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Choice of Court Agreements after Brexit

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Abstract

The aim of the contribution is to assess whether Hague Convention on Choice of Court Agreement and Brussels I bis Regulation are comparable legal instruments as far as choice of court agreements are concerned. The article shall analyze mutual features of the two legal instruments as well as their divergences in relation to choice of court agreements. The article shall demonstrate whether Hague Convention presents a complete and a comprehensive solution in terms of choice of court agreements for the UK provided that the Brussels Regulation is no longer applicable.

Keywords

Choice of Court Agreement; Hague Convention; Brussels I bis Regulation.

1 Introduction

As the dust begins to settle after the United Kingdom’s (“UK”) historic vote to leave the European Union (“EU”), attention is now turning to the impact of so-called Brexit on those areas that were not central to the popular political debate.¹ Upon the finalization of the withdrawal agreement between the UK and the EU neither of the EU founding treaties (the TEU² and the TFEU³) will be applicable in the UK. This includes the Art. 288 of the TFEU which provides for the direct application and binding force of the EU regulations.⁴

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¹ Masters, S., McRae, B. What does Brexit mean for the Brussels Regime. *Journal of International Arbitration*. 2016, Vol. 33, No. 7, p. 483.

² Treaty establishing the European Community.

³ Treaty on the Functioning of the European Union.

⁴ Masters, S., McRae, B. What does Brexit mean for the Brussels Regime. *Journal of International Arbitration*. 2016, Vol. 33, No. 7, p. 483.

Consequently, on 28 December 2018 the UK signed the Hague Convention on Choice of Court Agreements of 30 June 2005 (“Hague Convention on Choice of Court Agreements”).⁵ This legal instrument was created by the Hague Conference on Private International Law (“HCCH”) which is a global intergovernmental organization for cross-border cooperation in civil and commercial matters.⁶ Moreover, Hague Convention on Choice of Court Agreements was ratified by the 28 EU member states as well as by Mexico, Montenegro, and Singapore.⁷

Hague Convention on Choice of Court Agreements provides an international framework for rules on choice of court agreements.⁸ Since choice of court agreements are not always respected under divergent national rules, the aim of Hague Convention on Choice of Court Agreements is to provide certainty to businesses engaging in cross-border activities and create legal environment more amenable to international trade and investment.⁹

Once the UK leaves the EU, the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil

⁵ Choice of court section [online]. *hccb.net* [cit. 24. 3. 2019]. <https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court>

⁶ Newing, H., Webster, L. Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International*. 2016, Vol. 10, No. 2, pp. 105–117.

⁷ Choice of court section [online]. *hccb.net* [cit. 24. 3. 2019]. <https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court>

⁸ Brekoulakis, L. S. The Notion and the Superiority of Arbitration Agreements over Jurisdiction Agreements: Time to Abandon It? *Journal of International Arbitration*. 2007, Vol. 24, No. 4, p. 345; See also Newing, H., Webster, L. Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International*. 2016, Vol. 10, No.2, pp. 105–117.

⁹ Choice of court section [online]. *hccb.net* [cit. 24. 3. 2019]. <https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court>; See also Frischknecht, A. A. et al. *Enforcement of Foreign Arbitral Awards and Judgements in New York*. The Hague: Kluwer Law International, 2018, p. 42; See also Palermo, G. The Future of Cross-Border Disputes Settlement: Back to Litigation? In: Gonzalez-Bueno, C. (ed.). *40 under 40 International Arbitration*. Madrid: Dykinson, 2018, p. 357; See also Rea, M., Marotti, C. M. What is all the fuss? The Potential Impact of the Hague Convention on the Choice of Court Agreement on International Arbitration [online]. *arbitrationblog.kluwerarbitration.com*. Published on 16 June 2017 [cit. 15. 5. 2019]. <http://arbitrationblog.kluwerarbitration.com/2017/06/16/fuss-potential-impact-hague-convention-choice-court-agreement-international-arbitration/>

and commercial matters (“Brussels I bis Regulation”) will no longer apply in the UK.¹⁰ Due to the fact that Brussels I bis Regulation, among other, governs choice of court agreements, Hague Convention on Choice of Court Agreements is perceived as an alternative jurisdictional regime for cases involving such agreements.¹¹ Hague Convention on Choice of Court Agreements gives protection to the jurisdiction of the UK courts designated in choice of court agreements which will be respected in the rest of the EU, regardless of the outcome of the Brexit negotiations.¹²

The aim of this article is to assess whether Hague Convention on Choice of Court Agreements and Brussels I bis Regulation are comparable legal instruments as far as choice of court agreements are concerned. The article shall analyze mutual features of the two legal instruments as well as their divergences in relation to choice of court agreements. The article shall demonstrate whether Hague Convention on Choice of Court Agreements presents a complete and a comprehensive solution in terms of choice of court agreements for the UK provided that the Brussels I bis Regulation is no longer applicable.

To begin with, the scopes of application of Hague Convention on Choice of Court Agreements and Brussels I bis Regulation shall be compared.¹³ Thus, material, geographical, personal and temporal scopes of application

¹⁰ Croisant, G. Towards the Uncertainties of a Hard Brexit: An opportunity for International Arbitration [online]. *arbitrationblog.kluwerarbitration.com*. Published on 27 January 2017 [cit. 15. 5. 2019]. <http://arbitrationblog.kluwerarbitration.com/2017/01/27/towards-the-uncertainties-of-a-hard-brex-it-an-opportunity-for-international-arbitration/>; See also Moser, G. Brexit, Cognitive Biases and the Jurisdictional Conundrum [online]. *arbitrationblog.kluwerarbitration.com*. Published on 14 and 15 December 2018 [cit. 15. 5. 2019]. <http://arbitrationblog.kluwerarbitration.com/2018/12/15/brexit-cognitive-biases-and-the-jurisdictional-conundrum/>; See also Newing, H., Webster, L. Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. *Third-Party Funders in International. Dispute Resolution International*. 2016, Vol. 10, No.2, pp. 105–117.

¹¹ Beaumont, P., Ahmed, M. I thought we were exclusive? Some issues with the Hague Convention on Choice of Court, Brussels Ia and Brexit [online]. *abdn.ac.uk*. Published on 21 September 2017 [cit. 24. 3. 2019]. <https://www.abdn.ac.uk/law/blog/i-thought-we-were-exclusive-some-issues-with-the-hague-convention-on-choice-of-court-brussels-ia-and-brexit/>

¹² Ibid.

¹³ Art. 1, 2 Hague Convention on Choice of Court Agreements.

of both legal instruments will be examined as well as the pre-condition of an international element.¹⁴

Next, the article shall deal with choice of court agreements in general. Firstly, the definition of a “choice of court agreement” under both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation will be analyzed.¹⁵ Secondly, the exclusivity of a choice of court agreement will be assessed based on both documents.¹⁶ In this context, the legal consequence of conclusion of a non-exclusive choice of court agreement will be considered. Thirdly, the assessment of material and formal validity of a choice of court agreement arising out of the two documents will be compared.¹⁷ Next, the matter of severability of a choice of court agreement shall be examined based on both Brussels I bis Regulation and Hague Convention on Choice of Court Agreements.¹⁸

Consequently, the effects of a choice of court agreement arising out of the two legal instruments will be compared.¹⁹ In this context, the rule that the designated court shall have the jurisdiction will be analysed as well as any exceptions to it. Next, the obligations of the court not chosen will be examined.²⁰

Furthermore, the article shall also consider the process of recognition and enforcement of judgments given by a court designated in a choice of court agreement under both Brussels I bis Regulation and Hague Convention on Choice of Court Agreements.²¹ The definitions of the term “judgment” arising out of both documents will be evaluated.²² Moreover, the article shall compare the grounds on which an enforcement of a judgment may be refused.²³

Finally, the article shall consider the question of an actual incompatibility of Brussels I bis Regulation and Hague Convention on Choice of Court

¹⁴ Art. 1 Hague Convention on Choice of Court Agreements.

¹⁵ *Ibid.*, Art. 3.

¹⁶ *Ibid.*, Art. 3 letter a).

¹⁷ *Ibid.*, Art. 9 letter a).

¹⁸ *Ibid.*, Art. 3 letter d) or Art. 9 letter a).

¹⁹ *Ibid.*, Art. 8.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*, Art. 4 para. 1.

²³ *Ibid.*, Art. 9.

Agreements.²⁴ This question will be assessed in a situation when the parties reside exclusively within the EU member states and, consequently, in a situation when only one of them or none of them resides within the EU.²⁵

For the purposes of this article, the court designated in a choice of agreement shall be referred to as the “designated” or “chosen” court. The court non-designated in a choice of agreement shall be referred to as the “non-designated”, “not chosen”, “seized”, or “requested” court.

2 Scope of application of both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation

In order to assess whether Hague Convention on Choice of Court Agreements and Brussels I bis Regulation are comparable legal instruments, it is necessary to compare the scopes of their application. Thus, material, personal, temporal and geographical scopes of application of both documents shall be analyzed. First of all, however, the pre-condition of an “international element” will be examined.

2.1 International element

Both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation are applicable only in disputes where there is an “international element” and, thus, it is first necessary to analyze this pre-condition.²⁶

2.1.1 Hague Convention on Choice of Court Agreements

Art. 1 para. 1 of Hague Convention on Choice of Court Agreements specifically states that it applies only to international cases.²⁷ The definition of the term “international” is different in relation to jurisdictional issues (Chapter II of Hague Convention on Choice of Court Agreements) and with

²⁴ Ibid., Art. 26.

²⁵ Ibid., Art. 26.

²⁶ Art. 1 Hague Convention on Choice of Court Agreements; See also National information and online forms concerning Regulation No. 1215/2012 [online]. *e-justice.europa.eu* [cit. 24. 3. 2019]. https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-en.do

²⁷ Art. 1 para. 1 Hague Convention on Choice of Court Agreements.

regard to recognition and enforcement matters (Chapter III of Hague Convention on Choice of Court Agreements).²⁸

“For the Hague Convention’s jurisdictional rules to apply, a case is international unless the parties are resident in the same contracting state and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.”²⁹ Thus, the jurisdictional rules of Hague Convention on Choice of Court Agreements apply either if the parties are not resident in the same state or if some other element relevant to the case has a connection with some other state.³⁰ In other words, the choice of a foreign court does not make a case international if it is otherwise fully domestic.³¹

The term “residence” is defined in Art. 4 para. 2 of Hague Convention on Choice of Court Agreements which stipulates that: “For the purposes of this Convention, an entity or person other than a natural person shall be considered to be resident in 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.”³² This provision is a reconciliation³³ of different conceptions

²⁸ Ibid., Art. 1 para. 2, 3.

²⁹ Beaumont, P., Ahmed, M. Exclusive choice of court agreements: some issues on the Hague Convention on Choice of Court Agreements and its relationship with the Brussels I Recast especially anti-suit injunctions, concurrent proceedings and the implications of Brexit. *Journal of Private International Law*. 2017, Vol. 13, No. 2, p. 392.

³⁰ Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 40 [cit. 24. 3. 2019]. <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>; See also Palermo, G. The Future of Cross-Border Disputes Settlement: Back to Litigation? In: Gonzalez-Bueno, C. (ed.). *40 under 40 International Arbitration*. Madrid: Dykinson, 2018, p. 359.

³¹ Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 34 [cit. 24. 3. 2019]. <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

³² Art. 4 para. 2, 3 Hague Convention on Choice of Court Agreements.

³³ “It was necessary to include the *siège statutaire*, which is translated into English as ‘statutory seat’. However, this term does not refer to the corporation’s seat as laid down by some statute (legislation) but as laid down by the statut, the document containing the constitution of the company – for example, the articles of association. In the common law, the nearest equivalent is ‘registered office’”. In practice, the State where the corporation has its statutory seat will almost always be the State under whose law it was incorporated or formed; while the State where it has its central administration will usually be that in which it has its principal place of business.” See Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 56 [cit. 24. 3. 2019]. <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

of civil law and common law countries. It only applies to legal persons and it provides an autonomous definition of a residence of legal persons.³⁴

“For the purposes of obtaining the recognition and enforcement of a judgment in a contracting state, it is sufficient that the judgment presented is foreign.”³⁵ Thus, in recognition and enforcement matters the requirement of an international element is fulfilled if the judgment was given by a foreign court.³⁶

2.1.2 Brussels I bis Regulation

Similarly, Brussels I bis Regulation does not apply to purely internal situations as the existence of an international element is required.³⁷ Brussels I bis Regulation itself, however, does not regulate what constitutes an international element.³⁸ Similarly to Hague Convention on Choice of Court Agreements, the international element also differs in jurisdictional issues (Chapter II of Brussels I bis Regulation) and recognition and enforcement matters (Chapter III of Brussels I bis Regulation).³⁹

As for the jurisdictional matters, the requirement of international element generally means that parties or the subject-matter are domiciled in two different EU member states.⁴⁰ This, however, is not an absolute rule.⁴¹ “*The international nature of the legal relationship at issue need not necessarily derive (...) from*

³⁴ Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hccb.net*. Published on 8 November 2013, p. 56 [cit. 24. 3. 2019]. <https://assets.hccb.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

³⁵ Beaumont, P., Ahmed, M. Exclusive choice of court agreements: some issues on the Hague Convention on Choice of Court Agreements and its relationship with the Brussels I Recast especially anti-suit injunctions, concurrent proceedings and the implications of Brexit. *Journal of Private International Law*. 2017, Vol. 13, No. 2, p. 392.

³⁶ Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hccb.net*. Published on 8 November 2013, p. 34 [cit. 24. 3. 2019]. <https://assets.hccb.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

³⁷ Gonclaves, A. S. de S. Choice-of-Court-Agreements in the E-Commerce International Contracts. *Masaryk University Journal of Law and Technology*. 2017, Vol. 11, No. 1, pp. 63–76; See also Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 173.

³⁸ Hartley, C. Trevor. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 102.

³⁹ Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 174.

⁴⁰ *Ibid.*, p. 173.

⁴¹ *Ibid.*

the involvement, either because of the subject-matter of the proceedings or the respective domiciles of the parties, of a number of contracting states. The involvement of a contracting state and a non-contracting state, for example because the claimant and one defendant are domiciled in the first State and the events at issue occurred in the second, would also make the legal relationship at issue international in nature."⁴² Thus, the existence of an international element must be established in each case individually.⁴³

The term "domicile" is regulated by Art. 62 and 63 of Brussels I bis Regulation and is subject to numerous jurisprudence.⁴⁴

The Art. 62 which applies to natural persons does not provide an autonomous definition of a domicile of natural persons as it refers to national laws.⁴⁵ The Art. 63 para. 1 which is designed to be applied for legal persons stipulates that: "*For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat; (b) central administration; or (c) principal place of business.*" The Art. 63, thus, provides an autonomous definition of a domicile of legal persons as well as Hague Convention on Choice of Court Agreements.⁴⁶

Similarly to Hague Convention on Choice of Court Agreements, in cases of recognition and enforcement of an award, the condition of an international element is fulfilled provided that a judgment was given by a court of another EU member state.⁴⁷

To sum up this subchapter, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation require international element in order to invoke their applicability. As far as jurisdictional issues are concerned, Brussels I bis Regulation does not provide an autonomous definition of domicile of natural persons as it refers to national laws. As for legal

⁴² Judgment of the Court of Justice (Grand Chamber) of 1 March 2005, Case C-281/02.

⁴³ Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 174.

⁴⁴ Art. 62, 63 Brussels I bis Regulation; See also Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 181. See for example Judgment of the Court of Justice of 19 February 2002, Case C-256/00 and Judgment of the Court of Justice of 5 October 1999, Case C-420/97.

⁴⁵ Art. 62 Brussels I bis Regulation.

⁴⁶ Ibid., Art. 63.

⁴⁷ Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 174.

persons, however, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation provide an autonomous definition of domicile of legal persons. Regarding recognition and enforcement matters, according to both legal instruments it is sufficient if the judgment is foreign. Thus, both legal documents regulate the issue of international element in a similar way.

2.2 Material scope of application

2.2.1 Hague Convention on Choice of Court Agreements

Hague Convention on Choice of Court Agreements was designed to apply in civil and commercial matters pursuant to its Art. 1 para. 1.⁴⁸ The concept of “civil and commercial matters” has an autonomous meaning and does not entail a reference to national laws or other instruments.⁴⁹ The concept introduced in Hague Convention on Choice of Court Agreements shall be mainly understood in a way that it excludes public law and criminal law.⁵⁰ This provision is, however, subject to numerous exceptions.⁵¹

First of all, Art. 2 para. 1 of Hague Convention on Choice of Court Agreements states that it does not apply to consumer contracts or contracts of employment.⁵² “*This exclusion covers an agreement between a consumer and a non-consumer, as well as one between two consumers.*”⁵³ Hence Hague Convention on Choice of Court Agreements primarily applies in “business to business”

⁴⁸ Art. 1 para. 1 Hague Convention on Choice of Court Agreements; See also Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 36 [cit. 24. 3. 2019]. <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

⁴⁹ Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 42 [cit. 24. 3. 2019]. <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

⁵⁰ Ibid.

⁵¹ Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 42 [cit. 24. 3. 2019]. <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

⁵² Art. 2 para. 1 Hague Convention on Choice of Court Agreements.

⁵³ Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 42 [cit. 24. 3. 2019]. <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

commercial cases.⁵⁴ Moreover, it excludes both individual and collective contracts of employment.⁵⁵

Secondly, Art. 2 para. 2 provides that Hague Convention on Choice of Court Agreements does not apply to a number of specific areas of law listed in its sixteen sub-paragraphs.⁵⁶ These cover various matters, such as status and capacity; family law and succession; insolvency; carriage of passengers or goods; maritime matters; anti-trust (competition) matters; nuclear liability; personal injury; damage to tangible property; immovable property; the validity, nullity, or dissolution of legal persons; intellectual property rights other than copyright and related rights; and entries in public registers.⁵⁷ Thus, the jurisdictional rules of the Convention apply to matters, such as banking and finance; settlement; distribution agreements; licensing agreements; copyright and related rights etc.⁵⁸ It is important to bear in mind the Art. 2 para. 3 which sets an important rule according to which proceedings that relate to one of the excluded matters⁵⁹ referred to in Art. 2 para. 2 of Hague Convention on Choice of Court Agreements are not automatically excluded.⁶⁰

⁵⁴ Beaumont, P., Ahmed, M. Exclusive choice of court agreements: some issues on the Hague Convention on Choice of Court Agreements and its relationship with the Brussels I Recast especially anti-suit injunctions, concurrent proceedings and the implications of Brexit. *Journal of Private International Law*. 2017, Vol. 13, No. 2, p. 392; See also Brand, A. Ronald. *Forum non conveniens: history, global practice, and future under the Hague convention on choice of court agreements*. New York: Oxford University Press, 2007, p. 205.

⁵⁵ Art. 2 para. 1 letter b) Hague Convention on Choice of Court Agreements.

⁵⁶ *Ibid.*, Art. 2 para. 2.

⁵⁷ *Ibid.*

⁵⁸ Forner-Hooft, v. A. Brexit and the Future of Intellectual Property Litigation. *Journal of International Arbitration*. 2016, Vol. 33, No. 7, p. 556.

⁵⁹ This applies to contracts of insurance, for example. The EU has, however, invoked a declaration in this regard pursuant to Art. 21 according to which Hague Convention on Choice of Court Agreements does not apply to insurance contracts. See Newing, H., Webster, L. Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International*. 2016, Vol. 10, No. 2, pp. 105–117.

⁶⁰ Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hchb.net*. Published on 8 November 2013, p. 36 [cit. 24. 3. 2019]. <https://assets.hchb.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

Thirdly, Art. 2 para. 4 excludes arbitration and proceedings related thereto.⁶¹ “*This should be interpreted widely and covers any proceedings in which the court gives assistance to the arbitral process – for example, deciding whether an arbitration agreement is valid or not; ordering parties to proceed to arbitration or to discontinue arbitration proceedings; revoking, amending, recognising or enforcing arbitral awards; appointing or dismissing arbitrators; fixing the place of arbitration; or extending the time-limit for making awards.*”⁶²

Finally, Art. 2 para. 6 stipulates that privileges and immunities of States, or international organizations, shall not be affected.⁶³

2.2.2 Brussels I bis Regulation

Art. 1 para. 1 of Brussels I bis Regulation provides that: “*This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii).*”⁶⁴

Similarly to Hague Convention on Choice of Court Agreements, the term “civil and commercial” must be interpreted autonomously pursuant to ECJ’s decision *LTU v. Eurocontrol*.⁶⁵ Based on case law, an action between a public authority and a person governed by private law is excluded out of the material scope of Brussels I bis Regulation.⁶⁶ Contrastingly, an enforcement of civil-law rights arising out of criminal proceedings falls within the scope of Brussels I bis Regulation as well as matters involving a public authority not acting in the exercise of its powers.⁶⁷

⁶¹ Art. 2 para. 4 Hague Convention on Choice of Court Agreements.

⁶² Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hccb.net*. Published on 8 November 2013, p. 48 [cit. 24. 3. 2019]. <https://assets.hccb.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

⁶³ Art. 2 para. 6 Hague Convention on Choice of Court Agreements.

⁶⁴ Art. 1 para. 1 Brussels I bis Regulation.

⁶⁵ Judgment of the Court of Justice of 14 October 1976, Case C-29/76; See also Kyselovská, T., Rozehnalová, N. *Rozhodování Soudního dvora EU ve věcech příslušnosti: (analýza rozhodnutí dle nařízení Brusel Ibis)*. Brno: Masarykova univerzita, 2014, p. 488.

⁶⁶ Judgment of the Court of Justice of 14 October 1976, Case C-29/76; See also Council Convention No. 78/884/EC of 9 October 1978 on the accession on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice.

⁶⁷ Judgment of the Court of Justice of 21 April 1993, Case C-172/91; See also Judgment of the Court of Justice of 16 December 1980, Case C-814/79.

Moreover, Brussels I bis Regulation itself excludes certain matters from the scope of its application in Art. 1 para. 2.⁶⁸ These are: “(a) *the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage*; (b) *bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings*; (c) *social security*; (d) *arbitration*; (e) *maintenance obligations arising from a family relationship, parentage, marriage or affinity*; (f) *wills and succession, including maintenance obligations arising by reason of death*.”⁶⁹

To conclude this sub-chapter, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation apply only to civil and commercial matters. They both exclude arbitration; insolvency; family law; wills and succession; social security; and questions of status and capacity out of the material scope of their application. Hague Convention on Choice of Court Agreements additionally excludes competition law claims; tort claims; consumer contracts; employment contracts; carriage of passengers or goods; liability for nuclear damage; personal injury; damage to property; immovable property; and maritime matters. Therefore, the material scope of application of Hague Convention on Choice of Court Agreements is narrower.⁷⁰

2.3 Personal scope of application

2.3.1 Hague Convention on Choice of Court Agreements

Hague Convention on Choice of Court Agreements does not expressly regulate its personal scope of application and for the purposes of this article it is not necessary to determine this question any further.⁷¹

⁶⁸ Art. 1 para. 2 Brussels I bis Regulation.

⁶⁹ Ibid.

⁷⁰ Forner-Hooft, v. A. Brexit and the Future of Intellectual Property Litigation. *Journal of International Arbitration*. 2016, Vol. 33, No. 7, p. 556; See also Masters, S., McRae, B. What does Brexit mean for the Brussels Regime. *Journal of International Arbitration*. 2016, Vol. 33, No. 7, p. 496.

⁷¹ Rozehnalová, N., Drlíčková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 178.

2.3.2 Brussels I bis Regulation

Brussels I bis Regulation does not expressly regulate its personal scope⁷² of application, either.⁷³ As far as choice of court agreements are concerned, however, none of the parties has to be domiciled in the EU member state as Brussels I bis Regulation is applicable provided that parties choose any court of the EU member state.⁷⁴ As for the provisions on the recognition and enforcement, these apply to any judgment given in the EU member state.⁷⁵

2.4 Temporal and geographical scopes of application

2.4.1 Hague Convention on Choice of Court Agreements

Art. 16 para. 1 of Hague Convention on Choice of Court Agreements contains a basic rule according to which it applies to exclusive choice of court agreements concluded after its entry into force for the State of the chosen court.⁷⁶ Thus, as far as the temporal scope of application of Hague Convention on Choice of Court Agreements is concerned, the date when the court proceedings are commenced is irrelevant.⁷⁷ Consequently, Art. 31 specifies when Hague Convention on Choice of Court Agreements enters into force for each state.⁷⁸

⁷² Its personal scope is, however, deduced based on its Art. 4 para. 1 according to which as far as the provisions on jurisdiction are concerned, persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that Member state. This rule is subject to numerous exceptions (for example: Art. 6 para. 1, Art. 7, Art. 11 para. 1, Art. 17 para. 1, Art. 21 para. 1, Art. 24, Art. 25 para. 1). See Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 178.

⁷³ Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 178.

⁷⁴ *Ibid.*, p. 244.

⁷⁵ Art. 36 para. 1 Brussels I bis Regulation.

⁷⁶ Art. 16 para. 1 Hague Convention on Choice of Court Agreements.

⁷⁷ Forner-Delaygua, Q. Changes to jurisdiction based on exclusive jurisdiction agreements under the Brussels I Regulation Recast. *Journal of Private International Law*. 2015, Vol. 11, No. 3, p. 404; See also Hartley, T., Doguchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 80 [cit. 24. 3. 2019]. <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

⁷⁸ Art. 31 para. 1 Hague Convention on Choice of Court Agreements.

Hague Convention on Choice of Court Agreements entered into force in 27⁷⁹ EU member states and in Mexico on 1 October 2015.⁸⁰ Furthermore, it entered into force on 1 October 2016 for Singapore, on 1 August 2018 for Montenegro, on 1 September 2018 for Denmark and on 1 April 2019 for the United Kingdom.⁸¹ Moreover, China, Ukraine and the USA signed Hague Convention on Choice of Court Agreements, but they have not ratified it yet.⁸² Hague Convention on Choice of Court Agreements only applies if the court designated by a choice of court agreement is in a state which is bound by it.⁸³

2.4.2 Brussels I bis Regulation

Art. 66 para. 1 of Brussels I bis Regulations stipulates that: “*This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015.*”⁸⁴ Thus, Brussels I bis Regulations is interpreted in a way that its provisions are applicable to choice of court agreements concluded both before and after it came into force.⁸⁵

Pursuant to Art. 81 Brussels I bis Regulations is applicable in courts of all EU member states including the UK, Ireland and Denmark.⁸⁶

⁷⁹ Excluding Denmark, where it entered into force on 1 September 2018.

⁸⁰ Status table [online]. *hcch.net* [cit. 24. 3. 2019]. <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>

⁸¹ *Ibid.*

⁸² Status table [online]. *hcch.net* [cit. 24. 3. 2019]. <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>; See also Blackwell, H. Recent Developments in the PRC: A Change in Tide for Arbitration? [online]. *arbitrationblog.kluwerarbitration.com*. Published on 5 December 2017 [cit. 15. 5. 2019]. <http://arbitrationblog.kluwerarbitration.com/2017/12/05/recent-developments-prc-change-tide-arbitration/>; See also Born, B. G. *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*. The Hague: Kluwer Law International, 2016, p. 17, 18; See also Frischknecht, A. A. et al. *Enforcement of Foreign Arbitral Awards and Judgements in New York*. The Hague: Kluwer Law International, 2018, p. 42.

⁸³ Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 90.

⁸⁴ Art. 66 para. 1 Brussels I bis Regulation.

⁸⁵ Forner-Delaygua, Q. Changes to jurisdiction based on exclusive jurisdiction agreements under the Brussels I Regulation Recast. *Journal of Private International Law*. 2015, Vol. 11, No. 3, p. 404.

⁸⁶ Art. 81 Brussels I bis Regulation; See also Cuniberti, G. Denmark to Apply Brussels I Recast [online]. *conflictoflaw.net*. Published on 24 March 2013 [cit. 15. 5. 2019]. <http://conflictoflaw.net/2013/denmark-to-apply-brussels-i-recast/>; See also Hartley, C. Trevor. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, pp. 35–37.

In summation, as for the temporal scope of application of both legal documents, Hague Convention on Choice of Court Agreements applies to choice of court agreements concluded after its entry into force for the State of the chosen court whereas Brussels I bis Regulation applies to legal proceedings initiated after 10 January 2015.⁸⁷ The temporal scope of both legal documents is, thus, not really comparable.⁸⁸ As for the geographical scope of application of the two legal instruments, it is clear that Hague Convention on Choice of Court Agreements has a wider scope as it was ratified by all EU member states and several other countries.

2.5 Conclusion

Both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation require the presence of an international element in order to invoke their applicability. As for the jurisdictional issues, both Brussels I bis Regulation and Hague Convention on Choice of Court Agreements provide an autonomous definition of domicile which applies to legal persons. As far as recognition and enforcement issues are concerned, pursuant to both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation it is sufficient if the judgment is given by a foreign court.

As for the material scope of application, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation apply only to civil and commercial matters. They both exclude arbitration; insolvency; family law; wills and succession; social security and questions of status and capacity. Hague Convention on Choice of Court Agreements, however, additionally excludes competition law claims; tort claims; consumer contracts; employment contracts; carriage of passengers or goods; liability for nuclear damage; personal injury; damage to property; immovable property and maritime matters which makes its material scope of application narrower.

The temporal scope of application of both legal documents is not really comparable.

⁸⁷ Slaughter and May. Brexit Essentials Jurisdiction Agreements: New Developments [online]. *Slaughterandmay*. Published on 5 July 2018 [cit. 24. 3. 2019]. <https://www.slaughterandmay.com/media/2536943/brexit-essentials-jurisdiction-agreements-new-developments.pdf>

⁸⁸ Ibid.

As far as the geographical scope of application is concerned, Hague Convention on Choice of Court Agreements has a wider scope of application due to the fact it was ratified by all EU member states and Singapore, Mexico, and Montenegro.

3 Choice of court agreements under both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation

3.1 Definitions

3.1.1 Hague Convention on Choice of Court Agreements

Art. 3 a) of Hague Convention on Choice of Court Agreements provides a definition of a choice of court agreement.⁸⁹ It states that: “*‘Exclusive choice of court agreement’ means an agreement concluded by two or more parties that meets the requirements of paragraph c) and 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.*”⁹⁰

The above definition implies the following requirements of a choice of court agreement: (i) an agreement between two or more parties (material validity of a choice of court agreement); (ii) fulfilment of formal requirements of paragraph c) (formal validity of a choice of court agreement); (iii) exclusivity of a choice of court agreement; (iv) the designated court in a contracting state; (v) the designation for the purpose of deciding disputes which have arisen in connection with a particular legal relationship.⁹¹

The first three requirements will be further analysed below.

As for the fourth requirement that the designated court shall be in a contracting state, this is a reference to the geographical scope of application

⁸⁹ Art. 3 letter a) Hague Convention on Choice of Court Agreements.

⁹⁰ Ibid.

⁹¹ Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcb.net*. Published on 8 November 2013, p. 50 [cit. 24. 3. 2019]. <https://assets.hcb.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

of Hague Convention on Choice of Court Agreements.⁹² Hague Convention on Choice of Court Agreements applies only to choice of court agreements in favour of the contracting states and agreements designating the courts of non-contracting states are not covered by this legal instrument.⁹³

The fifth requirement provides that the designation must be for the purpose of deciding disputes which have arisen in connection with a particular legal relationship, present or future.⁹⁴

3.1.2 Brussels I bis Regulation

Art. 25 para. 1 of Brussels I bis Regulation provides that: “*If the parties, regardless of their domicile, have agreed that a court or the courts of a member state are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that member state. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either: (a) in writing or evidenced in writing; (b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce (...).*”⁹⁵

This definition contains similar requirements regarding a choice of court agreement. These are: (i) an agreement between two or more parties (material validity of a choice of court agreement); (ii) fulfilment of formal requirements (formal validity of a choice of court agreement); (iii) exclusivity of a choice of court agreement; (iv) the designated court within the EU member states; (v) the designation for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, future or present.⁹⁶

⁹² Hartley, C.T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 90.

⁹³ Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 52 [cit. 24. 3. 2019]. <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

⁹⁴ *Ibid.*

⁹⁵ Art. 25 para. 1 Brussels I bis Regulation.

⁹⁶ Hartley, C.T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 130, 142.

Similarly to Hague Convention on Choice of Court Agreements, the first three requirements will be further analysed below.

As for the fourth requirement that the designated court shall be in the EU member state, this is again a reference to the geographical scope of application of Brussels I bis Regulation. Correspondingly to Hague Convention on Choice of Court Agreements, the fifth requirement provides that the designation must be for the purpose of deciding disputes which have arisen in connection with a particular legal relationship, present or future.⁹⁷

Moreover, it must be noted that Brussels I bis Regulation contains special provisions dealing with matters of insurance, consumer law, employment contracts and exclusive jurisdiction.⁹⁸ Choice of court agreements are very limited or not permitted at all in these areas as a result of protection of weaker contracting parties.⁹⁹ Due to the fact that these areas are excluded out of material scope of application of Hague Convention on Choice of Court Agreements, these issues shall not be analyzed any further.

3.2 Material validity

3.2.1 Hague Convention on Choice of Court Agreements

Pursuant to its Art. 3 a) Hague Convention on Choice of Court Agreements is only applicable if parties consent to a choice of court agreement.¹⁰⁰ “*A choice of court agreement cannot be established unilaterally: there must be agreement. Whether there is consent is normally decided by the law of the State of the chosen court, including its rules of choice of law.*”¹⁰¹ Thus, when assessing the material validity of a choice of court agreement, a designated court decides by its own law.

⁹⁷ Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, pp. 242–243.

⁹⁸ Art. 15, 19, 23 and 24 Brussels I bis Regulation.

⁹⁹ Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 190.

¹⁰⁰ Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hccb.net*. Published on 8 November 2013, p. 50 [cit. 24. 3. 2019]. <https://assets.hccb.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

¹⁰¹ Ibid.

A non-designated court is, however, also bound to use the law of the court designated in a choice of court agreement.¹⁰²

3.2.2 Brussels I bis Regulation

Similarly to Hague Convention on Choice of Court Agreements, parties' consent is a necessary requirement which safeguards the material validity of a choice of court agreement.¹⁰³ Correspondingly to Hague Convention on Choice of Court Agreements, pursuant to Art. 25 para. 1 of Brussels I bis Regulation the material validity of a choice of court agreement shall be determined by the law of the country of the designated court no matter if it is being decided in the country of the chosen court or not.¹⁰⁴

Therefore, Hague Convention on Choice of Court Agreements and Brussels I bis Regulation govern the material validity of a choice of court agreement in the same way.

3.3 Formal validity

3.3.1 Hague Convention on Choice of Court Agreements

Regarding the formal validity of a choice of court agreement, the Art. 3 c) of Hague Convention on Choice of Court Agreements declares that: “*An exclusive choice of court agreement must be concluded or documented – i) in writing; or ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference.*”¹⁰⁵

Thus, a choice of court agreement is firstly deemed to be formally valid provided that it is in writing.¹⁰⁶ “*The other possible form is intended to cover electronic means of data transmission or storage. This includes all normal possibilities, provided that the data is retrievable so that it can be referred to and understood on future*

¹⁰² Bříza, P. Choice-of-Court Agreements: Could the Hague Choice of Court Agreements Convention and the Reform of the Brussels I Regulation be the Way out of the Gasser – Owusu Disillusion? *Journal of Private International Law*. 2009, Vol. 5, No. 3, p. 556.

¹⁰³ Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 130.

¹⁰⁴ Ibid.

¹⁰⁵ Art. 3 letter c) Hague Convention on Choice of Court Agreements.

¹⁰⁶ Ibid.

occasions. It covers, for example, e-mail and fax.”¹⁰⁷ Therefore, a formally valid choice of court agreement under Hague Convention on Choice of Court Agreements must be either concluded in one of these forms or it must be documented in it.

Formal requirements arising out of Art. 3 c) of Hague Convention on Choice of Court Agreements have two important consequences. Firstly, a choice of court agreement not complying with conditions stipulated in Art. 3 c) does not fall within the scope of application of Hague Convention on Choice of Court Agreements.¹⁰⁸ Secondly, if a choice of court agreement complies with these requirements, a court of a contracting state cannot refuse to give effect to it because, for example, it is written in a foreign language, it is in small type or it is not signed by the parties separately from the main agreement.¹⁰⁹ In other words, contracting states are not allowed to create their own formal requirements regarding choice of court agreements.¹¹⁰

3.3.2 Brussels I bis Regulation

As far as formal validity of a choice of court agreement under Brussels I bis Regulation is concerned, it is regulated by its Art. 25 para. 1.¹¹¹ It provides that: *“The agreement conferring jurisdiction shall be either: (a) in writing or evidenced in writing; (b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.”*¹¹² Furthermore, pursuant to Art. 25 para. 2: *“Any communication by electronic means which provides a durable record of the agreement shall be equivalent to ‘writing.’”*¹¹³

¹⁰⁷ Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hccb.net*. Published on 8 November 2013, p. 54 [cit. 24. 3. 2019]. <https://assets.hccb.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Art. 25 para. 1 Brussels I bis Regulation.

¹¹² Ibid.

¹¹³ Ibid., Art. 25 para. 2.

Similarly to Hague Convention on Choice of Court Agreements, ECJ stressed out in its decisions *Elefanten Schuh v. Jacqmain* and *Trasporti Castelletti v. Hugo Trumpy* that the EU member states cannot lay down formal requirements of choice of court agreements.¹¹⁴

Thus, under Brussels I bis Regulation a choice of court agreement must be in the following form: (i) in writing or evidenced in writing including electronic form; or (ii) based on practices established between the parties; (iii) or arising out of international trade or commerce usages.¹¹⁵ Therefore, compared to Hague Convention on Choice of Court Agreements, Brussels I bis Regulation additionally provides that a form which accords to practices or arises out of international trade or commerce usages is acceptable.

As far as international trade or commerce usages are concerned, these derive from Art. 9 para. 2 of the United Nations Convention of 11 April 1980 on contracts for the international sale of goods. Based on ECJ's decision *MSG v. Les Gravières Rhénanes S.A.R.L.*: “It must therefore be considered that the fact that one of the parties to the contract did not react or remained silent in the face of a commercial letter of confirmation from the other party containing a pre-printed reference to the courts having jurisdiction and that one of the parties repeatedly paid without objection invoices issued by the other party containing a similar reference may be deemed to constitute consent to the jurisdiction clause in issue, provided that such conduct is consistent with a practice in force in the area of international trade or commerce in which the parties in question are operating and the parties are or ought to have been aware of that practice.”¹¹⁶ Reference to international trade or commerce usages thus broadens number of situations in which the conditions regarding formal validity of a choice of court agreement are deemed to be fulfilled.

To summarize, Brussels I bis Regulation provides more favourable requirements regarding formal validity of a choice of court agreement as a higher

¹¹⁴ Judgment of the Court of Justice of 24 June 1981, Case C-150/80 and Judgment of the Court of Justice of 16 March 1999, Case C-159/97; See also Kyselovská, T., Rozehnalová, N. *Rozhodování Soudního dvora EU ve věcech příslušnosti: (analýza rozhodnutí dle nařízení Brusel Ibis)*. Brno: Masarykova univerzita, 2014, p. 465, 446.

¹¹⁵ Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 245, 246.

¹¹⁶ Judgment of the Court of Justice (Sixth Chamber) of 20 February 1997, Case C-106/95; See also Kyselovská, T., Rozehnalová, N. *Rozhodování Soudního dvora EU ve věcech příslušnosti: (analýza rozhodnutí dle nařízení Brusel Ibis)*. Brno: Masarykova univerzita, 2014, p. 116.

number of choice of court agreements is likely to be considered formally valid. This includes especially choice of court agreements in a form which accords with the practices that the parties have established between them or in the form common for international trade and commerce.

3.4 Exclusivity

3.4.1 Hague Convention on Choice of Court Agreements

Hague Convention on Choice of Court Agreements only applies to exclusive choice of court agreements.¹¹⁷ Art. 3 a) stipulates that: “*‘Exclusive choice of court agreement’ means an agreement concluded by two or more parties that meets the requirements of paragraph c) and 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.*”¹¹⁸

Thus, in order for Hague Convention on Choice of Court Agreements to be applicable, parties must ensure that their choice of court agreement designates the courts of one contracting state and that the designation is to the exclusion of any other courts.¹¹⁹ An exclusive choice of court agreement may refer either to the courts of one contracting state in general, or to one or more specific courts in one contracting state.¹²⁰ Therefore, if a choice of court clause is non-exclusive and provides for the courts of two or more contracting states, then Hague Convention on Choice

¹¹⁷ Art. 3 letter a) Hague Convention on Choice of Court Agreements.

¹¹⁸ Ibid.

¹¹⁹ Born, B. G. *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*. The Hague: Kluwer Law International, 2016, p. 16, 17; See also Frischknecht, A. A. et al. *Enforcement of Foreign Arbitral Awards and Judgements in New York*. The Hague: Kluwer Law International, 2018, p. 42; See also Newing, H., Webster, L. Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International*. 2016, Vol. 10, No. 2, pp. 105–117.

¹²⁰ Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hccb.net*. Published on 8 November 2013, p. 52 [cit. 24. 3. 2019]. <https://assets.hccb.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>; Art. 3 letter a) Hague Convention on Choice of Court Agreements.

of Court Agreements will not be applicable. The same applies in cases where there is no choice made at all.¹²¹

A choice of court agreement under Hague Convention on Choice of Court Agreements must be exclusive irrespective of the party bringing the proceedings.¹²² “That means, for example, that a clause cannot be ‘asymmetrical’ or ‘unilateral’, that is, it cannot designate the exclusive jurisdiction of one contracting state’s courts to apply if one party were to bring proceedings, but allow the other party the choice to bring proceedings in a court of any other contracting state.”¹²³

To avoid confusion, Hague Convention on Choice of Court Agreements deems all choices of jurisdiction exclusive unless the parties have provided otherwise.¹²⁴

Despite the fact that the scope of Hague Convention on Choice of Court Agreements is limited to exclusive choice of court agreements, contracting states have the possibility of extending its scope to cover non-exclusive choice of court agreements pursuant to its Art. 22.¹²⁵

3.4.2 Brussels I bis Regulation

As far as exclusivity of a choice of court agreement under Brussels I bis Regulation is concerned, its Art. 25 para. 1 provides that: “*Jurisdiction shall*

¹²¹ Affaki, G. B., Naón, A. G. H. *Jurisdictional choices in times of trouble*. Paris: International Chamber of Commerce, 2015, p. 191; See also Newing, H., Webster, L. Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International*. 2016, Vol. 10, No. 2, pp. 105–117.

¹²² Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 52 [cit. 24. 3. 2019]. <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>. Art. 3 letter a) Hague Convention on Choice of Court Agreements.

¹²³ Newing, H., Webster, L. Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International*. 2016, Vol. 10, No. 2, pp. 105–117.

¹²⁴ Art. 3 letter c) Hague Convention on Choice of Court Agreements; See also Palermo, G. The Future of Cross-Border Disputes Settlement: Back to Litigation? In: Gonzalez-Bueno, C. (ed.). *40 under 40 International Arbitration*. Madrid: Dykinson, 2018, p. 361.

¹²⁵ Art. 22 Hague Convention; See also Alameda, C. A. Choice of Court Agreements under Brussels I Recast Regulation [online]. *ejtn.eu* [cit. 24. 3. 2019]. http://www.ejtn.eu/Documents/Themis%20Luxembourg/Written_paper_Spain1.pdf; See also Born, B. G. *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*. The Hague: Kluwer Law International, 2016, p. 16, 17.

*be exclusive unless the parties have agreed otherwise.*¹²⁶ This provision is understood in a way that if there is no agreement as to the exclusivity of the court designated in a choice of court agreement, its jurisdiction will be considered to be exclusive.¹²⁷ Similarly, pursuant to Brussels I bis Regulation parties may either choose a particular court in the EU member state or the courts generally of the EU member state.¹²⁸ So far, this regulation corresponds to Art. 3 c) of Hague Convention on Choice of Court Agreements.

Under Brussels I bis Regulation, however, provided that parties agree on a non-exclusive choice of court agreement, effect will be given to this.¹²⁹ If parties, for example, decide that two courts of two countries should decide the dispute, Brussels I bis Regulation will still apply.¹³⁰ Moreover, under Brussels I bis Regulation asymmetrical clauses are acceptable.¹³¹

This regulation is, thus, different than the one in Hague Convention on Choice of Court Agreements. Hague Convention on Choice of Court Agreements applies only to exclusive choice of court agreements; non-exclusive and asymmetrical choice of court agreements invoke its inapplicability. Pursuant to Brussels I bis Regulation, however, non-exclusive and asymmetrical choice of court agreements are acceptable.¹³²

3.5 Severability

3.5.1 Hague Convention on Choice of Court Agreements

Art. 3 d) of Hague Convention on Choice of Court Agreements stipulates that: “*An exclusive choice of court agreement that forms part of a contract shall*

¹²⁶ Art. 25 para. 1 Brussels I bis Regulation.

¹²⁷ Born, B. G. *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*. The Hague: Kluwer Law International, 2016, p. 16, 17.

¹²⁸ Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 141.

¹²⁹ Forner-Hooft, v. A. Brexit and the Future of Intellectual Property Litigation. *Journal of International Arbitration*. 2016, Vol. 33, No. 7, p. 559.

¹³⁰ Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 141.

¹³¹ Born, B. G. *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*. The Hague: Kluwer Law International, 2016, p. 16, 17.

¹³² Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 141.

*be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.*¹³³ Therefore, Hague Convention on Choice of Court Agreements explicitly incorporates the principle of severability according to which the designated court may hold the main contract invalid without depriving the choice of court agreement of its validity and vice versa.¹³⁴

3.5.2 Brussels I bis Regulation

Art. 25 para. 5 of Brussels I bis Regulation provides that: *“An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.”*¹³⁵ Similarly to Hague Convention on Choice of Court Agreements, Brussels I bis Regulation incorporates the principle of severability.¹³⁶

Thus, both legal instruments provide that the invalidity of the main contract does not invoke the invalidity of a choice of court agreement and vice versa due to the principle of severability.

3.6 Conclusion

To conclude this sub-chapter, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation contain requirements regarding choice of court agreements.

First of all, both legal instruments apply only to choice of court agreements designating the courts which are located within the geographical scope of their application.¹³⁷ Moreover, both documents stipulate that

¹³³ Art. 3 letter d) Hague Convention on Choice of Court Agreements.

¹³⁴ Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hccb.net*. Published on 8 November 2013, p. 54 [cit. 24. 3. 2019]. <https://assets.hccb.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

¹³⁵ Art. 25 para. 5 Brussels I bis Regulation.

¹³⁶ Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, pp. 137–139.

¹³⁷ Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hccb.net*. Published on 8 November 2013, p. 52 [cit. 24. 3. 2019]. <https://assets.hccb.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

the designation must be for the purposes of deciding disputes that have arisen in connection with a particular legal relationship.

Secondly, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation incorporate certain conditions related to the material and formal validity of choice of court agreements.

As for the material validity, it is governed in the same way under both legal instruments. Both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation are applicable only if parties agree on a choice of court agreement. Under both regulations the material validity of such an agreement is to be determined by the law of the country of the designated court.

As far as the formal validity of a choice of court agreement is concerned, Brussels I bis Regulation represents a more favourable regulation. Under Brussels I bis Regulation, a greater number of choice of court agreements is likely to be considered formally valid especially those which accord with the practices that the parties have established between them or those which are in the form common for international trade and commerce.

Consequently, both legal instruments regulate the question of exclusivity of a choice of court agreement.

Under both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation a court of choice agreement is presumed to be exclusive unless stated otherwise. Moreover, under both documents parties may either choose a particular court of one state or the courts generally of that state.

The difference, between the two legal instruments is that Hague Convention on Choice of Court Agreements applies only to exclusive choice of court agreements. Non-exclusive and asymmetrical choice of court agreements invoke its inapplicability. Under Brussels I bis Regulation, however, if the parties conclude a non-exclusive or an asymmetrical choice of court agreement, Brussels I bis Regulation will still apply. Therefore, Brussels I bis Regulation is likely to cover more court of choice agreements.

With regards to severability, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation stipulate that the invalidity of the main contract does not invoke the invalidity of a choice of court agreement and *vice versa*.

To conclude, Brussels I bis Regulation provides more favourable general regulation of choice of court agreements.

4 Effects of choice of court agreements

The most important effect of a valid choice of court agreement is that it grants jurisdiction to the designated court and deprives all other courts of their jurisdiction.¹³⁸

4.1 Hague Convention on Choice of Court Agreements

Art. 5 para. 1 of Hague Convention on Choice of Court Agreements, which is considered as the key provision of this legal instrument, provides that: “*The court or courts of a contracting state designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that state.*”¹³⁹

According to this provision a court designated in an exclusive choice of court agreement has the jurisdiction to decide the dispute at hand.¹⁴⁰ The only applicable exception to this rule is the nullity and voidness of a choice of law agreement which is to be assessed pursuant to the law of the state of the chosen court including its choice-of-law rules.¹⁴¹ “*The ‘null and void’*

¹³⁸ Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 172.

¹³⁹ Art. 5 para. 1 Hague Convention on Choice of Court Agreements.

¹⁴⁰ *Ibid.*; See also Born, B. G. *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*. The Hague: Kluwer Law International, 2016, pp. 16, 17; See also Palermo, G. The Future of Cross-Border Disputes Settlement: Back to Litigation? In: Gonzalez-Bueno, C. (ed.). *40 under 40 International Arbitration*. Madrid: Dykinson, 2018, p. 360.

¹⁴¹ Affaki, G. B., Naón, A. G. H. *Jurisdictional choices in times of trouble*. Paris: International Chamber of Commerce, 2015, p. 88; See also Bríza, P. Choice-of-Court Agreements: Could the Hague Choice of Court Agreements Convention and the Reform of the Brussels I Regulation be the Way out of the Gasser – Owusu Disillusion? *Journal of Private International Law*. 2009, Vol. 5, No. 3, p. 556; See also Jhangiani, S. Amin, R. The Hague Convention on Choice of Court Agreements: A Rival to the New York Convention and a “Game-Changer” for International Disputes? [online]. *arbitrationblog.kluwerarbitration.com*. Published on 23 September 2016 [cit. 15. 5. 2019]. http://arbitrationblog.kluwerarbitration.com/2016/09/23/the-hague-convention-on-choice-of-court-agreements-a-rival-to-the-new-york-convention-and-a-game-changer-for-international-disputes/?_ga=2.38319014.449827635.1558337497-2077811134.1558337497

*provision is primarily intended to refer to generally recognised grounds like fraud, mistake, misrepresentation, duress and lack of capacity.*¹⁴²

Consequently, Art. 5 para. 2 reinforces the obligation laid down in Art. 5 para. 1. It stipulates that the court designated in a choice of court agreement shall not decline to exercise its jurisdiction on the ground that the dispute should be decided in a court of another state.¹⁴³ There are two legal doctrines on the basis of which a court might consider that the dispute should be decided in a court of another state – forum non conveniens and lis pendens.¹⁴⁴ Art. 5 para. 2 is understood in a way that it precludes resort to these doctrines.¹⁴⁵

It must be noted, however, that neither Art. 5 para. 1 nor Art. 5 para. 2 affect internal state rules on allocation of jurisdiction among the courts of a contracting state.¹⁴⁶

Subsequently, Art. 6 is considered as the second key provision of Hague Convention on Choice of Court Agreements as it regulates the obligations of the court not chosen.¹⁴⁷ According to this provision, if proceedings

¹⁴² Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 56 [cit. 24. 3. 2019]. <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

¹⁴³ Art. 5 para. 2 Hague Convention on Choice of Court Agreements.

¹⁴⁴ Affaki, G. B., Naón, A. G. H. *Jurisdictional choices in times of trouble*. Paris: International Chamber of Commerce, 2015, p. 191; See also Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 58 [cit. 24. 3. 2019]. <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>; See also Landbrecht, J. The Singapore International Commercial Court (SICC) – an Alternative to International Arbitration? *ASA Bulletin*. 2016, Vol. 34, No. 1, p. 117; See also Palermo, G. The Future of Cross-Border Disputes Settlement: Back to Litigation? In: Gonzalez-Bueno, C. (ed.). *40 under 40 International Arbitration*. Madrid: Dykinson, 2018, p. 362.

¹⁴⁵ Brand, A. R. *Forum non conveniens: history, global practice, and future under the Hague convention on choice of court agreements*. New York: Oxford University Press, 2007, p. 208; See also Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 58 [cit. 24. 3. 2019]. <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

¹⁴⁶ Art. 5 para. 3 Hague Convention on Choice of Court Agreements.

¹⁴⁷ Jhangiani, S. Amin, R. The Hague Convention on Choice of Court Agreements: A Rival to the New York Convention and a “Game-Changer” for International Disputes? [online]. *arbitrationblog.kluwerarbitration.com*. Published on 23 September 2016 [cit. 15. 5. 2019]. http://arbitrationblog.kluwerarbitration.com/2016/09/23/the-hague-convention-on-choice-of-court-agreements-a-rival-to-the-new-york-convention-and-a-game-changer-for-international-disputes/?_ga=2.38319014.449827635.1558337497-2077811134.1558337497; See also Newing, H., Webster, L. Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International*. 2016, Vol. 10, No. 2, p. 108.

are brought in the courts of a contracting state that was not designated in a court of choice agreement that court must decline to hear the case.¹⁴⁸

Moreover, Art. 6 lays down five exceptions to the rule that the proceedings must be dismissed by the court not chosen.¹⁴⁹ These are: (i) nullity and voidness of a choice of court agreement under the law of the state of the chosen court; (ii) lack of capacity to conclude a choice of court agreement under the law of the state of the court seized; (iii) manifest injustice; (iv) incapability of performance; or (v) the chosen court has decided not to hear the case.¹⁵⁰ It is important to bear in mind that when assessing the nullity and voidness of a choice of court agreement, the court seized applies the law of the state of the chosen court.¹⁵¹ In all the other cases, the court seized applies its own law including its choice-of-law provisions.¹⁵²

4.2 Brussels I bis Regulation

Under Art. 25 para. 1 of Brussels I bis Regulation, the court chosen in a choice of court agreement is also obliged to hear the case.¹⁵³ It is important to point out that the court is obliged to hear the case, regardless of the domicile of the parties as in terms of choice of court agreements under Brussels I bis Regulation, the connection with the territory of the EU is no longer

¹⁴⁸ Affaki, G. Bachir. Naón, A. G. Horacio. *Jurisdictional choices in times of trouble*. Paris: International Chamber of Commerce, 2015, p. 195; See also Born, B. G. *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*. The Hague: Kluwer Law International, 2016, p. 16, 17; See also Newing, H., Webster, L. Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International*. 2016, Vol. 10, No. 2, pp. 105–117; See also Palermo, G. The Future of Cross-Border Disputes Settlement: Back to Litigation? In: Gonzalez-Bueno, C. (ed.). *40 under 40 International Arbitration*. Madrid: Dykinson, 2018, p. 360.

¹⁴⁹ Art. 6 Hague Convention on Choice of Court Agreements.

¹⁵⁰ *Ibid.*

¹⁵¹ Affaki, G. B., Naón, A. G. H. *Jurisdictional choices in times of trouble*. Paris: International Chamber of Commerce, 2015, p. 191; See also Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hccb.net*. Published on 8 November 2013, p. 62 [cit. 24. 3. 2019]. <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

¹⁵² Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hccb.net*. Published on 8 November 2013, p. 62 [cit. 24. 3. 2019]. <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

¹⁵³ Art. 25 para. 1 Brussels I bis Regulation.

necessary.¹⁵⁴ “*This means that if, for example, a Chinese company and Thai company choose the courts of Germany, the German courts are obliged to apply the Regulation.*”¹⁵⁵

Although it is not expressly stated, Art. 25 para. 1 of Brussels I bis Regulation is understood in a way that the court designated cannot decline the case on the ground of the doctrine *forum non conveniens*.¹⁵⁶ This also applies in case of Hague Convention on Choice of Court Agreements.¹⁵⁷

As far as the obligations of the court not chosen are concerned, Art. 31 para. 3 states that: “*Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another member state shall decline jurisdiction in favour of that court.*” Similarly to Hague Convention on Choice of Court Agreements, the court not chosen is obliged to decline its jurisdiction.¹⁵⁸

Unlike Hague Convention on Choice of Court Agreements, however, overriding the *lis pendens* rule is regulated in a slightly different manner.¹⁵⁹ Art. 31 of Brussels I bis Regulation states that: “*Where a court of a member state on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seized, any court of another member state shall stay the proceedings until such time as the court seized on the basis of the agreement declares that it has no jurisdiction under the agreement.*”¹⁶⁰ This provision provides that where an exclusive choice of court agreement designates a court of the EU member state, a court of another member state, even if it was seized first, is obliged to stay the proceedings until the designated court declares that it had no jurisdiction

¹⁵⁴ Affaki, G. B., Naón, A. G. H. *Jurisdictional choices in times of trouble*. Paris: International Chamber of Commerce, 2015, p. 87; See also Born, B. Gary. *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*. The Hague: Kluwer Law International, 2016, p. 16, 17.

¹⁵⁵ Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 100.

¹⁵⁶ Landbrecht, J. The Singapore International Commercial Court (SICC) – an Alternative to International Arbitration? *ASA Bulletin*. 2016, Vol. 34, No. 1, p. 117.

¹⁵⁷ Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hch.net*. Published on 8 November 2013, p. 58 [cit. 24. 3. 2019]. <https://assets.hch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

¹⁵⁸ Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 182.

¹⁵⁹ *Ibid.*, p. 228.

¹⁶⁰ Art. 31 para. 2 Brussels I bis Regulation.

due to invalidity of a choice of court agreement.¹⁶¹ Thus, this provision lays down a reverse *lis pendens* rule as the court seized must first stay its proceedings in favour of the designated court which is the one that determines the validity of the choice of court agreement.¹⁶² The designated court, on the other hand, is entitled to go ahead with the proceedings without waiting for the court first seized to stay the proceedings before it.¹⁶³ This is different than the regulation of Hague Convention on Choice of Court Agreements which only provides that the designated court is not permitted to decline its jurisdiction on the ground that the dispute should be decided in a court of another State based on *lis pendens* rule.¹⁶⁴

What is more, unlike Hague Convention on Choice of Court Agreements, Brussels I bis Regulation does not lay down further exceptions to the rule that the court not chosen shall decline its jurisdiction.¹⁶⁵

4.3 Conclusion

Under both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation the court designated in a choice of court agreement is obliged to decide the case, whereas the court not chosen shall decline its jurisdiction.

Moreover, both legal instruments implicitly state that the court designated cannot decline the case on the ground of *forum non conveniens*.¹⁶⁶

As far as the *lis pendens* rule is concerned, Hague Convention on Choice of Court Agreements only states that the designated court shall not

¹⁶¹ Affaki, G. B., Naón, A. G. Horacio. *Jurisdictional choices in times of trouble*. Paris: International Chamber of Commerce, 2015, p. 193; See also Forner-Hooft, v. A. Brexit and the Future of Intellectual Property Litigation. *Journal of International Arbitration*. 2016, Vol. 33, No. 7, p. 561.

¹⁶² Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 228.

¹⁶³ Ibid.

¹⁶⁴ Hartley, T., Doguchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hccb.net*. Published on 8 November 2013, p. 58 [cit. 24. 3. 2019]. <https://assets.hccb.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

¹⁶⁵ Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 183.

¹⁶⁶ Ibid.

decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State based on *lis pendens* rule. Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (“Brussels Convention”), however, contains a reverse *lis pendens* rule pursuant to which the court seized shall stay its proceedings in favour of the designated court which is the one that determines the validity of the choice of court agreement.

Moreover, Brussels I bis Regulation does not lay down further exceptions to the rule that the court not chosen shall decline its jurisdiction. Therefore, Brussels I bis Regulation seems to be more favourable towards the applicability of choice of court agreements.

5 Recognition and enforcement of judgments given by courts designated in a choice of court agreement

5.1 Judgment

In order to compare the process of recognition and enforcement of judgments given by courts designated in a choice of court agreement under both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation, it is necessary to define the term “judgment”.

5.1.1 Hague Convention on Choice of Court Agreements

Art. 4 para. 1 of Hague Convention on Choice of Court Agreements stipulates that: “*Judgment’ means 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.*”¹⁶⁷

The definition in the sense of Hague Convention on Choice of Court Agreements covers any decision on the merits, regardless of what it is called.¹⁶⁸

¹⁶⁷ Art. 4 para. 1 Hague Convention on Choice of Court Agreements.

¹⁶⁸ Ibid.

It excludes procedural rulings with the exception of decisions as to costs or expenses.¹⁶⁹ Moreover, it excludes interim measures.¹⁷⁰

Next, pursuant to Art. 12 a settlement concluded before (or approved by) court of a contracting state designated in an exclusive choice of court agreement must be enforced in other contracting states in the same manner as a judgment.¹⁷¹

5.1.2 Brussels I bis Regulation

Pursuant to Art. 2 a) of Brussels I bis Regulation: “*Judgment*’ means any judgment given by a court or tribunal of a member state, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court. For the purposes of Chapter III,¹⁷² ‘judgment’ includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement.”

Under Brussels I bis Regulation the term “judgment” must be interpreted autonomously regardless of its form and denomination under national laws of the EU member states.¹⁷³ The term “judgment” covers a decision on the merits, not on the procedure.¹⁷⁴ Furthermore, a judgment must be enforceable in the state of origin, thus, it does not matter whether an appeal against the judgment to a higher court is admissible.¹⁷⁵ In contrast to Hague Convention on Choice of Court Agreements, Brussels I bis Regulation also applies to interim measures.¹⁷⁶

¹⁶⁹ Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hccb.net*. Published on 8 November 2013, p. 54 [cit. 24. 3. 2019]. <https://assets.hccb.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

¹⁷⁰ Ibid.

¹⁷¹ Art. 12 Hague Convention on Choice of Court Agreements.

¹⁷² Chapter III: Recognition and Enforcement Brussels I bis Regulation.

¹⁷³ Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 258.

¹⁷⁴ Ibid., pp. 267–268; See also Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Úvod do mezinárodního práva soukromého*. Praha: Wolters Kluwer, 2017, p. 267.

¹⁷⁵ Art. 38 Brussels I bis Regulation; See also Judgment of the Court of Justice of 22 November 1977, Case C-43/77.

¹⁷⁶ Masters, S., McRae, B. What does Brexit mean for the Brussels Regime. *Journal of International Arbitration*. 2016, Vol. 33, No. 7, p. 496.

The term “court” was defined by ECJ in its decision *Kleinmotoren GmbH vs. Emilisio Beach* as a: “*judicial body of a contracting state deciding on its own authority on the issues between the parties.*”¹⁷⁷ Thus, the type of the court which gave decision is irrelevant.¹⁷⁸ It must, however, be a court of a member state which excludes arbitral awards, decision of church courts and decisions of international tribunals.¹⁷⁹

Based on the abovementioned definition, however, the court settlement is not a judgment in the sense of Art. 2 a) of Brussels I bis Regulation.¹⁸⁰ An enforceable court settlement may, however, be enforced in other member states pursuant to Art. 59 of Brussels I bis Regulation.¹⁸¹

Therefore, as far as the definition of “judgment” under both legal instruments is concerned, there is not much of a difference. Both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation exclude procedural decisions with the exception of decisions as to costs or expenses. Moreover, court settlements are to be enforced in the same manner as judicial decisions. The difference between the two legal instruments is that Brussels Convention applies to interim measures.

5.2 Recognition and enforcement

5.2.1 Hague Convention on Choice of Court Agreements

Art. 8 para. 1. of Hague Convention on Choice of Court Agreements stipulates that: “*A judgment given by a court of a contracting state designated in an exclusive choice of court agreement shall be recognised and enforced in other contracting states.*”¹⁸²

Thus, the key conditions regarding recognition of any judgment are, first, that the judgment has been given by a court of a contracting state and, secondly, that that court has been designated in an exclusive choice of court

¹⁷⁷ Judgment of the Court of Justice (Sixth Chamber) of 2 June 1994, Case C-414/92.

¹⁷⁸ Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 258; See also Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Úvod do mezinárodního práva soukromého*. Praha: Wolters Kluwer, 2017, p. 267.

¹⁷⁹ Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 258.

¹⁸⁰ Judgment of the Court of Justice (Sixth Chamber) of 2 June 1994, Case C-414/92.

¹⁸¹ Art. 59 Brussels I bis Regulation.

¹⁸² Art. 8 para. 1 Hague Convention on Choice of Court Agreements.

agreement.¹⁸³ If these requirements are satisfied, the judgment shall be recognized, unless there is a reason why it should not be.¹⁸⁴

Pursuant to Art. 8 para. 2 no review as to the merits of the judgment is permitted.¹⁸⁵ Art. 8 para. 2, however, further stipulates that the court addressed shall be bound by the findings of facts on which the court of origin based its jurisdiction.¹⁸⁶ “*This means that if, for example, the court addressed has to decide whether the formal requirements of a choice of court agreement were satisfied, it has to accept any findings of fact made by the court of origin. It is, however, free to draw its own conclusions of law from these facts.*”¹⁸⁷ Thus, this provision is understood in a way that the court addressed may itself decide whether a choice of court agreement was within the scope of the court of origin.¹⁸⁸

Consequently, Art. 8 para. 3 provides that a judgment will be recognised only if it has effect in the State of origin and will be enforced only if it is enforceable in the State of origin.¹⁸⁹ Finally, Art. 8 para. 4 provides that recognition or enforcement of a judgment may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired.¹⁹⁰

Generally speaking, Art. 8 of Hague Convention on Choice of Court Agreements incorporates the principles of recognition and enforcement and the following Art. 9 of Hague Convention on Choice of Court Agreements sets out exception to these principles. There are seven situations listed in which recognition or enforcement of a judgment may be refused.¹⁹¹ It must be emphasized that the wording of Art. 9 using the words “may”

¹⁸³ Hartley, C.T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 195.

¹⁸⁴ *Ibid.*, p. 196.

¹⁸⁵ Art. 8 para. 2 Hague Convention on Choice of Court Agreements.

¹⁸⁶ *Ibid.*

¹⁸⁷ Hartley, C.T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 197.

¹⁸⁸ *Ibid.*, p. 195.

¹⁸⁹ Art. 8 para. 3 Hague Convention on Choice of Court Agreements.

¹⁹⁰ *Ibid.*, Art. 8 para. 4.

¹⁹¹ *Ibid.*

rather than “shall” indicates that courts are not obliged to not to recognize or not to enforce a judgment; they are, however, entitled to do so.¹⁹²

Based on Art. 9 a), recognition or enforcement may be refused if the choice of court agreement is null and void under the law of the state of the chosen court.¹⁹³ Thus, the court addressed may decide whether the choice of court agreement is valid as to its substance unless the chosen court has resolved this question.¹⁹⁴ Art. 9 b) provides that recognition or enforcement may be refused if a party lacked the capacity to conclude a choice of court agreement under the law of the requested State.¹⁹⁵ Next, Art. 9 c) stipulates that recognition or enforcement may be refused due to insufficient notification of a defendant that the proceedings are being brought.¹⁹⁶ Pursuant to Art. 9 d) fraud constitutes reason for non-recognition and non-enforcement of a judgment.¹⁹⁷ Under Art. 9 e) recognition or enforcement may be refused if it would be manifestly incompatible with the public policy of the requested state.¹⁹⁸ Finally, Art. 9 f) and g) deal with conflicting judgments either from the requested state or from third countries.¹⁹⁹ These two articles have been copied from Brussels I bis Regulation.²⁰⁰

Furthermore, Art. 11 para. 1 stipulates that: “*Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.*”²⁰¹ This wording was adopted to take account of the fact that “punitive” damages may be “compensatory” and should be enforced

¹⁹² Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hccb.net*. Published on 8 November 2013, p. 96 [cit. 24. 3. 2019]. <https://assets.hccb.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

¹⁹³ Art. 9 letter a) Hague Convention on Choice of Court Agreements.

¹⁹⁴ Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 198.

¹⁹⁵ Art. 9 letter b) Hague Convention on Choice of Court Agreements.

¹⁹⁶ *Ibid.*, Art. 9 letter c).

¹⁹⁷ *Ibid.*, Art. 9 letter d).

¹⁹⁸ *Ibid.*, Art. 9 letter e).

¹⁹⁹ *Ibid.*, Art. 9 letter f), g).

²⁰⁰ Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 201.

²⁰¹ Art. 11 para. 1 Hague Convention on Choice of Court Agreements.

to that extent.²⁰² Thus, Art. 11 para. 2 requires the court addressed to take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.²⁰³

Finally, Art. 14 stipulates that recognition is governed by the law of the requested state.²⁰⁴ Therefore, where the law of the requested state incorporates special procedure for recognition of a foreign judgment, the process will not be automatic.²⁰⁵

5.2.2 Brussels I bis Regulation

As far as the rules for recognition and enforcement under Brussels I bis Regulation are concerned, it must be noted that these apply generally, they are not peculiar to choice of court agreements.²⁰⁶

Art. 36 para. 1 of Brussels I bis Regulation provides that: “*A judgment given in a member state shall be recognised in other member states without any special procedure being required.*”²⁰⁷ Both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation incorporate a rule pursuant to which a judgment given in one member state or contracting state is to be recognised in another member or contracting state.²⁰⁸ The difference, however, is that under Hague Convention on Choice of Court Agreements the process of recognition is governed by the law of the requested state, whereas under

²⁰² Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 204.

²⁰³ Art. 11 para. 2 Hague Convention on Choice of Court Agreements.

²⁰⁴ *Ibid.*, Art. 14.

²⁰⁵ Hartley, T., Doguchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hccj.net*. Published on 8 November 2013, p. 80 [cit. 24. 3. 2019]. <https://assets.hccj.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

²⁰⁶ Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 190.

²⁰⁷ Art. 36 para. 1 Brussels I bis Regulation.

²⁰⁸ Rea, M., Marotti, C. M. What is all the fuss? The Potential Impact of the Hague Convention on the Choice of Court Agreement on International Arbitration [online]. *arbitrationblog.kluwerarbitration.com*. Published on 16 June 2017 [cit. 15. 5. 2019]. <http://arbitrationblog.kluwerarbitration.com/2017/06/16/fuss-potential-impact-hague-convention-choice-court-agreement-international-arbitration/>

Brussels I bis Regulation it is automatic.²⁰⁹ The solution adopted in Hague Convention on Choice of Court Agreements is less comprehensive compared to Brussels I bis Regulation.²¹⁰

Next, pursuant to Art. 52 of Brussels I bis Regulation: “*Under no circumstances may a judgment given in a member state be reviewed as to its substance in the member state addressed.*”²¹¹ Similar provision can also be found in Hague Convention on Choice of Court Agreements.²¹² The difference between the two legal documents, however, is that Art. 45 para. 3 of Brussels I bis Regulation provides that the jurisdiction of the court of origin may not be reviewed and, therefore, the court asked is not permitted to inquire whether the court of origin had jurisdiction to decide a dispute.²¹³ This, however, does not apply in case of Hague Convention on Choice of Court Agreements as according to its Art. 8 para. 2 the court asked may decide itself whether a choice of court agreement was within the scope of the court of origin.²¹⁴

As far as the grounds for non-enforcement are concerned, these are regulated in Art. 45 and 46²¹⁵ of Brussels I bis Regulation.²¹⁶ First of all, using of words “shall” instead of “may” in both provisions indicates that courts are obliged to not to recognize or not to enforce a judgment *ex officio* in case that the conditions stipulated in Art. 45 and 46 are met.²¹⁷ This is different

²⁰⁹ Art. 14 Hague Convention; See also Forner-Hooft, v. A. Brexit and the Future of Intellectual Property Litigation. *Journal of International Arbitration*. 2016, Vol. 33, No. 7, p. 553; See also Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 263.

²¹⁰ Masters, S., McRae, B. What does Brexit mean for the Brussels Regime. *Journal of International Arbitration*. 2016, Vol. 33, No. 7, p. 496.

²¹¹ Art. 52 Brussels I bis Regulation.

²¹² See Art. 8 para. 2 Hague Convention.

²¹³ Art. 45 para. 3 Brussels I bis Regulation; See also Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 189.

²¹⁴ Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 195.

²¹⁵ Art. 45 Brussels I bis Regulation regulates the grounds for non-recognition and Art. 46 the grounds for non-enforcement. It states that: “*On the application of the person against whom enforcement is sought, the enforcement of a judgment shall be refused where one of the grounds referred to in Article 45 is found to exist*”. Therefore, the grounds for non-recognition and non-enforcement shall be assessed together.

²¹⁶ Art. 45 Brussels I bis Regulation.

²¹⁷ Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 268.

to Hague Convention on Choice of Court Agreements which provides that a court may rule on non-enforcement or non-recognition of a judgment at its own discretion.

Regarding the specific grounds for non-recognition and non-enforcement, Art. 45 para. 1 a) provides that a recognition (or enforcement) of a judgment shall be refused if such recognition (or enforcement) is manifestly contrary to public policy (*ordre public*) in the member state addressed.²¹⁸ Similar provision may also be found in Hague Convention on Choice of Court Agreements.²¹⁹ Next, based on Art. 45 para. 1 b) failure to notify the defendant of the commencement of the proceedings constitutes a ground for non-recognition (or non-enforcement) of a judgment.²²⁰ Comparable provision is also included in Hague Convention on Choice of Court Agreements.²²¹ Art. 45. para. 1 c) and d) refer to conflicting judgments either from the requested state or from third countries.²²² Corresponding provisions are incorporated in Hague Convention on Choice of Court Agreements, too.²²³ Finally, Art. 45. para. 1 e) stipulates that recognition (or enforcement) shall be refused due to breach of special provisions dealing with insurance, consumers and employment contracts and exclusive jurisdiction.²²⁴ As choice of court agreements are generally not permitted (though there are exceptions) in these areas,²²⁵ this ground for non-recognition and non-enforcement shall not be analyzed any further.

Therefore, all the grounds for non-recognition (or non-enforcement) of a judgment stipulated in Art. 45 of Brussels I bis Regulation may also be found in Art. 9 of Hague Convention on Choice of Court Agreements.²²⁶

²¹⁸ Art. 45 para. 1 letter a) Brussels I bis Regulation.

²¹⁹ See Art. 9 letter e) Hague Convention on Choice of Court Agreements.

²²⁰ Art. 45 para. 1 letter b) Brussels I bis Regulation.

²²¹ See Art. 9 letter c) Hague Convention on Choice of Court Agreements.

²²² Art. 45 para. 1 letter c), d) Brussels I bis Regulation.

²²³ Art. 9 letter f), g) Hague Convention on Choice of Court Agreements.

²²⁴ Art. 45 para. 1 letter e) Brussels I bis Regulation.

²²⁵ Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 190.

²²⁶ With the exception of Art. 45 para. 1 letter e) Brussels I bis Regulation which is not relevant as choice of court agreements are generally not concluded in that matter; See also Forner-Hoof, v. A. Brexit and the Future of Intellectual Property Litigation. *Journal of International Arbitration*. 2016, Vol. 33, No. 7, p. 556.

Hague Convention on Choice of Court Agreements, however, additionally provides that recognition or enforcement may be refused if the choice of court agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement was valid;²²⁷ if a party lacked the capacity to conclude the agreement under the law of the requested State;²²⁸ and if the judgment was obtained by fraud.²²⁹

5.3 Conclusion

Both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation define the term “judgment” in a similar manner. The difference between the two legal instruments is that Brussels Convention applies also to interim measures.

As far as the process of recognition and enforcement under the two legal instruments is concerned, the basic principle under both instruments is that judgments given under a choice of court agreement must be recognized and enforced in courts of other contracting or member states. In both documents, a distinction is made between the process of recognition of a judgment and its enforcement.²³⁰ Under both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation the grounds for non-enforcement derive exclusively from these documents and may not be deduced from national laws.²³¹

There are, however, certain differences between Hague Convention on Choice of Court Agreements and Brussels I bis Regulation. Firstly, under Hague Convention on Choice of Court Agreements the process of recognition is governed by the law of the requested state, whereas under Brussels I bis Regulation it is automatic.²³² Secondly, pursuant to Hague

²²⁷ Art. 9 letter a) Hague Convention on Choice of Court Agreements.

²²⁸ Ibid., Art. 9 letter b).

²²⁹ Ibid., Art. 9 letter d).

²³⁰ Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 188.

²³¹ Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 264.

²³² Art. 14 Hague Convention on Choice of Court Agreements; See also Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 263.

Convention on Choice of Court Agreements the court addressed is entitled to decide itself whether a choice of court agreement was within the scope of the court of origin. Under Brussels I bis Regulation, however, the court addressed is not permitted to do so.²³³ Thirdly, pursuant to Brussels I bis Regulation courts are obliged to rule on non-recognition or non-enforcement *ex officio*, whereas under Hague Convention on Choice of Court Agreements courts may decide at their own discretion.

Finally, all the grounds regarding non-recognition and non-enforcement of a judgment under Brussels I bis Regulation are also incorporated in Hague Convention on Choice of Court Agreements.²³⁴ Hague Convention on Choice of Court Agreements, however, provides three additional grounds for non-recognition and non-enforcement of a judgment. Thus, the regulation adopted in Hague Convention on Choice of Court Agreements is more restrictive as far as recognition and enforcement of judgments is concerned.

6 Reciprocal Relationship between Hague Convention on Choice of Court Agreements and Brussels I bis Regulation

It is entirely possible that a conflict could arise between Hague Convention on Choice of Court Agreements and Brussels I bis Regulation due to the fact that both legal instruments govern agreements conferring jurisdiction.²³⁵ Thus, it is essential to decide which instrument applies in a given case.²³⁶

The reciprocal relationship between Hague Convention on Choice of Court Agreements and Brussels I bis Regulation is regulated by Art. 26. para. 6 of Hague Convention on Choice of Court Agreements which provides that:

²³³ Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 189.

²³⁴ With the exception of Art. 45 para. 1 letter e) Brussels I bis Regulation which is not relevant as choice of court agreements are generally not concluded in that matter.

²³⁵ Newing, H., Webster, L. Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International*. 2016, Vol. 10, No.2, pp. 105–117.

²³⁶ Alameda, C. A. Choice of Court Agreements under Brussels I Recast Regulation [online]. *ejtn.eu* [cit. 24. 3. 2019]. http://www.ejtn.eu/Documents/Themis%20Luxembourg/Written_paper_Spain1.pdf

“This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention – a) where none of the parties is resident in a contracting state that is not a member state of the Regional Economic Integration Organisation; b) as concerns the recognition or enforcement of judgments as between member states of the Regional Economic Integration Organisation.”²³⁷ The underlying principle is that where a case is “regional” in terms of residence of the parties, Hague Convention on Choice of Court Agreements gives way to the regional instrument.²³⁸

Hague Convention on Choice of Court Agreements limits its impact on Brussels I bis Regulation as the latter’s application shall not be affected where none of the parties is resident in a contracting state that is not a member state of the EU.²³⁹ “Brussels Ibis Regulation will always be applied if both parties in the agreement are domiciled in the EU member state; if one or both parties to the agreement are domiciled in a state party that is not the EU member state, Hague Convention becomes applicable.”²⁴⁰ Thus, if a Mexican company and a Czech company choose Rotterdam district court, Hague Convention on Choice of Court Agreements prevails; if, on the other hand, German company and Czech company choose Rotterdam district court, Brussels I bis Regulation prevails.²⁴¹

With regard to recognition and enforcement of judgments, pursuant to Art. 26. para. 6 b) of Hague Convention on Choice of Court Agreements, Brussels I bis Regulation prevails where the court that granted the judgment or the court in which recognition is sought is located in the EU.²⁴²

²³⁷ Art. 26 para. 6 Hague Convention on Choice of Court Agreements.

²³⁸ Affaki, G. B., Naón, A. G. H. *Jurisdictional choices in times of trouble*. Paris: International Chamber of Commerce, 2015, p. 191; See also Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hccch.net*. Published on 8 November 2013, p. 96 [cit. 24. 3. 2019]. <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>; See also Palermo, G. The Future of Cross-Border Disputes Settlement: Back to Litigation? In: Gonzalez-Bueno, C. (ed.). *40 under 40 International Arbitration*. Madrid: Dykinson, 2018, p. 359.

²³⁹ Bříza, P. Choice-of-Court Agreements: Could the Hague Choice of Court Agreements Convention and the Reform of the Brussels I Regulation be the Way out of the Gasser – Owusu Disillusion? *Journal of Private International Law*. 2009, Vol. 5, No. 3, p. 557, 558.

²⁴⁰ Alameda, C. A. Choice of Court Agreements under Brussels I Recast Regulation [online]. *ejtn.eu* [cit. 24. 3. 2019]. http://www.ejtn.eu/Documents/Themis%20Luxembourg/Written_paper_Spain1.pdf

²⁴¹ Palermo, G. The Future of Cross-Border Disputes Settlement: Back to Litigation? In: Gonzalez-Bueno, C. (ed.). *40 under 40 International Arbitration*. Madrid: Dykinson, 2018, p. 359.

²⁴² Art. 26 para. 6 letter b) Hague Convention on Choice of Court Agreements.

“This means that the generally more limited grounds for non-recognition laid down in Art. 34 of Brussels I bis Regulation will apply in place of the wider grounds in Art. 9 of Hague Convention on Choice of Court Agreements (...) In most cases, this should make it easier to enforce the judgment.”²⁴³

As far as conflicts with other international treaties²⁴⁴ are concerned, Hague Convention on Choice of Court Agreements seeks to eliminate any perceived incompatibility through interpretation in its Art. 26 para. 1.²⁴⁵ Where this is not possible, Hague Convention on Choice of Court Agreements specifies four cases (Art. 26 para. 2, 3, 4 and 5) in which another convention should prevail over it.²⁴⁶ Therefore, Hague Convention on Choice of Court Agreements regulates circumstances in which it must “give way” to another treaty.²⁴⁷ Due to the limited scope of this article, the issue of conflicts with other international treaties will not be explored any further.

7 Conclusion

To conclude, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation aim to regulate choice of court agreements in order to provide certainty to businesses engaging in cross-border activities.

To begin with, under both these legal instruments the presence of an international element is required in order to invoke their applicability. As far as their material scope of application is concerned, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation apply exclusively to civil and commercial matters excluding arbitration; insolvency;

²⁴³ Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hccb.net*. Published on 8 November 2013, p. 38 [cit. 24. 3. 2019]. <https://assets.hccb.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

²⁴⁴ Instruments of this kind include the Lugano Convention, the Minsk Convention and various instruments in the Americas.

²⁴⁵ Art. 26 para. 1 Hague Convention on Choice of Court Agreements; See also Newing, H., Webster, L. Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International*. 2016, Vol. 10, No. 2, pp. 105–117.

²⁴⁶ Art. 26 para. 2, 3, 4 and 5 Hague Convention on Choice of Court Agreements.

²⁴⁷ Newing, H., Webster, L. Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International*. 2016, Vol. 10, No. 2, pp. 105–117.

family law; or wills and successions. Hague Convention on Choice of Court Agreements, however, additionally excludes consumer contracts; employment contracts; carriage of passengers or goods; competition law claims; tort claims; liability for nuclear damage; personal injury; damage to property; immovable property and maritime matters. Thus, the material scope of application of Hague Convention on Choice of Court Agreements is narrower.

Regarding the geographical scope of application, Hague Convention on Choice of Court Agreements has a wider scope of application as it was ratified by all EU member states as well as Singapore, Mexico, and Montenegro. In the author's view this is not entirely relevant due to the fact that where a case is purely "regional", in terms of residence of the parties, Hague Convention on Choice of Court Agreements gives way to Brussels I bis Regulation which prevails.

Consequently, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation contain requirements regarding choice of court agreements.

Firstly, under both legal documents a choice of court agreement must be designated for the purpose of deciding disputes that have arisen in connection with a particular legal relationship.

Secondly, regarding the material validity of a choice of court agreement, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation are applicable only if both parties agree on a choice of court agreement. The material validity of such an agreement shall be determined by the law of the country of the designated court under both regulations.

Thirdly, as far as the formal validity of a choice of court agreement is concerned, Brussels I bis Regulation represents seems slightly more favourable due to the fact that a greater number of choice of court agreements is likely to be considered formally valid.

Next, both legal documents regulate the issue of exclusivity of a choice of court agreement in a way that a court of choice agreement is presumed to be exclusive unless stated otherwise. The difference is that Hague Convention on Choice of Court Agreements applies only to exclusive choice

of court agreements as non-exclusive and asymmetrical choice of court agreements invoke its inapplicability. Brussels I bis Regulation, however, applies even in these cases.

Therefore, in author's opinion Brussels I bis Regulation is likely to cover more court of choice agreements.

Regarding the effects of a choice of court agreement, under both legal instruments the court designated in such an agreement is obliged to decide the case in spite of the doctrine of *forum non conveniens*. Pursuant to both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation the court not chosen shall decline its jurisdiction. Under Hague Convention on Choice of Court Agreements, however, there are five exceptions to this rule which makes this legal instrument less effective.

As far as the issue of recognition and enforcement is concerned, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation define the term "judgment" in a similar way. Moreover, the basic principle under both instruments is that a judgment given under a choice of court agreement must be recognized and enforced in another contracting state or the EU member state. There are, however, some differences between the two legal documents.

Firstly, under Hague Convention on Choice of Court Agreements the process of recognition is governed by the law of the requested state. Under Brussels I bis Regulation it is automatic which makes this regulation more convenient. Secondly, unlike Brussels I bis Regulation, Hague Convention on Choice of Court Agreements authorises the court addressed to decide itself whether a choice of court agreement was within the scope of the court of origin. Such a solution is not perfect as it may reduce the number of recognised and enforced judgments. Thirdly, when dealing with the recognition and enforcement of a choice of court agreement, courts under Brussels I bis Regulation act *ex officio*, whereas under Hague Convention on Choice of Court Agreements courts may decide at their own discretion. In author's opinion the latter solution is not desirable in light of the legal certainty. Finally, as far as grounds regarding non-recognition and non-enforcement of a judgment, Hague Convention on Choice of Court

Agreements, incorporates more grounds for non-recognition and non-enforcement of a judgment making this legal regulation less favourable. Therefore, as far as choice of court agreements are concerned, Brussels I bis Regulation constitutes a more favourable regulation compared to Hague Convention on Choice of Court Agreements. Therefore, there is no reason why the current EU regime should not remain in place as Brussels I bis Regulation, in fact, takes precedence over the Hague Convention on Choice of Court Agreements in matters including parties within the EU member state. Hague Convention on Choice of Court Agreements, however, represents a legal regulation which is in force not only in the EU, but in other countries, such as Mexico, Montenegro, and Singapore. Moreover, once the UK has exited the EU, Brussels I bis Regulation will no longer apply in the UK and the only alternative regime left is the one represented by Hague Convention on Choice of Court Agreements.

In spite of the fact that Hague Convention on Choice of Court Agreements does not constitute such a favourable regulation compared to Brussels I bis Regulation, it provides certainty that a choice of court clause will be upheld across the EU and a few other countries. This definitely outweighs the other alternative which is nothing else than conflict of law rules which are likely to add time and cost to cross-border enforcement of judgments. Moreover, Hague Convention on Choice of Court Agreements is open for signature for all states and, thus, it has the potential to become more widespread in the future.

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