

Is Hague Convention on Choice of Court Agreements the Way to Go?

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Abstract

The article demonstrates 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 analyses the mutual features of the two legal instruments as well as their divergences in terms of choice of court agreements. Therefore, the material and geographical scopes of application, the definition of “a choice of court agreement”, the effects of choice of court agreements as well as the process of the recognition and enforcement under both legal regulations shall be compared. The main goal of this article is to demonstrate that Hague Convention on Choice of Court Agreements does not present a complete and comprehensive solution in terms of choice of court agreements when compared to Brussels I bis Regulation.

Keywords

Hague Convention on Choice of Court Agreements; Brussels I bis Regulation; Choice of Court Agreements.

1 Introductory Notes

The future of the direct application of provisions regarding jurisdiction and recognition and enforcement of judgments incorporated in 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 and commercial matters (“Brussels I bis Regulation”) seems to be coming to an end in the United Kingdom (“UK”). According to Art. 67 para. 1, 2 of Agreement on the withdrawal of the UK from

the European Union (“EU”) and the European Atomic Energy Community No. 2019/C 384 /I/01 (“Withdrawal Agreement”) provisions regarding jurisdiction and recognition and enforcement of judgments of Brussels I bis Regulation shall apply in the UK to legal proceedings instituted before the end of the transition period.¹ Brussels I bis Regulation, among other things, regulates choice of court agreements in its Art. 25.²

The UK, however, signed the Hague Convention on Choice of Court Agreements of 30 June 2005 (“Hague Convention on Choice of Court Agreements”) on 28 December 2018.³ Hague Convention on Choice of Court Agreements is an international legal instrument providing framework for rules on choice of court agreements.⁴ It aims to establish an international legal regime that ensures the effectiveness of choice of court agreements between parties to commercial transactions and governs the recognition and enforcement of judgments resulting from proceedings based on such agreements.⁵

Therefore, Hague Convention on Choice of Court Agreements is perceived as an alternative jurisdictional regime for cases involving choice of court agreements.⁶ This article aims to demonstrate that Hague Convention on Choice of Court Agreements does not present a complete and comprehensive solution in terms of choice of court agreements for the UK compared to Brussels I bis Regulation.

¹ Art. 67 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. *EUR-Lex* [online]. 12.11.2019 [cit. 1.8.2020]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1580206007232&uri=CELEX%3A12019W/TXT%2802%29>

² Art. 25 Brussels I bis Regulation.

³ Choice of court section. *HCCH* [online]. [cit. 1.8.2020]. Available at: <https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court>

⁴ 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. and L. WEBSTER. Could the Hague Convention on Choice of Court Agreements 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.

⁵ Preamble Hague Convention on Choice of Court Agreements.

⁶ BEAUMONT, P. and M. AHMED. I thought we were exclusive? Some issues with the Hague Convention on Choice of Court Agreements on Choice of Court, Brussels Ia and Brexit. *abdn.ac.uk* [online]. 21.9.2017 [cit. 1.8.2020]. Available at: <https://www.abdn.ac.uk/law/blog/i-thought-we-were-exclusive-some-issues-with-the-hague-convention-on-choic%E2%80%82e-of-court-brussels-ia-and-brexite/>

Thus, the material and geographical scopes of application of both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation will be compared as well as the way the two legal instruments define the term of “a choice of court agreement”. Next, the effects of choice of court agreements arising out of both legal frameworks shall be compared. Finally, the regulation of the recognition and enforcement process under both legal instruments will be considered.

2 Scopes of Application of Hague Convention on Choice of Court Agreements and Brussels I bis Regulation

To begin with, it is important to emphasize that both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation require an international element to invoke their applicability.⁷

The term “international” is understood differently concerning jurisdictional issues and recognition and enforcement matters under both legal instruments.⁸ As far as the recognition and enforcement matters are concerned, both legal instruments apply if the judgment was given by a court of another member or contracting state.⁹

The jurisdictional rules of the Hague Convention on Choice of Court Agreements apply according to its Art. 1 para. 2 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 designated court, are connected only with that state.¹⁰ In other words, the jurisdictional

⁷ Art. 1 para. 1 Hague Convention on Choice of Court Agreements; see also ROZEHNALOVÁ, N., K. DRLIČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 173.

⁸ BEAUMONT, P. and M. AHMED. 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 ROZEHNALOVÁ, N., K. DRLIČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 174.

⁹ Art. 1 para. 3 Hague Convention on Choice of Court Agreements; see also ROZEHNALOVÁ, N., K. DRLIČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 174.

¹⁰ Art. 1 para. 2 Hague Convention on Choice of Court Agreements.

rules of Hague Convention on Choice of Court Agreements apply either if the parties are not residents in the same state or if some other elements relevant to the case have a connection with some other state.¹¹

Brussels I bis Regulation, however, does not specifically govern what constitutes an “international element” concerning jurisdictional issues. Thus, it must be established in each case individually.¹² Therefore, the European Court of Justice (“ECJ”) in *Owusu vs. N. B. Jackson*, case C-281/02, of 1 March 2005 presumed that the application of Brussels I bis Regulation is not limited to purely intra-EU disputes.¹³ In the author’s view, the regulation of an international element of jurisdictional issues in Brussels I bis Regulation is more convenient as it invokes the universal application of this legal instrument.

Regarding the material scope of application of Hague Convention on Choice of Court Agreements and Brussels I bis Regulation, both these legal instruments apply in civil and commercial matters.¹⁴ The concept of “civil and commercial matters” shall be interpreted autonomously under both legal regulations as it does not entail a reference to national laws.¹⁵ Both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation exclude matters such as arbitration, social security, questions of status and capacity, insolvency, family law, wills, and successions out of the material

¹¹ HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8. 11. 2013, p. 40 [cit. 1. 8. 2020]; 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.

¹² HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8. 11. 2013, p. 102 [cit. 1. 8. 2020]. Available at: <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>; see also ROZEHNALOVÁ, N., K. DRLÍČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 174.

¹³ Judgment of ECJ of 1. 3. 2015, *Andrew Owusu vs. N.B. Jackson, trading as ‘Villa Holidays Bal-Inn Villas’*, case C-281/02.

¹⁴ Art. 1 para. 1 Hague Convention on Choice of Court Agreements; Art. 1 para. 1 Brussels Regulation.

¹⁵ HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8. 11. 2013, p. 42 [cit. 1. 8. 2020]. Available at: <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>; see also Judgment of ECJ of 14. 10. 1975, *LTU vs. Eurocontrol*, case C-29/76.

scope of their application.¹⁶ Hague Convention on Choice of Court Agreements nevertheless additionally excludes consumer and employment contracts, competition law claims, personal injury, damage to property, tort claims, liability for nuclear damage, immovable property and carriage of passengers and goods which makes its material scope of application narrower compared to Brussels I bis regulation.¹⁷

As far as the geographical scope of application of both legal instruments is concerned, Brussels I bis Regulation applies in all the EU member states including Denmark and Ireland.¹⁸ Hague Convention on Choice of Court Agreements also entered into force in those states and further applies in Mexico, Montenegro, the UK, and Singapore.¹⁹ Thus, it may seem that Hague Convention on Choice of Court Agreements has a wider geographical scope of application as it entered into force in four more states.

The author believes that the fact that Hague Convention on Choice of Court Agreements applies in four more states is not entirely relevant. The reason for that relates to how the reciprocal relationship between Hague Convention on Choice of Court Agreements and Brussels I bis Regulation is governed. According to Art. 26 para. 6 of Hague Convention on Choice of Court Agreements: *“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.”*²⁰ In other words, the impact of Hague Convention on Choice of Court Agreements is limited

¹⁶ Art. 1 para. 2. Brussels I bis Regulation and Art. 2 para. 2 Hague Convention on Choice of Court Agreements.

¹⁷ Art. 2 Hague Convention on Choice of Court Agreements.

¹⁸ CUNIBERTI, G. Denmark to Apply Brussels I Recast. *conflictoflaw.net* [online]. 24. 3. 2013 [cit. 1. 8. 2020]. Available at: <http://conflictoflaws.net/2013/denmark-to-apply-brussels-i-recast/>; 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 on Choice of Court Agreements*. Oxford: Oxford University Press, 2013, pp. 35–37.

¹⁹ Status Table: Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. [cit. 1. 8. 2020]. Available at: <https://www.hcch.net/en/%E2%80%82instruments/conventions/status-table/?cid=98>

²⁰ Art. 26 para. 6 Hague Convention on Choice of Court Agreements.

where a case is “regional” in terms of residence of the parties or where the court that granted the judgment or the court in which recognition is sought is located in the EU.²¹ Hague Convention on Choice of Court Agreements thus gives way to Brussels I bis regulation in purely regional cases.²²

3 A Choice of Court Agreement under Hague Convention on Choice of Court Agreements and Brussels I bis Regulation

Art. 3 of Hague Convention on Choice of Court Agreements and Art. 25 of Brussels I bis Regulation are provisions that contain certain requirements regarding a choice of court agreement.²³ Some of these requirements are almost identical under both legal regulations while some differ considerably. Let’s first have a look at what Hague Convention on Choice of Court Agreements and Brussels I bis Regulation have in common as far as a choice of court agreement is concerned.

A choice of court agreement under both legal instruments is an agreement whereby parties have agreed that a court or more specific courts of one state are to have a jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship.²⁴

Firstly, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation stipulate that the designation must be to decide

²¹ 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, pp. 556–558.

²² AFFAKI, G. B. and A. G. H. NAÓN. *Jurisdictional choices in times of trouble*. Paris: International Chamber of Commerce, 2015, p. 191; see also HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCCH* [online]. 8.11.2013, p. 58 [cit. 1.8.2020]. Available at: <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. 359.

²³ Art. 3 Hague Convention on Choice of Court Agreements and Art. 25 Brussels I bis Regulation.

²⁴ Art. 3 letter a) Hague Convention on Choice of Court Agreements and Art. 25 para. 1 Brussels I bis Regulation.

disputes arising in connection with a particular legal relationship, present, or future.²⁵

Secondly, both legal instruments apply exclusively to a choice of court agreement designating the courts located within the geographical scope of their application.²⁶ In other words, a choice of court agreement designating a court or more courts of non-contracting states is not covered by these two legal instruments.²⁷ This stems from Art. 3 a) of Hague Convention on Choice of Court Agreements and Art. 25 para. 1 of Brussels I bis Regulation.²⁸

Thirdly, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation apply the principle of severability according to which the invalidity of the main contract does not invoke the invalidity of a choice of court agreement and vice versa.²⁹ This means that the court designated in a choice of court agreement may hold the main contract invalid without depriving the choice of court agreement of its validity.³⁰

Next, Hague Convention on Choice of Court Agreements and Brussels I bis Regulation are only applicable if the condition of the material validity of a choice of court agreement is fulfilled.³¹ This condition means that the parties have consented to a choice of court agreement as such

²⁵ ROZEHNALOVÁ, N., K. DRLIČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 52.

²⁶ HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8. 11. 2013, p. 52 [cit. 1. 8. 2020]. Available at: <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>; see also ROZEHNALOVÁ, N., K. DRLIČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, pp. 242–243.

²⁷ HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8. 11. 2013, p. 42 [cit. 1. 8. 2020]. Available at: <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

²⁸ Art. 3 letter a) Hague Convention on Choice of Court Agreements and Art. 25 para. 1 Brussels I bis Regulation.

²⁹ Art. 3 letter d) Hague Convention on Choice of Court Agreements and Art. 25 para. 5 Brussels I bis Regulation.

³⁰ HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8. 11. 2013, p. 42 [cit. 1. 8. 2020]. Available at: <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

³¹ Art. 3 letter a) Hague Convention on Choice of Court Agreements and Art. 25 para. 1 Brussels I bis Regulation.

an agreement cannot be established unilaterally.³² According to Art. 3 a) of Hague Convention on Choice of Court Agreements and Art. 25 para. 1 of Brussels I bis Regulation, the material validity of a choice of court agreement is to be determined by the law of the country of the court designated in a choice of court agreement.³³ Consequently, the non-designated court is also bound by the law of the court designated in a choice of court agreement when assessing the material validity of a choice of court agreement.³⁴ Therefore, the concept of material validity of a choice of court agreement is regulated in a similar way under both legal instruments.

As far as the condition of the formal validity of a choice of court agreement is concerned, the two legal instruments differ. According to Art. 3 para. 1 Hague Convention on Choice of Court Agreements a choice of court agreement must be concluded or documented i) in writing; or ii) by any other means of communication which renders information accessible to be usable for subsequent reference.³⁵ The second condition is understood in a way that it covers electronic means of data transmission such as e-mail and fax.³⁶ Under Brussels I bis Regulation, however, a choice of court agreement must be i) in writing or evidenced in writing including electronic means of communication; or ii) based on practices established between the parties; or iii) arising out of international trade or commerce usages.³⁷ Thus, compared to Hague Convention on Choice of Court Agreements, Brussels I bis Regulation additionally provides that a choice of court agreement is formally valid if it is concluded in a form that accords with the practices established between the parties or if it in the form common for international trade

³² HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8. 11. 2013, p. 50 [cit. 1. 8. 2020]. Available at: <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

³³ 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 on Choice of Court Agreements*. Oxford: Oxford University Press, 2013, p. 130; 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, pp. 556–558.

³⁴ *Ibid.*

³⁵ Art. 3 letter a) i) and ii) Hague Convention on Choice of Court Agreements.

³⁶ HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8. 11. 2013, p. 54 [cit. 1. 8. 2020]. Available at: <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

³⁷ Art. 25 para. 1 and 2 Brussels I bis Regulation.

and commerce.³⁸ Therefore, Brussels I bis Regulation represents a more favourable regulation since a greater number of choice of court agreements is likely to be considered formally valid.

The biggest difference between the two legal regulations (as far as the definition of the term “a choice of court agreement” is concerned) consists in the fact that Hague Convention on Choice of Court Agreements only applies to exclusive choice of court agreements according to its Art. 3 a).³⁹ Therefore, to invoke the applicability of Hague Convention on Choice of Court Agreements the parties must designate a court or more specific courts of one state to the exclusion of any other courts.⁴⁰ If a choice of court agreement is not exclusive and provides for the courts of two or more contracting states, Hague Convention on Choice of Court Agreements will not be applicable.⁴¹ Unlike Hague Convention on Choice of Court Agreements, however, Brussels I bis Regulation will still apply provided that parties agree on a non-exclusive choice of court agreement.⁴² In other words, if parties decide that two courts of two countries shall decide their dispute, effect will be given to this under Brussels I bis Regulation.⁴³ In the author’s view, Brussels I bis is a more convenient legal regulation as it is likely to cover more choice of court agreements.

³⁸ Art. 3 letter a) i) and ii) Hague Convention on Choice of Court Agreements and Art. 25 para. 1 and 2 Brussels I bis Regulation.

³⁹ Art. 3 letter a) Hague Convention on Choice of Court Agreements.

⁴⁰ BORN, B. G. *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*. The Hague: Kluwer Law International, 2016, pp. 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. and L. WEBSTER. Could the Hague Convention on Choice of Court Agreements 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.

⁴¹ AFFAKI, G. B. and A. G. H. NAÓN. *Jurisdictional choices in times of trouble*. Paris: International Chamber of Commerce, 2015, p. 191; see also NEWING, H. and L. WEBSTER. Could the Hague Convention on Choice of Court Agreements 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.

⁴² Van HOOFT, A. Brexit and the Future of Intellectual Property Litigation. *Journal of International Arbitration*, 2016, Vol. 33, no. 7, p. 559.

⁴³ 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 on Choice of Court Agreements*. Oxford: Oxford University Press, 2013, p. 130.

4 Effects of a Choice of Court Agreement under Hague Convention on Choice of Court Agreements and Brussels I bis Regulation

Put simply, a choice of court agreement under both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation grants jurisdiction to the designated court and deprives a non-designated court of its jurisdiction.⁴⁴

Furthermore, under both legal instruments, the court designated in a choice of court agreement cannot decline its jurisdiction on the ground that another court may more conveniently hear a case (*forum non conveniens*).⁴⁵ Similarly, according to both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation, the court designated in a choice of court agreement shall not dismiss proceedings if another court has been seized first in proceedings involving the same cause of action between the same parties (*lis pendens*).⁴⁶

The difference between the two legal instruments is that Hague Convention on Choice of Court Agreements in its Art. 6 lays down five exceptions to the rule that the proceedings must be dismissed by the non-designated court.⁴⁷ The application of these exceptions may, however, jeopardize the use of choice of court agreements. In the author's view, the regulation in Brussels I bis Regulation is more favourable as it promotes the applicability of choice of court agreements and brings greater certainty to the parties of international commercial trade.

⁴⁴ Art. 5 and 6 Hague Convention on Choice of Court Agreements and Art. 25 and 31 para. 3 Brussels I bis Regulation.

⁴⁵ AFFAKI, G.B. and A.G.H. NAÓN. *Jurisdictional choices in times of trouble*. Paris: International Chamber of Commerce, 2015, p. 191; see also HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8.11.2013, p. 58 [cit. 1.8.2020]. Available at: <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.

⁴⁶ HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8.11.2013, p. 58 [cit. 1.8.2020]. Available at: <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

⁴⁷ Art. 6 Hague Convention on Choice of Court Agreements.

5 Recognition and Enforcement of Judgments under Hague Convention on Choice of Court Agreements and Brussels I bis Regulation

To compare the process of recognition and enforcement of judgments given by courts designated in a choice of court agreement under Hague Convention on Choice of Court Agreements and Brussels I bis Regulation, the term judgment must be interpreted first.

Under both legal regulations “a judgment” means any decision on the merits given by a court, whatever it may be called.⁴⁸ Thus, decisions of church courts, international tribunals, and arbitral awards are excluded from the scope of both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation.⁴⁹ Moreover, under both legal regulations, procedural rulings are excluded except for decisions on costs or expenses.⁵⁰ Next, under both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation an enforceable court settlement is to be enforced in the same manner as a judgment.⁵¹ The difference between the two legal regulations is that Brussels I bis Regulation applies to interim measures.⁵²

Regarding the process of recognition and enforcement, the underlying principle incorporated in both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation is that a judgment given by a court designated in a choice of court agreement must be recognized and enforced in other contracting or member states.⁵³ Furthermore, the recognition and enforcement may be refused on the grounds which derive exclusively from these legal regulations and which must not be deduced from national laws.⁵⁴

⁴⁸ Art. 4 para. 1 Hague Convention on Choice of Court Agreements and Art. 2 letter a) Brussels I bis Regulation.

⁴⁹ ROZEHNALOVÁ, N., K. DRLIČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 258.

⁵⁰ Art. 4 para. 1 Hague Convention on Choice of Court Agreements and Art. 2 letter a) Brussels I bis Regulation.

⁵¹ Art. 12 Hague Convention on Choice of Court Agreements and Art. 59 Brussels I bis Regulation.

⁵² Art. 4 para. 1 Hague Convention on Choice of Court Agreements and Art. 2 letter a) Brussels I bis Regulation; 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.

⁵³ Art. 8 para. 1 Hague Convention on Choice of Court Agreements and Art. 36 and 39 Brussels I bis Regulation.

⁵⁴ ROZEHNALOVÁ, N., K. DRLIČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 264.

Under both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation the review on merits of a judgment is not permitted.⁵⁵ Moreover, according to Art. 45 para. 3 of Brussels I bis Regulation the jurisdiction of the court that granted the judgment may not be reviewed.⁵⁶ Contrastingly, Art. 8 para. 2 of Hague Convention on Choice of Court Agreements provides that the court in which the recognition and enforcement is sought shall be bound by the findings of fact on which the court that granted the judgment based its jurisdiction.⁵⁷ The court in which the recognition and enforcement is sought is free to draw its conclusions of law from these facts when reviewing the jurisdiction of the court that granted the judgment.⁵⁸ Thus, the difference between the two legal instruments is that under Hague Convention on Choice of Court Agreements the court in which the recognition and enforcement is sought is entitled to decide whether a choice of court agreement was within the scope of the court that granted the judgment.⁵⁹ The author believes that the solution adopted in Hague Convention on Choice of Court Agreements is not a desirable one as it brings less certainty to international commercial transactions.

Moreover, the process of recognition under Brussels I bis Regulation is an automatic one, whereas under Hague Convention on Choice of Court Agreements the process of recognition is governed by the law of the state in which the recognition is sought.⁶⁰ The solution adopted in Brussels I bis Regulation seems more comprehensive and practical.⁶¹

⁵⁵ Art. 8 para. 1 Hague Convention on Choice of Court Agreements and Art. 52 Brussels I bis Regulation.

⁵⁶ Art. 45 para. 3 Brussels I bis Regulation.

⁵⁷ Art. 8 para. 2 Hague Convention on Choice of Court Agreements.

⁵⁸ 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 on Choice of Court Agreements*. Oxford: Oxford University Press, 2013, p. 197.

⁵⁹ *Ibid.*, p. 195.

⁶⁰ Art. 14 Hague Convention on Choice of Court Agreements and Art. 36 para. 1 Brussels I bis Regulation; see also HOOFT, A. Van. Brexit and the Future of Intellectual Property Litigation. *Journal of International Arbitration*, 2016, Vol. 33, no. 7, p. 553; see also ROZEHNALOVÁ, N., K. DRLIČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 263.

⁶¹ MASTERS, S. and B. McRAE. What does Brexit mean for the Brussels Regime. *Journal of International Arbitration*, 2016, Vol. 33, no. 7, p. 496.

Next, under Brussels I bis Regulation the courts are obliged to refuse recognition and enforcement of a judgment *ex officio* in case that the criteria for non-recognition or non-enforcement are met.⁶² Using the wording of “may” instead of “shall” in Art. 9 of Hague Convention on Choice of Court Agreements, however, indicates that under Hague Convention on Choice of Court Agreements the courts in which the recognition and enforcement are sought are not obliged to refuse the recognition and enforcement of a judgment. They are simply entitled to do so at their discretion.⁶³ The author believes that the approach adopted in Hague Convention on Choice of Court Agreements brings less certainty to commercial transactions.

As far as the grounds for non-recognition and non-enforcement are concerned, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation incorporate the following grounds: incompatibility with the public policy of the state in which the recognition and enforcement is sought;⁶⁴ insufficient notification of a defendant that the proceedings are being brought;⁶⁵ and the existence of conflicting judgments either from the state in which the recognition and enforcement is sought or from the third state.⁶⁶

Brussels I bis Regulation further adds breach of provisions dealing with insurance, consumer and employment contracts, and exclusive jurisdiction. In these areas, however, choice of court agreements are generally not permitted.⁶⁷ Hague Convention on Choice of Court Agreements additionally stipulates that recognition and enforcement may be refused on the following grounds: nullity and voidness of a choice of court agreement;⁶⁸ the lack

⁶² ROZEHNALOVÁ, N., K. DRLIČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 268.

⁶³ HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8. 11. 2013, p. 96 [cit. 1. 8. 2020]. Available at: <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>

⁶⁴ Art. 9 letter e) Hague Convention on Choice of Court Agreements and Art. 45 para. 1 letter a) Brussels I bis Regulation.

⁶⁵ Art. 9 letter c) Hague Convention on Choice of Court Agreements and Art. 45 para. 1 letter b) Brussels I bis Regulation.

⁶⁶ Art. 9 letters f), g) Hague Convention on Choice of Court Agreements and Art. 45 para. 1 letters c), d) Brussels I bis Regulation.

⁶⁷ Art. 45 para. 1 letter e) Brussels I bis Regulation.

⁶⁸ *Ibid.*, Art. 9 letter a).

of the capacity to conclude a choice of court agreement;⁶⁹ and obtainment of the judgment by fraud.⁷⁰ In the author's opinion, the regulation adopted in Hague Convention on Choice of Court Agreements is more restrictive as far as recognition and enforcement of judgments given by courts designated in a choice of court agreements and thus less efficient.

6 Conclusion

This article aimed to demonstrate that Hague Convention on Choice of Court Agreements does not present a complete and comprehensive solution in terms of choice of court agreements compared to Brussels I bis Regulation.

Hague Convention on Choice of Court Agreements and Brussels I bis Regulation both govern choice of court agreements and are only applicable if the condition of an international element is fulfilled. The regulation of an international element of jurisdictional issues under Brussels I bis Regulation seems slightly more convenient as it invokes the universal application of this legal instrument.

As far as the scopes of application of the two legal instruments are concerned, they both apply in civil and commercial matters excluding arbitration, social security, questions of status and capacity, insolvency, family law, and wills and successions. Hague Convention on Choice of Court Agreements additionally excludes consumer and employment contracts, competition law claims, personal injury, damage to property, tort claims, liability for nuclear damage, immovable property, and carriage of passengers and goods which makes its material scope of application narrower and thus less efficient. The fact that Hague Convention on Choice of Court Agreements has a wider scope of geographical application is not entirely relevant given the fact that where a case is "regional", Brussels I bis Regulation prevails.

Furthermore, the understanding of a choice of court agreement under Hague Convention on Choice of Court Agreements is less convenient as Convention applies to purely exclusive choice of court agreement and non-exclusive choice of court agreements invoke its inapplicability.

⁶⁹ *Ibid.*, Art. 9 letter b).

⁷⁰ *Ibid.*, Art. 9 letter d).

Moreover, the regulation of formal validity of choice of court agreements under Hague Convention on Choice of Court Agreements is more restrictive compared to Brussels I bis Regulation. Thus, Brussels I bis Regulation is likely to cover more choice of court agreements which makes this legal instrument more advantageous.

Regarding the effects of choice of court agreements, both legal instruments stipulate that the court designated in choice of court agreements shall decide the case and the non-designated court shall decline its jurisdiction. Unlike Brussels I bis Regulation, however, Hague Convention on Choice of Court Agreements incorporates five exceptions to the rule that the non-designated court shall decline its jurisdiction which weakens the position of choice of court agreements.

As far as the process of recognition and enforcement is concerned, Brussels I bis Regulation presents a more suitable legal instrument for the following reasons. Firstly, unlike Hague Convention on Choice of Court Agreements, the court in which the regulation and the enforcement is sought must not review the jurisdiction of the court that granted the judgment. Secondly, unlike Hague Convention on Choice of Court Agreements, the process of recognition of a judgment under Brussels I bis Regulation is automatic and not governed by the law of the requested state. Thirdly, unlike Hague Convention on Choice of Court Agreements under Brussels I bis Regulation, the courts are obliged to refuse recognition and enforcement of a judgment *ex officio* in case that the criteria for non-recognition or non-enforcement are met; they are not entitled to decide on non-recognition or non-enforcement at their discretion. Next, Brussels I bis Regulation incorporates fewer grounds for non-recognition and non-enforcement.

For all the reasons mentioned above, the author believes that Brussels I bis Regulation presents a more favourable, comprehensive, and efficient legal instrument when compared to Hague Convention on Choice of Court Agreements. In the author's opinion, the regulation of choice of court agreements adopted in Brussels I bis Regulation brings greater certainty to international commercial transactions as this legal regulation applies to a greater number of a choice of court agreements.

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