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The Hague Conference on Private International Law – an update on current projects, priorities and the latest developments regarding the Choice of Court Convention 2005 and Judgments Convention 2019

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The Work of the HCCH in Transnational Litigation

Dr Christophe Bernasconi
Secretary General HCCH

IBA Annual Litigation Forum

Session: The Hague Conference on Private International Law – an update on current projects, priorities and the latest developments regarding the Choice of Court Convention 2005 and Judgments Convention 2019

Amsterdam, Thursday, 18 April 2024

THE ORGANISATION

- Intergovernmental organisation (origin going back to 1893)
- Works for the “progressive unification of the rules of private international law” (Art. 1 Statute)
- Develops “HCCH Conventions” (and sometimes other instruments) & monitors their practical operation
- Practical impact for individuals, families, and companies

SELECTION OF CORE HCCH CONVENTIONS

International Family & Child Protection Law

- 1980 Child Abduction (103)
- 1993 Adoption (106)
- 1996 Child Protection (54)
- 2000 Protection of Adults (15)
- 2007 Child Support (51)
- 2007 Maintenance Protocol (32)

Transnational Litigation & Apostille

- 1961 Apostille (126)
- 1965 Service (84)
- 1970 Evidence (66)
- 1980 Access to Justice (28)
- **2005 Choice of Court (34)**
- **2019 Judgments (29)**

International Commercial, Digital & Financial Law

- 1985 Trusts (14)
- 2006 Securities (3)
- 2015 Choice of Law Principles

EFFECTIVE MULTILATERALISM

Total number of
ratifications of / accessions to / approvals of
HCCH Conventions:

1 013

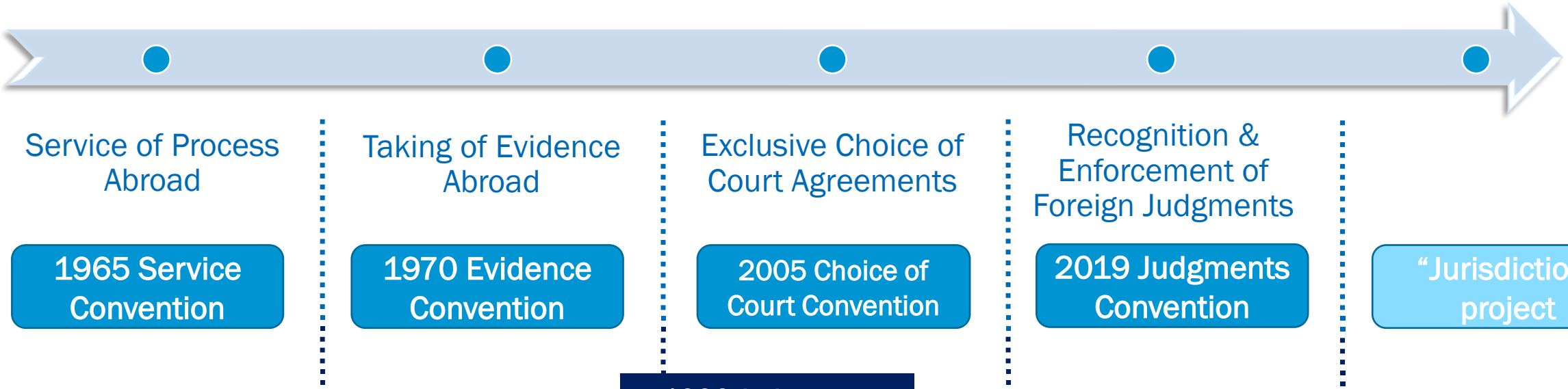
would require

32 237

bilateral agreements
to establish same number of treaty connections

TRANSNATIONAL LITIGATION

THE CORE HCCH TRANSNATIONAL LITIGATION CONVENTIONS



1980 Access to Justice Convention

1961 Apostille Convention

2005 CHOICE OF COURT CONVENTION

&

2019 JUDGMENTS CONVENTION

2005 CHOICE OF COURT CONVENTION

- *Convention of 30 June 2005 on Choice of Court Agreements* (EIF: 1 Oct 2015)
- 33 States and the EU are bound by the Convention (**34** in total)
- Contracting Parties include Mexico (EIF: 1 Oct 2015), Singapore (EIF: 1 Oct 2016), the **UK** (EIF: 1 Oct 2015)
- Promotes *party autonomy* and ensures *effectiveness* of *exclusive* "forum selection / jurisdiction" clauses (presumption in favour of exclusiveness)
- Provides ***legal certainty*** and ***predictability*** in international commercial transactions, thus allowing for effective planning of possible litigation (alleviates the risk of parallel proceedings and conflicting judgments)
- ***Three Key Obligations***
- Offers an effective *alternative to arbitration*

2019 JUDGMENTS CONVENTION

- *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*
- Entered into force on 1 September 2023 (shorter than average time it takes for HCCH Conventions to enter into force)
- 28 States and the EU are bound by the Convention (**29** in total)
- Contracting Parties include EU, Ukraine, and Uruguay. Recent *signatory*: United Kingdom
- Global framework for recognition and enforcement of foreign judgments in civil or commercial matters – ***"game-changer"***
- Provides greater ***legal certainty*** and ***predictability*** in recognition and enforcement, reducing costs, timeframes, and risks in cross-border dealings and dispute resolution => *meaningful (effective) judgments*
- Promotes effective *access to justice*, facilitates *multilateral trade and investment*, and mobility – ***World Bank's Business Ready (B-READY) report***

TRANSNATIONAL LITIGATION: LOOKING AHEAD

SPECIAL COMMISSION 65/70/80

- Special Commission on the practical operation of the 1965 Service, 1970 Evidence, and 1980 Access to Justice Conventions (2 – 5 July 2024)
- Key questions:
  - Use of *modern technology* (incl. e-transmission of requests; taking of evidence by video);
  - "Contracting out" of 1965 Service Convention (*Rockefeller* decision US Supreme Court of California) – Service Convention is "non-mandatory but exclusive"
- Forthcoming: new Practical Handbooks on the Service and Evidence Conventions.
- Practical IBA input would be most valuable

“JURISDICTION” PROJECT

- Working Group for the development of a new instrument on matters related to jurisdiction in transnational civil or commercial litigation; its focus is on developing rules to address *parallel proceedings* and *related actions/claims*, in civil or commercial matters (which may occur when separate proceedings are instituted before the courts of different States).
- An *exchange of views with practitioners*, representatives of the judiciary, and other experts of diverse legal traditions with practical experience in parallel proceedings and related actions will be explored.
- A *“further piece of the puzzle”* under the original Judgments Project, complementing the 2005 Choice of Court and 2019 Judgments Conventions.

HCCH

Connecter Protéger Coopérer Depuis 1893
Connecting Protecting Cooperating Since 1893

THANK YOU!

Dr Christophe Bernasconi

Secretary General, HCCH

The Judgments Project
- state of play -

Dr Norel Rosner

This presentation does not present in any way the opinions and/or positions of the European Commission nor of the European Union. Any views expressed herein are authors' only.

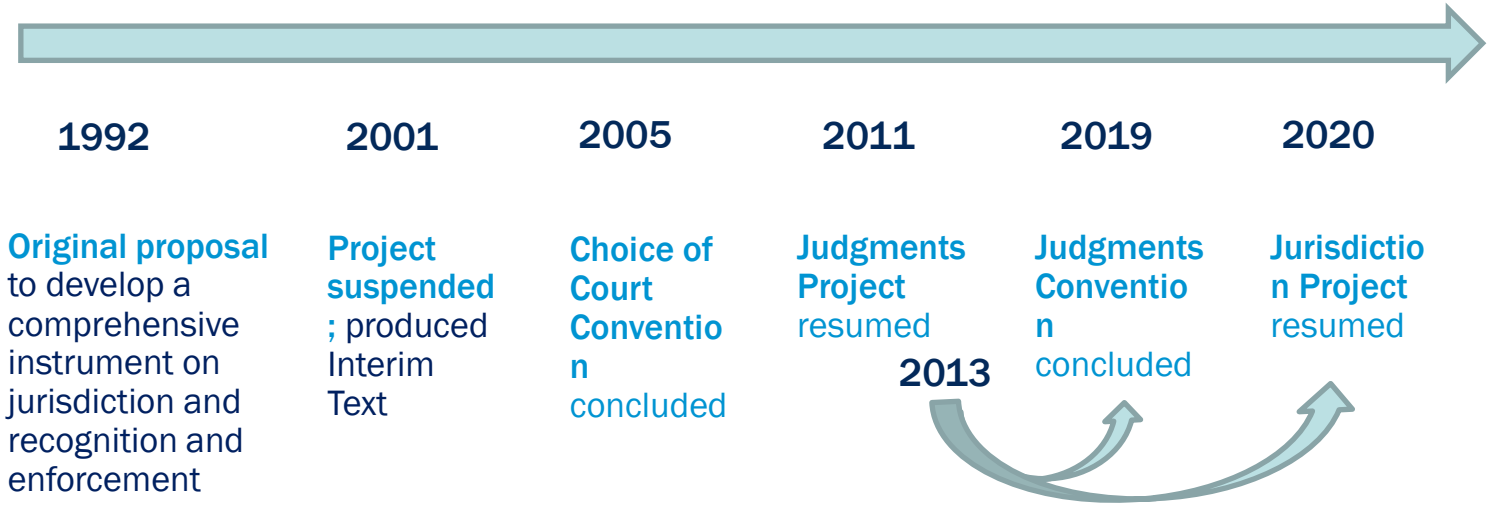
Issues covered

- Background and history of the project
- Architecture of the Choice of Court Convention
- Architecture of the Judgments Convention
- Coherence between the two instruments
- Geographical scope and entry into force
- Current work
- Some thoughts on relevant EU developments

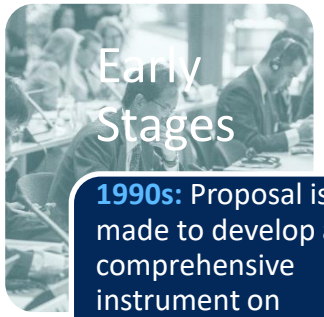
Background and history

- The Judgments Project can be traced back to 1992
- In 2001 a second attempt failed
- The first outcome in this project dates back to 2005 (Choice of Court Convention – approved by the EU in 2015)
- The Judgments Convention was adopted in 2019 after seven years of discussions – EU acceded in August 2022;
- Entered into force on 1 September 2023;
- Residual work on jurisdiction.

History of the Judgments project



History of the Judgments Project



Early Stages

1990s: Proposal is made to develop a comprehensive instrument on jurisdiction and recognition and enforcement

2001: Project is split; recognition and enforcement and jurisdiction will become separate instruments

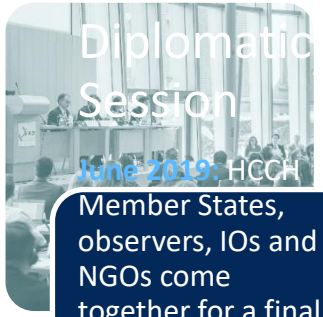
2005:

Project Developme nt

2011: Experts' Group begins assessing the possible merits of continuing the Judgments Project

2012-2016: Working Group meets to prepare a draft text for deliberation at the Special Commission

2016-2018:



Diplomatic Session

June 2019: HCCH Member States, observers, IOs and NGOs come together for a final round of negotiation on the Judgments Convention

2 July 2019: Consensus is reached and the Judgments Convention is

Architecture of the Choice of Court Convention

- The chosen court must hear the dispute (Article 5)
- Any non-chosen court must suspend / dismiss proceedings (Article 6)
- Judgment given by the chosen court must be recognised and enforced (Article 8)

Geographical scope

- The European Union (including Denmark), Mexico, Montenegro, Singapore, United Kingdom and soon Moldova (1 July 2024)

- Other signatory States: Albania, China, Israel, North Macedonia, United States

Architecture of the Judgments Convention

- Main obligation under international law found in Article 4: **to recognise and enforce judgments given by courts of another Contracting State**
- Provides for a "**floor**" for recognition and enforcement
- Subject to certain refusal grounds and provided that the jurisdiction in the court of origin complies with the rules of the Convention
- More favourable regimes under national law can still apply ("the **ceiling**")

EU accession process

- Proposal by the Commission in July 2021;
- Consent by the Parliament in June 2022;
- Council Decision in July 2022;
- Deposit of instrument of accession in August 2022;
- Entry into force 1 September 2023;
- Declaration made by EU: content and background.

Entry into force of the Convention

- Entered into force **on 1 September 2023**;
- To be applied between the **EU and Ukraine**;
- Courts in the EU can recognise and enforce Ukrainian judgments for proceedings instituted there after 1 September 2023;
- Uruguay also ratified on 2023 and will apply the Convention as of 1 October 2024;
- Other signatory States: Costa Rica, Israel, Montenegro, North Macedonia, Russia, United Kingdom, United States.
- Other prospective signatory States?

Coherence between the two conventions

- Scope of application – similar but not quite
- Exclusive/non-exclusive choice of court agreements
- Direct jurisdiction
- Rules on parallel proceedings

Work on jurisdiction

- Background information;
- Current work started in February 2020;
- Work gathered pace after September 2022;
- Direct jurisdiction is a sensitive area;
- More consensus on work on parallel proceedings;
- Quasi-consensus on looking at jurisdiction of courts in the context of parallel proceedings;
- Different priority criteria envisaged;
- Prospects for the future.

Relevant recent EU developments

- *Inkreal s.r.o. v Duha reality s.r.o. Case C-566/22*
- Article 25(1) of the Brussels Ia Regulation (No 1215/2012)

“must be interpreted as meaning that an agreement conferring jurisdiction by which the parties to a contract who are established in the same Member State agree on the jurisdiction of the courts of another Member State to settle disputes arising out of that contract is covered under that provision, even if that contract has no other connection with that other Member State.”

Contrast Article 25(1) Brussels Ia and Article 1(2) Choice of Court

Brussels Ia

"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."

Choice of Court

"For the purposes of Chapter II, 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."

Questions?

Thank you

Choice of Court Agreement Act ("CCAA")

EJC designates Singapore:

11.—(1) A Singapore court, designated in an exclusive choice of court agreement for the purposes of deciding a dispute, has jurisdiction to decide the dispute, unless the agreement is null and void under the law of Singapore.

(2) A Singapore court that has jurisdiction under subsection (1) **cannot decline to exercise jurisdiction** on the ground that the dispute should be decided in a court of another State.

CCAA

EJC does not point to Singapore:

12.—(1) Despite any other written law or rule of law, if an exclusive choice of court agreement does not designate any Singapore court as a chosen court, **a Singapore court must stay or dismiss** any case or proceeding to which the agreement applies, unless the Singapore court determines that —

(a) the agreement is null and void under the law of the State of the chosen court;

(b) a party to the agreement lacked the capacity, under the law of Singapore, to enter into or conclude the agreement;

(c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of Singapore;

(d) the agreement cannot reasonably be performed for exceptional reasons beyond the control of the parties to the agreement; or

(e) the chosen court has decided not to hear the case or proceeding.

(2) This section does not affect the ability of a Singapore court to stay or dismiss the case or proceeding on other grounds.

Key decisions by the Singapore Court

6DM (S) Pte Ltd v AE Brands Korea Ltd and others [2022] 3 SLR 1300

- Manufacturer alleged non-payment of invoices under three Distributorship Agreements, all of which were governed by English law and provided for:
  - 2016: the exclusive jurisdiction of "*the local courts*"
  - 2017: the exclusive jurisdiction of the Courts of England and Wales; and
  - 2020: the exclusive jurisdiction of the Courts of England and Wales.
- Manufacturer terminated all three Distributorship Agreements
- Distributor started proceedings in the Singapore Court, alleging misrepresentation and conspiracy
- In reliance on the EJCs, Manufacturer sought a stay of the Singapore Court proceedings under section 12 of the CCAA

Key decisions by the Singapore Court

6DM (S) Pte Ltd v AE Brands Korea Ltd and others [2022] 3 SLR 1300

- Stay ordered in favour of Manufacturer:
  - Tortious claims arose in connection with Distributorship Agreements
  - Section 12 of CCAA (ie where Singapore is not the chosen court) requires mandatory stay unless one of the five exceptions apply;
  - Exceptions are narrow and will not be lightly invoked: "*highly probable*"; "*manifest*"
- Distributor argued section 11 of the CCAA (ie where Singapore is the chosen court) applicable because:
  - "*local courts*" meant Singapore Courts; and
  - Effectively trumps the EJCs in the 2017 and 2020 Distributorship Agreements because of section 11(2)

Key decisions by the Singapore Court

6DM (S) Pte Ltd v AE Brands Korea Ltd and others [2022] 3 SLR 1300

- Court held section 11(2) did not apply. All three EJCs are in favour of the English courts
- Even if it applied, "*s 11(2) was never intended to apply in a situation where s 12(1) is engaged*" [96]:

> *"[95] …section 11(2) concerns situations where a Singapore court may consider 'that the dispute should be decided in a court of another state'…; in other words, where the Singapore court is faced with arguments of improper forum. Section 11(2) cannot be the basis for a Singapore court ignoring the EJCs in the [2017 and 2020 Agreements]; [the Distributor] itself concedes that these two EJCs attract the operation of s 12(1) and s 12(1) is framed in mandatory terms ('must stay or dismiss any case or proceeding'..*"

Key decisions by the Singapore Court

6DM (S) Pte Ltd v AE Brands Korea Ltd and others [2022] 3 SLR 1300

- The Singapore court endorsed the Hartley Dogauchi Report that there are only 2 situations where the dispute should be decided by another court under section 11(2):
  - First, under the doctrine of *forum conveniens*
  - Second, where *lis pendens* applies
- *Qompass Voyage Ltd v APACPAY Pte Ltd* [2023] SGHCR 20 in relation to refusing a stay on public policy grounds, the Singapore court held that putting a party through considerable expense pursuing an action in one jurisdiction, and required to enforce in another, does not give rise to manifest injustice.

Key decisions by the Singapore Court

Ermgassen & Co Ltd v Sixcap Financials Pte Ltd [2018] SGHR 8

- *Ex parte* application under the CCAA for recognition and enforcement of summary judgment from English courts
- For such an application, the Singapore Rules of Court set out mandatory requirements, including the production of "*complete and certified copy*" of the decision to be recognised and enforced
- Not all these requirements were met
- Taking guidance from the Hartley/Dogauchi report, the Singapore Court adopted a very loose interpretation to these requirements
- That excessive formalism should be avoided
- Reflective of judiciary's intent on facilitating recognition and enforcement of foreign judgments?

Hague Convention on Choice of Court Agreements 2005 ("Choice of Court Convention")

Article 16

Transitional provisions

(1) This Convention shall apply to exclusive choice of court agreements concluded after its entry into force for the State of the chosen court.

(2) This Convention shall not apply to proceedings instituted before its entry into force for the State of the court seised.

Private International Law (Implementation of Agreements) Act 2020

Schedule 5, paragraph 7

Interpretation of the 2005 Hague Convention as it has the force of law in the UK

For the purposes of Article 16 of the 2005 Hague Convention, as it has the force of law in the United Kingdom by virtue of section 3D(1) of the Civil Jurisdiction and Judgments Act 1982 (as inserted by section 1(2) of this Act), the date on which the 2005 Hague Convention entered into force for the United Kingdom is 1 October 2015, and accordingly references in the Convention to a Contracting State are to be read as including, without interruption from that date, the United Kingdom.

European Commission Notice to Stakeholders 27 August 2020

3.3 Aspects related to choice of court agreements

Sections 3.1. and 3.2 of this notice also apply to the recognition and enforcement of a judgment given by a court in the United Kingdom designated in a choice of court agreement. This means that proceedings instituted, based on a choice of court agreement, in UK courts after the end of the transition period no longer benefit from EU rules on recognition and enforcement in EU Member States.

The United Kingdom has expressed its intention to accede in its own right to the 2005 Hague Convention on Choice of Court Agreements after the end of the transition period. The Convention will apply between the EU and the United Kingdom to exclusive choice of court agreements concluded after the Convention enters into force in the United Kingdom as party in its own right to the Convention.

Etihad Airways PJSC v Flother [2020] EWCA Civ 1707

Choice of Court Convention

Article 3

Exclusive choice of court agreements

For the purposes of this Convention –

a) "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;

b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise;

c) 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;

d) an exclusive choice of court agreement that forms part of a contract shall 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.

Choice of Court Convention, Explanatory Report (Hartley Dogauchi)

105 **Asymmetric agreements.** Sometimes a choice of court agreement is drafted to be exclusive as regards proceedings brought by one party but not as regards proceedings brought by the other party. International loan agreements are often drafted in this way. A choice of court clause in such an agreement may provide, “Proceedings by the borrower against the lender may be brought exclusively in the courts of State X; proceedings by the lender against the borrower may be brought in the courts of State X or in the courts of any other State having jurisdiction under its law.”

106 It was agreed by the Diplomatic Session that, in order to be covered by the Convention, the agreement must be exclusive irrespective of the party bringing the proceedings. So agreements of the kind referred to in the previous paragraph are not exclusive choice of court agreements for the purposes of the Convention. However, they may be subject to the rules of the Convention on recognition and enforcement if the States in question have made declarations under Article 22.

Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ("Brussels Recast")

Article 25(1)

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, 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.

Article 29(1)

Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

Article 31(3)

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.

Brussels Recast

Recital 22

However, in order to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics, it is necessary to provide for an exception to the general *lis pendens* rule in order to deal satisfactorily with a particular situation in which concurrent proceedings may arise. This is the situation where a court not designated in an exclusive choice-of-court agreement has been seised of proceedings and the designated court is seised subsequently of proceedings involving the same cause of action and between the same parties. In such a case, the court first seised should be required to stay its proceedings as soon as the designated court has been seised and until such time as the latter court declares that it has no jurisdiction under the exclusive choice-of-court agreement. This is to ensure that, in such a situation, the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it. The designated court should be able to proceed irrespective of whether the non-designated court has already decided on the stay of proceedings.

This exception should not cover situations where the parties have entered into conflicting exclusive choice-of-court agreements or where a court designated in an exclusive choice-of-court agreement has been seised first. In such cases, the general *lis pendens* rule of this Regulation should apply.

Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019 ("Judgments Convention")

Article 5(1)(m)

Bases for recognition and enforcement

A judgment is eligible for recognition and enforcement if one of the following requirements is met –

The judgment was given by a court designated in an agreement concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference, other than an exclusive choice of court agreement.

For the purposes of this sub-paragraph, an "exclusive choice of court agreement" means an agreement concluded by two or more parties that designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one State or one or more specific courts of one State to the exclusion of the jurisdiction of any other courts.

Choice of Court Convention

Article 26(6)

Relationship with other international instruments

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.

Future potential..?

Singapore International Commercial Court

- Launched in 2015
- Facilitates resolution of cross-border commercial and insolvency disputes
- Established reputation for neutrality
- Bench comprises internationally renowned judges
- 27 Singapore judges, and 20 international judges, including:
  - Justice Lord Neuberger of Abbotsbury (UK)
  - Justice Lord Jonathan Hugh Mance (UK)
  - Justice Dominique T. Hascher (France)
  - Justice Christopher Scott Sontchi (US)
- Straightforward process for non-Singapore-qualified practitioners to have a right of audience

Decision and Rationale

77. Having considered the responses received and wider stakeholder feedback, the Government has concluded that it is the right time for the UK to join Hague 2019 and will seek to do so as soon as practicable.

Signature, Ratification and Entry into Force

82. The Government will move to sign the Convention as soon as possible, as an important signal of its commitment to multilateral Private International Law instruments and to help improve legal certainty for businesses and consumers involved in cross-border litigation. The Convention will enter into force for the UK 12 months after the date it deposits its instrument of ratification.

83. Ratification will take place once all of the necessary implementing legislation and rules have been put in place to facilitate the Convention's smooth operation in the UK.

84. The Government will lay the Convention in Parliament ahead of ratification and will ensure that implementing legislation is in place for the three jurisdictions ahead of doing so. Hague 2019 would be implemented in UK domestic law principally using powers in the Private International Law (Implementation of Agreements) Act 2020, subject to appropriate parliamentary scrutiny.

85. The Government also intends to work with the Crown Dependencies and the Overseas Territories to determine if the Convention should extend to these territories.

Implementation and Declarations

86. The Government has concluded that the Convention should have UK-wide extent based on the benefits to all three of the UK jurisdictions expressed by respondents.

87. The Government intends that Hague 2019 will be implemented via powers in the Private International Law (Implementation of Agreements) Act 2020, as well as via rules of court in all 3 jurisdictions of the UK.

88. The Government intends that Hague 2019 will be implemented using a registration model, as it is clear and consistent with previous approaches taken to foreign judgments including in particular the 2005 Hague Convention model. It would also allow for the UK to monitor the number of requests under the Convention.