise based upon such a ruling.

Article 11 concerns damages and provides a further discretion to the addressed court to refuse recognition and enforcement if the judgment awards damages which do not compensate a party for actual loss or harm suffered. This addresses concerns that the Convention may require recognition and enforcement of awards of punitive or exemplary damages.[57] Finally Article 12 extends Chapter III to judicial settlements approved by, or concluded before, a court designated in an ECCA.

Finally, Chapter III contains a number of procedural provisions regarding recognition and enforcement proceedings.[58]

4. Modifications to the Effect of the Convention

Whilst Section 3, above, set out the broad effect of the Convention when it applies, it is necessary to examine two important matters which may further influence its operation in any given case.

4.1 Declarations

Articles 19-22 provide Contracting States with the freedom to make declarations concerning a number of issues. This freedom exists as a compromise in respect of concerns voiced during the Convention's drafting as to its operation in particular areas.

Further, pursuant to Article 28, States consisting of non-unified legal systems may make declarations affecting the application of the Convention to relevant territorial units in their territory.

Unfortunately, these Articles complicate the application of the Convention as they mean that, when assessing its potential effect, it will be necessary to consider whether the Contracting State of the courts designated in the ECCA and the Contracting State in which recognition and enforcement is desired have entered any such declarations and, if so, what their effect is. Any declarations entered by Contracting States can be viewed in the status table available on the HCCH's website.[59] As of the date of this guide, Mexico had not entered any and the EU has only entered one; under Article 21 and concerning insurance matters (see 5.3 below).

4.1.1 Article 19 – Declarations limiting jurisdiction

A Contracting State may declare that it will not determine disputes to which an ECCA applies if, except for the location of the chosen court, there is no other connection between it and the parties or the dispute. The reason is that some States see wholly foreign disputes as a burden to their courts. This allows such States to join the Convention whilst maintaining such a position.

4.1.2 Article 20 – Declarations limiting recognition and enforcement

This Article provides Contracting States with the ability to refuse to apply the Convention's provisions on recognition and enforcement to judgments from other Contracting States concerning matters which would otherwise be wholly domestic to the requested Contracting State.

4.1.3 Article 21 – Declarations with respect to specific matters.

This Article provides Contracting States with the ability to exclude specific matters from the Convention in addition to those set out in Article 2(2).The effect is that the Convention will not then apply to that matter in the Contracting State that made the declaration and in other Contracting States where the ECCA designates the courts of the Contracting State that made the declaration.

4.1.4 Article 22 – Non-exclusive choice of court agreements

Although the Convention generally only applies to ECCAs, it contains a facility for the recognition and enforcement provisions of Chapter III to be extended to situations in which the choice of court agreement does not constitute an ECCA within the meaning of Article 3(a).[60]

The operation of Article 22 is somewhat technical and depends upon certain conditions being met. If ever seeking to rely upon Article 22 at the drafting stage the key additional points to bear in mind are as follows:

First, recognition and enforcement pursuant to Article 22 depends upon reciprocity of declarations i.e. both the Contracting State of origin and the Contracting State in which recognition and enforcement is sought must have made such a declaration.[61] As a threshold issue, it will therefore be necessary to check whether such a declaration is in force for both Contracting States (see 4.1.5 as to further observations regarding the temporal effect of such a declaration).

Second, the court of origin must be a court of a Contracting State which has been designated in a choice of court agreement that meets the (minimal) formal requirements of Article 3(c) and designates a court or courts of one or more Contracting States.[62]

Third, there are various provisions in Article 22[63] which, even if the above requirements are met, preclude recognition and enforcement to the extent that a judgment has been given by, or proceedings exist before, other courts before which proceedings may be brought under the terms of the choice of court agreement. The consequence is that the extent to which the same is possible pursuant to the clause will *directly influence* the likelihood of these provisions being available to frustrate recognition and enforcement. Where that is a crucial consideration careful thought will therefore need to be given to the precise extent to which the clause permits proceedings elsewhere.[64]

4.1.5 Temporal effect of declarations under Articles 19-22

Special rules exist for the time at which declarations made under Articles 19-22 take effect.[65] In general, any of the declarations listed above can be made by a Contracting State either (i) upon signature, ratification, acceptance, approval or accession or (ii) at any time thereafter.

In the case of (i) the declaration will take effect simultaneously with the entry into force of the Convention for the Contracting State concerned.[66] In the case of (ii) it will take effect on the first day of the month following the expiry of three months after the date on which notification is received by the depositary.[67]

Any declaration made by a Contracting State under Articles 19, 20 or 21 will not, however, apply to ECCAs concluded before that declaration takes effect i.e. it will not retrospectively affect any such clauses which otherwise fall within the Convention.[68]

Declarations under Article 22, however, work differently. Article 32(5) does not apply to such a declaration. So, where a Contracting State has made such a declaration it is, *prima facie*, capable of applying to the recognition and enforcement of a judgment from a court of a Contracting State designated in a choice of court agreement falling within Article 22 and concluded before the declaration in the requested Contracting State entered into force. In addition, Article 16(1) does not apply to such a choice of court agreement (as it is only concerned with ECCAs).

The combined effect would therefore seem to be that, provided that both the Contracting State of origin and the requested

Contracting State have both made Article 22 declarations which are in force at the time of the recognition and enforcement proceedings it does not matter when the clause itself was concluded. Although this may be the starting position, two points of caution should be made. First, States making an Article 22 declaration may specifically address this issue; which may alter the position. Second, there is a difficult issue as to when exactly, in time, reciprocity as to the Article 22 declarations being in force must be established (which may or may not also be addressed in a State's declaration). As a result, unless the position is absolutely clear in the relevant declarations, it would seem that the most prudent course of action at the drafting stage would be to rely upon Article 22 only where it is clear that relevant declarations are in force in both the Contracting State of the designated court and the Contracting State in which recognition and enforcement is desired.[69]

4.1.6 Article 28 – Declarations with respect to non-unified legal systems

Non-unified legal systems were discussed in the context of the meaning of ECCAs (see 2.1.1) and concern a Contracting State which consists of a number of territorial units with different systems of law. Article 28 allows a Contracting State to limit which of these the Convention applies to (although if it makes no such declaration, the Convention is deemed to extend to all of them). Accordingly, if it is proposed to designate the courts of such a unit, or recognition and enforcement in a particular territorial unit is desired, then whether any such declaration has been made by the relevant Contracting States should be established.

4.2 Relationship with other international instruments

In the international legal order there are a number of regional and bilateral arrangements which cover questions of jurisdiction and the recognition and enforcement of judgments between States. For example, within Europe, EU Regulation 1215/2012 (the "**Brussels I Recast**") and the 2007 Lugano Convention.[70]

Given the potentially global nature of the Convention, any given Contracting State may therefore find itself in a position where it is party both to the Convention and an instrument of that nature. The question will then arise as to which instrument that Contracting State must apply where there is inconsistency. To deal with this, the Convention contains rules which clarify which instrument is to have priority. These are set out in Article 26.

4.2.1 Other treaties

Articles 26(1)-(5) deal with conflicts between the Convention and other treaties.

The first provision is a rule of interpretation at Article 26(1) which states that the Convention must be interpreted, so far as possible, to be compatible with other treaties in force for Contracting States (whether concluded before or after the Convention).

Should that not be capable of resolving the inconsistency, it is then followed by four "*give-way*" rules. In the event of any of these being satisfied, the Convention yields to the treaty in question.

Article 26(2) is based on the residency[71] of the parties[72] and applies whether the conflicting treaty was concluded before or after the Convention. Its purpose is to preserve the conflicting treaty's effect unless States who are Contracting States but not also party to that treaty can be taken to have an interest in seeing the Convention being applied.[73] So, to effect this outcome, the rule provides that the Convention shall not affect the application of the other treaty where none of the parties is resident in a Contracting State that is not a Party to the other treaty (or, put in a positive way; only if one or more of the parties is resident in a Contracting State that is also not a Party to the relevant treaty, does the Convention prevail).[74]

Article 26(3) addresses the problem that a Contracting State may, in giving effect to the Convention over and above a conflicting treaty, violate its obligations to a State which is party to that treaty, but not to the Convention. Thus, under Article 26(3), the Convention will give way if its application would be inconsistent with the obligations of the Contracting State to any non-contracting State under a separate treaty. This rule only applies to treaties concluded before the Convention entered into force in the Contracting State in question but extends to revisions or replacements of the same (save to the extent those create new inconsistencies).

Article 26(4) addresses recognition and enforcement of a judgment where the both the State of origin and the requested State have concluded a separate treaty on the matter (before or after the Convention) and are also both Contracting States. It provides that the Convention shall not affect the application of that treaty, but that the judgment shall not be recognised or enforced to a lesser extent than under the Convention.

Finally, Article 26(5) addresses the situation where the Contracting State is party to a treaty in relation to a *specific matter*[75]. This article permits that treaty to have priority provided that the Contracting State concerned has made a declaration[76] to that effect (which then has effect in both that Contracting State and, to a limited extent, other Contracting States).

4.2.2 Rules of a Regional Economic Integration Organisation ("REIO")

By contrast with the above, Article 26(6) applies to the relationship between the Convention and the rules of a REIO (whether adopted before or after the Convention). Such rules are therefore subject to separate priority provisions.

Under Article 26(6) there are two "*give-way*" rules:

Article 26(6)(a) mirrors Article 26(2): The Convention shall not affect the REIO rules where none of the parties is resident in a Contracting State that is also not a Member State of the REIO.[77]

Article 26 (6)(b), applies to the recognition and enforcement of judgments as between REIO Member States. Simply put, the Convention shall not affect the REIO rules on the same.

One of the most significant REIOs is the EU.[78] The EU, in the form of the Brussels I Recast, has a pre-existing set of detailed rules governing jurisdiction and the recognition and enforcement of judgments within the EU. The relationship, via Article 26(6), between the Convention and the Brussels I Recast is the subject of the final part of this guide.

5. The Convention in the EU Legal Order

Within the EU, jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is now generally[79] governed by the Brussels I Recast. At the same time, all of the EU Member States (excluding Denmark) will, as of 1 October 2015, become Contracting States.

Given that the Convention was concluded by the EU it is, within the EU, to be regarded as an instrument of EU Law[80] the effect of which is preserved before the EU courts by Article 67 of the Brussels I Recast. However, the exact interrelationship between the Convention and the Brussels I Recast in so far as an EU court is concerned is not entirely straightforward. Nonetheless it is something that it will be important for EU practitioners to understand. Below we address some of the key issues.

(Within the EU, the CJEU will be the supreme arbiter of the interpretation of the Convention as its jurisdiction to give preliminary rulings extends to that instrument).[81]

5.1 Jurisdictional effects

5.1.1 Choice of court agreements in favour of EU Member State courts.

Choice of court agreements in favour of EU Member State courts are generally governed by Article 25 of the Brussels I Recast which requires chosen EU Member State courts to accept jurisdiction on the basis of such a clause and non-chosen EU courts to decline jurisdiction to the extent that such a clause is exclusive in favour of elsewhere in the EU.

Similar obligations in respect of ECCAs will be imposed by Articles 5 and 6 of the Convention once the EU Member States become Contracting States. Accordingly, from the perspective of one EU court assessing such a clause in favour of itself or another EU court, the clause may also, assuming it falls squarely within the scope of the Convention, be capable of being governed by that instrument.

Where this is so will be significantly limited by the give way provision of Article 26(6)(a) (the effect of which will be that the Brussels I Recast takes priority in many cases). But the theoretical consequence is that whilst one ECCA in favour of an EU court may be governed by the Recast, another may be governed by the Convention.

Fortunately, this possibility should have a limited practical impact on the use of and effect to be given to EU jurisdiction clauses within the EU. This is largely as a result of changes introduced into the Brussels I Recast which have already brought it in line with the Convention.[82] The result of these is that, in so far as a chosen EU court is concerned, the approach it must take to a clause in its favour is rendered the same irrespective of whether it considers it under the Brussels I Recast or the Convention.

One potential point of departure is, however, whether the degree to which the obligations under the Convention of a non-chosen EU court are precisely the same as under the Brussels I Recast when faced with an exclusive choice of court agreement in favour of elsewhere in the EU. In particular, it may be queried whether, in the limited cases where Article 26(6)(a) gives the Convention priority, the obligation on that court, under the Brussels I Recast, to stay its proceedings automatically when the chosen court is seised applies.[83]

5.1.2 Choice of Court Agreements in favour of non-EU Contracting States.

In this respect the Convention may have a significant effect as it helps address a controversial question under the Brussels I Recast; namely the extent to which an EU court with jurisdiction under that instrument can decline to exercise it on the basis of a non-EU jurisdictional factor (a choice of court agreement in favour of a non-EU court included).

Where only Article 6 of the Brussels I Recast is engaged (i.e. the defendant is non-EU domiciled and no other ground of jurisdiction in that instrument applies) the issue is less pressing because national law can be applied to resolve the issue.

On the other hand, greater difficulties emerge when any of the other grounds of jurisdiction in the Brussels I Recast are engaged; for example Article 4 (EU defendant sued in the courts of its domicile). Following the CJEU's decision in *Owusu*[84] the extent to which an EU court can recognise a non-EU jurisdictional factor in such circumstances (absent some other instrument, such as the Lugano Convention, prescribing a different answer over and above the rules in the Brussels I Recast) has been a matter of significant debate.

This point is partially answered by Articles 33 and 34 of the Brussels I Recast which provide EU courts with a discretion to stay proceedings brought before them where the same or related matters are already before the courts of a non-EU State. However, these Articles only operate subject to certain conditions (so are not a comprehensive solution) and leave a question mark as to whether any other discretion is available.

The Convention therefore steps into this area and will provide a route by which an ECCA in favour of a non-EU State can be given direct effect by an EU court in the face of Brussels I Recast based jurisdiction (assuming, of course, that the Brussels I Recast requires that jurisdiction to be assumed in the first place). There are, however, two significant limitations. First, the case must fall within the basic scope of the Convention to begin with (so, for example, the choice of court agreement must be an ECCA within the Convention's meaning). Second, even if that is the case, the "*give-way*" provision of Article 26(6)(a) must also not operate in favour of the Brussels I Recast; otherwise the question reverts to the issues raised by *Owusu* and Articles 33 and 34 of the Brussels I Recast.

5.2 Recognition and enforcement of judgments

5.2.1 Judgments from other EU Member States

This area will remain unaffected, and governed by the provisions of the Brussels I Recast even if recognition and enforcement could otherwise fall within the scope of the Convention.[85]

5.2.2 Judgments from other non-EU Contracting States

Judgments which fall within the scope of the Convention will be entitled to recognition and enforcement pursuant to its terms in every EU Member State (Article 26(6)(a) does not need to be considered in this context as the Brussels I Recast does not apply to the recognition and enforcement of non-EU judgments). Where there is a separate recognition and enforcement arrangement between the Contracting State of origin and the EU Member State in which recognition and enforcement is sought,

which applies will be determined by the Convention's "*give-way*" rules, as applicable to other treaties, discussed at 4.2.1.

5.3 Declarations

Upon approval of the Convention, the EU entered a declaration, pursuant to Article 21, excluding insurance contracts from the scope of application of the Convention. The reason for this is that the Brussels I Recast contains protective rules for insured parties and, left unamended, the Convention would conflict with/override such rules in the cases in which it applied.[86] Accordingly, this reservation was thought necessary in order to preserve the effect of such rules even in such cases. Consistent with that the declaration also specifies a number of defined situations in which the Convention will nonetheless apply which broadly correlate with the circumstances in which the Brussels I Recast would otherwise permit effect to be given to a choice of court agreement in an insurance contract.

Other than this declaration, and those confirming its competence to conclude the Convention on behalf of the EU Member States, the EU has not, at the date of this guide, made any other declarations.

Footnotes

[1] This shows which States are party to the Convention, when it entered into force in respect of each and whether States have entered any declarations, reservations or notifications (as well as their content).

[2] http://www.hcch.net/index_en.php?act=text.display&tid=134

[3] See 2.1, below.

[4] Also known more colloquially as jurisdiction clauses. In this guide, for consistency with the Convention's language, we refer to choice of court agreements.

[5] Following Mexico's accession in 2007, this constituted the second instrument of ratification, acceptance, approval or accession. This, in accordance with Article 31(1), has the effect of bringing the Convention into force for the first time.

[6] Which, as at the date of this guide, is not due to become a Contracting State. References to the EU Member States in this guide should be read accordingly.

[7] Although, so far as an EU Member State court is concerned, the Convention will, generally speaking, have little impact on the position under EU Regulation 1215/2012 in intra-EU matters (i.e. where such a court is concerned with either the effect of an exclusive choice of court agreement in favour of itself or another EU Member State, or the recognition and enforcement of a judgment from another EU Member State). This is due to provisions in the Convention which mean that, in such circumstances, it largely gives way to the rules under EU Regulation 1215/2012 or, in any event, is consistent with them (see section 5 of this guide for more). Instead, from the perspective of an EU Member State court (and, in particular, a choice in favour of such a court) the main impact will be in cases concerning the effect of an exclusive choice of court agreement in favour of itself, or the recognition and enforcement of its consequent judgment, in a non- EU Contracting State (i.e., at the date of this guide, Mexico), and vice versa.

[8] Article 16(1).

[9] Ratification by the US has been delayed by disagreements over the most appropriate method of implementing the Convention into the US's federal system. The Convention only enters into force in relation to any particular State following its ratification, acceptance, approval or accession to it (signature of the Convention only indicates a willingness to proceed towards such a step). In future, once a State's instrument of the same has been deposited with the Ministry of Foreign Affairs of the Netherlands (the Convention's depository) the Convention will then enter into force in relation to that State on the first day of the month following the expiry of three months after that deposit (Article 31(2)).

[10] Provided there is no other relevant treaty or instrument to which the Convention must give way to in accordance with Article 26 (see 4.2).

[11] See 5.1.1.

[12] Any common law jurisdictions will, for example, find that Article 5(2) excludes the application of *forum non conveniens* in this context (although it is true that it is rarely deployed in the face of a choice of court agreement in favour of the seised court in any event).

[13] By contrast, if, in such circumstances, the Convention is either not available, or it is not suitable (for example, the Convention generally requires a particular form of choice of court agreement to be used, see 2.1), then recognition and enforcement would, in the absence of any other available recognition and enforcement regime for court judgments, be left solely to local law in the prospective State of recognition and enforcement. Even then, litigation in the courts of the desired jurisdiction may not need to be ruled out (depending on what local advice is) as some local laws are almost as receptive to foreign judgments as treaty based enforcement. Enforcement of foreign judgments in other States may, by contrast, be decidedly difficult and in those circumstances arbitration is commonly deployed (as the New York Convention may provide an answer to enforcement concerns).

[14] Or by any other means of communication which renders information accessible so as to be usable for subsequent reference. See.3.1.1

[15] See 3.1.1.

[16] At the date of this guide, neither the EU Member States, nor Mexico, have made such a declaration. See 4.1.4-4.1.5, below, for more in this issue generally.

[17] Examples given at paragraph 104 of the Report.

[18] See the examples at paragraph 107 of the Report of Canada, China, the UK and the US and, as respective territorial units, Ontario, Hong Kong, Scotland and New Jersey (of course these are largely illustrative examples since, at the date of this guide, with the exception of the UK, these states are not currently due to become Contracting States).

[19] As would the designation of one or more specific courts within that distinct territorial unit. What may confuse, however, and may therefore be best avoided, would be a designation of courts in two or more different territorial units of that type within one Contracting State. If a court were to interpret those units as separate "States" then the clause would not be exclusive within the meaning of Article 3(a) as it would involve the designation of the courts of more than one Contracting State. A further, separate, point to bear in mind is the potential for Contracting States to enter declarations regarding the application of the Convention to such territorial units (see 4.1.6, below).

[20] Although, provided the designation of a court or courts falls within Article 3(a), it will, under the Convention, be deemed to be exclusive unless the parties have expressly agreed otherwise (Article 3(b)). So, for example, a choice of court agreement designating the courts of one Contracting State generally (e.g. "*the courts of Germany*") and giving no indication as to whether that jurisdiction is exclusive would be deemed to be exclusive under the Convention. Of course the Convention must apply for this rule to have effect so parties may well consider that there remain benefits to expressly using the word "exclusive".

[21] See paragraphs 105-106,108-109 of the Report.

[22] This is not to be misunderstood as also meaning that the Convention, as before the Contracting States, invalidates a choice of court agreement which does not meet this definition of an ECCA. Nor does the Convention prohibit the Contracting States from giving recognition and enforcement to a judgment given by a chosen court under a choice of court agreement which does not meet this definition. Instead, for a discussion of the consequences of a case falling outside the scope of the Convention on this basis see 2.4.

[23] At the date of this guide, neither the EU nor Mexico had made the relevant declaration.

[24] Whilst it is known that they may raise certain local law and enforcement issues, arbitration clauses with an option to litigate (or vice versa) are, for example, sometimes used in appropriate circumstances.

[25] If, in such an arrangement, the choice of court agreement itself does not "*designate[s]…the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts*" then the issue under discussion becomes irrelevant. On any view such an arrangement will not be an ECCA.

[26] See paragraph 53 of Preliminary Document No.32 of June 2005, a document referenced in the Report at footnote 144.

[27] See, for example, Brand & Herrup, *The 2005 Hague Convention on Choice of Court Agreements* (CUP) (2008) pg 42 (footnote 2), although no reference is made therein to the document referred to at footnote 26 above.

[28] In order to, for example, secure recognition and enforcement of any consequent court judgment in another Contracting State on the basis of the Convention.

[29] See paragraphs 218-220 of the Report and examples given therein for further detail.

[30] Article 16(1).

[31] 1 October 2015 being the date upon which the Convention enters into force for the EU Member States and Mexico (see Article 31(1)). For future Contracting States the relevant date will be the first day of the month following the expiry of three months after the deposit of the relevant State's instrument of ratification, acceptance, approval or accession (Article 31(2)(a)).

[32] Article 16(2).

[33] Article 31(2)(a).

[34] See paragraphs 218-220 of the Report considering this interaction between Articles 16(1) and 16(2), in particular Example 2.

[35] For the purposes of the Convention, residency, in the case of entities other than a natural person, is defined by Article 4(2) and has an expanded meaning encompassing the State: (a) where it has its statutory seat; (b) under whose law it was incorporated or formed;(c) where it has its central administration; or (d) where it has its principal place of business.

[36] Article 1(1),(2).

[37] Article 1(1),(3).

[38] Article 1(1).

[39] Article 2(1)(a),(b).

[40] Article 2(2)(a)-(p). In general these are matters in respect of which there exists a consensus that a particular place should have jurisdiction in priority to the parties' choice by reason of the subject matter. Or, where there exist particular international conventions.

[41] Article 2(3). Accordingly, as that provision makes clear, proceedings will not fall outside the scope of the Convention merely because such a matter arises as a preliminary question or by way of defence.

[42] Article 2(4). The exclusion is necessary to preserve the effect of existing international instruments on arbitration, primarily the New York Convention.

[43] Article 17(1),(2).

[44] At 2.1.

[45] Article 1(1). As an example in this context; assume a wholly non-exclusive choice of court agreement (not an ECCA) is concluded in favour of England. The English courts would then still generally apply EU Regulation 1215/2012 to determine its effect. If recognition and enforcement is then sought in the other EU Member States then it will be governed by EU Regulation 1215/2012 (which, in any event, in matters of recognition and enforcement within the EU is wholly unaffected by the Convention even when a matter is within the Convention's scope; see 5.2.1).

[46] Report, paragraph 125.

[47] Report, paragraph 126.

[48] The Report gives some examples at paragraph 126, although this appears to be a non-exclusive list and, ultimately, it will be for the courts of Contracting States to delimit the scope.

[49] Report, paragraphs 132-134.

[50] Set out at Article 6 (a)-(e). These include: (a) the ECCA is null and void under the law of the State of the chosen court (see 3.1.1), (b) a party lacked capacity to conclude the ECCA under the law of the State of the court seised, (c) manifest injustice/manifestly contrary to public policy of the State of the court seised, (d) for exceptional reasons beyond the parties' control the ECCA cannot reasonably be performed, and (e) chosen court has decided not to hear the case.

[51] As "*any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment*".

[52] For Article 8 to be engaged it is only necessary that the court is so designated. The court need not have actually based its jurisdiction on the ECCA (see Report paragraph 164). Although, either way, recognition and enforcement under the Convention also, of course, requires that the court of origin was designated to resolve the dispute that the judgment actually concerns (or, to put it another way, that the judgment concerns a dispute within the scope of the relevant choice of court agreement).

[53] The binding nature of findings of fact under this Article is also subject to the proviso that, in this context, jurisdiction in the designated court was actually based on the ECCA. If based on some other ground, the addressed court is not bound by such findings of fact. Further, even if bound by those factual findings, this does not, generally, mean that the addressed court is also bound to accept the court of origin's legal evaluation of them (see Report paragraphs 166-169).

[54] See Article 9(a)-(g). These include: (a) the ECCA is null and void under the law of the State of the chosen court (see 3.1.1), unless the chosen court has determined it is valid, (b) a party lacked capacity to conclude the ECCA under the law of the State of the court seised, (c)(i)&(ii) provisions concerning the adequacy of notice of the proceedings given to the defendant and compatibility of the same with fundamental principles of the requested state concerning service of documents, (d) judgment obtained by fraud in connection with a matter of procedure, (e) manifest incompatibility with public policy of the requested state, (f) inconsistency with a judgment given in the requested State in a dispute between the same parties, and (g) inconsistency with an earlier judgment from another state in defined circumstances.

[55] See the Report at paragraph 182.

[56] Article 2(3).

[57] See, generally, the Report at paragraphs 203-205.

[58] See Articles 13-15.

[59] http://www.hcch.net/index_en.php?act=text.display&tid=134

[60] The jurisdiction provisions of the Convention are *not* extended to such clauses; Article 22 is only concerned with recognition and enforcement. Other than that, however, the remaining provisions of the Convention will continue to apply in respect of recognition and enforcement under Article 22 (e.g. matters excluded under Article 2 & 21 would remain so), see paragraphs 240-244 Report.

[61] Article 22(2).

[62] Article 22(1), 22(2)(a).

[63] Article 22(a)(b)(c).

[64] See, in general, paragraphs 245-252 Report.

[65] Article 32.

[66] Article 32(3).

[67] Article 32(4).

[68] Article 32(5).

[69] See Report, paragraphs 253-255.

[70] Examples existing in the Americas at the time of the Convention's conclusion were examined in Preliminary Document No. 31 of June 2005: *The American Instruments on Private International Law: A Paper on their Relation to a Future Hague Convention on Exclusive Choice of Court Agreements*.

[71] See Article 4(2).

[72] For these purposes "*party*" means a person (or entity) who is both party to the choice of court agreement and to the actual proceedings before the relevant Contracting State. See paragraph 275 of the Report.

[73] See paragraphs 271-274 of the Report.

[74] E.g. assume a dispute is heard in State A. State A, which is a Contracting State, is also party to a treaty which conflicts with the Convention. In such circumstances, the effect of Article 26(2) is that State A only applies the Convention *if* one or more of the parties is resident in a Contracting State that is *also not a party* to the relevant treaty. In any other situation (e.g. the parties are resident in Contracting States that are *also* party to the relevant treaty, or in States which are party to the relevant treaty but not to the Convention, or in States which are party to neither), the Convention does not affect the application of the other treaty.

[75] As stated in the Report (paragraph 288) this means a treaty on a discrete area of law.

[76] Which is subject to the general rules on declarations in Article 32 discussed above.

[77] Or, again, to put it in a positive way: only if one or more of the parties is resident in a Contracting State that is also not a Member State of the REIO, will the REIO rules be displaced. To give an example from the perspective of the courts of the EU and on the assumption that the only other (non-EU) Contracting State is Mexico; this rule means that the Convention only displaces the relevant EU rules before the EU courts where one or more of the parties is resident in Mexico. As with Article 26(2), party, in this context, means a person (or entity) who is both party to the choice of court agreement and to the actual proceedings before the relevant Contracting State. See paragraph 294 of the Report.

[78] Articles 29 & 30 make provision for a REIO and its member states to become party to the Convention. REIO is not defined but carries an autonomous meaning (see Report paragraphs 313-316). There is unlikely to be a much clearer example than the EU. Indeed, Article 30 was deployed by the EU as the mechanism by which the Convention was accepted on behalf of the EU Member States (excluding Denmark).

[79] The EU is also party to the Lugano Convention 2007 which regulates jurisdiction and the recognition and enforcement of judgments as between the EU Member States and Switzerland, Norway and Iceland (the latter three being the "**Lugano States**"). Before an EU court the Lugano Convention

applies to determine matters of jurisdiction whenever a defendant is domiciled in a Lugano State, the case involves exclusive jurisdiction of a Lugano State, the case involves a jurisdiction agreement in favour of a Lugano State, or there is a *lis pendens* before a Lugano State court. Likewise it governs the recognition and enforcement of a judgment from the Lugano States (Article 64 Lugano Convention). It should therefore be kept in mind that, in those limited circumstances, reference to the Lugano Convention would be needed, rather than the more generalised analysis which follows.

In so far as the Lugano States do not become Contracting States there will, from an EU court's perspective, be fewer opportunities for inconsistency between the Convention and the Lugano Convention but, in the event that there are any, these will fall to be resolved in accordance with Articles 26(1)-(5).

[80] *Haegeman v Belgium* Case 181/73 at paragraph 5.

[81] Treaties within the EU's competence and concluded between it and non-EU States are regarded as "*acts of the institutions*" of the EU for the purposes of Article 267 (b) TFEU, see *Haegeman v Belgium* Case 181/73.

[82] Specifically, the release of the chosen court from its obligation to stay its proceedings in the event of proceedings first in time elsewhere in the EU (effected by Article 31(2) and Recital 22 of the Brussels I Recast) which mirrors the effect of Article 5(2) and, further, a rule on substantive validity in Article 25 of the Brussels I Recast mirroring that in Article 5(1). A general *forum non conveniens* discretion is also not available to an EU chosen court when applying Article 25 of the Brussels I Recast as a result of *Owusu* v *Jackson* (C-128/02). In addition the matters excluded from the scope of the Convention also generally mirror those which, under the Brussels I Recast, are excluded or in respect of which the effect of a choice of court agreement is otherwise limited. (One area of significant difference may have been insurance contracts (see Report paragraphs 307-310) but as to this see 5.3 for a discussion of steps taken by the EU to minimise divergences).

[83] Article 31(2) of the Brussels I Recast. It could be said that the non-chosen court should be left free to apply Article 6. Strong arguments in favour of the non-chosen court having to apply Article 31(2) of the Brussels I Recast exist, however, based on the CJEU's approach to EU *lis pendens* in the context of international conventions in *The Tatry* (C-406-92). Whatever the position is, it should be noted that the *chosen* EU court is, under the Convention (as under the Brussels I Recast), of course not required to stay its proceedings in the face of proceedings elsewhere (Article 5(2)).

[84] Case C-128/02, which ruled out the application of a *forum non conveniens* discretion in such circumstances.

[85] Article 26(6)(b).

[86] See paragraphs 302-304 of the Report and *Commission Proposal for a Council Decision on the approval of the Convention* (COM(2014) 46 Final) paragraph 3.2.2.2.

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