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BREXIT and English Jurisdiction Agreements: The Post-Referendum Legal Landscape

Mukarrum Ahmed*

Abstract

This article presents an early view of the impact of BREXIT on English jurisdiction agreements in international commercial contracts. It is almost certain that the Brussels I Recast Regulation will cease to apply in the UK after BREXIT and as a result the near automatic recognition and enforcement of English court judgments in the continuing EU (and Lugano Convention Contracting States) and *vice versa* will be in jeopardy. Contrary to some recent speculation, it is unlikely that the Brussels Convention will revive and the option to adhere to the Lugano Convention also does not seem to be viable for a newly 'liberated' UK. The article suggests practical solutions to minimise the litigation risk arising from English jurisdiction agreements in relation to the EU. Significantly, the Hague Convention on Choice of Court Agreements can be harnessed to regulate English exclusive jurisdiction agreements in relation to the EU in matters within the scope of the Convention. If the courts of a post-BREXIT EU Member State are seised in a case concerning an English exclusive jurisdiction agreement, Article 6 of the Hague Convention should accord deference to the elected forum.

* Lecturer in Business Law at Lancaster University Law School. This research paper was presented at the "Changes and Challenges in Cross-Border Litigation - A Post-Referendum View from the UK" conference on 7 October 2016 at the Institute of Advanced Legal Studies, University of London. The paper has materially benefited from the feedback received at the IALS conference.

Introduction

The initial shock at the UK's referendum vote must be replaced by a reasoned consideration of how best to respond in an uncertain situation. A decision for those entering into cross border commercial contracts in the post-referendum legal landscape is what to do about an English jurisdiction provision in the contract. The referendum result hasn't itself changed anything legally, but it may be necessary to invoke these jurisdiction provisions of a contract in a few years' time, when the legal framework might be different. It should be noted that the implications of BREXIT in relation to English jurisdiction agreements are not yet fully clear. This article will attempt to give an early view on the implications for the topic under discussion of the UK leaving the EU at some point in the future as a result of the majority vote in the EU referendum in the UK in June 2016 to leave the EU.

The Aftermath of the Brussels I Recast Regulation: Revival of the Brussels Convention and the Right to Adhere to the Lugano Convention?

The jurisdiction of the English courts and the courts of other EU Member States in civil and commercial matters is currently governed by the 2012 Brussels I Recast Regulation.¹ The Regulation provides that a choice of jurisdiction by the parties should be upheld and that judgments given by the courts of one Member State should be enforced in all other Member States. After BREXIT, the Brussels I Recast Regulation will in all probability cease to apply to the UK, which has led some lawyers in continuing EU Member States to promote the idea that commercial litigation that might have traditionally come to the English courts should instead be diverted to the other emerging European centres of international litigation. English lawyers are naturally perturbed by such a prospect. What the post-BREXIT jurisdiction and enforcement landscape will look like is uncertain. Lawyers can debate enthusiastically whether judgments given in proceedings commenced before BREXIT will continue to be enforceable after, whether the 1968 Brussels Convention² will be restored, whether the pre-Brussels Convention bilateral treaties between the UK and individual Member States will revive, whether the UK has a right to adhere to the 2007 Lugano Convention³ or, if not, whether one or more of the existing Contracting States BREXIT will block the UK's doing so.⁴

The prospects of the Brussels and Lugano Conventions as viable alternatives for the UK after BREXIT are discussed by Dickinson in a recent article.⁵ The author agrees with the opinion

¹ Council Regulation (EU) 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 (recast) [2012] OJ L351/1. ('Brussels I Recast Regulation').

² 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters OJ L 299, 31.12.1972, p. 32. ('Brussels Convention')

³ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 339/3, 21.12.2007, OJ 2009, L 147/5. ('Lugano Convention')

⁴ Article 72 of the Lugano Convention.

⁵ See A Dickinson, *Back to the Future: The UK's EU Exit and the Conflict of Laws* 12 *Journal of Private International Law* 195, 201-207 (2016).

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of academic commentators that it is politically unlikely that the UK will continue to apply either of those Conventions after BREXIT.⁶ The Lugano Convention is too heavily influenced by the jurisprudence of the Court of Justice of the European Union⁷ (CJEU) because of its parallelism to the 2001 Brussels I Regulation⁸ and it provides for a strict race to the court through the *lis pendens* rule.⁹ It seems unlikely that the mutual trust constraints imposed by a European civil procedural regime will appeal to a newly ‘liberated’ UK. A post-BREXIT UK is likely to want to keep its indigenous rules of jurisdiction (at least in England and Wales) with a discretionary system for declining jurisdiction through the doctrine of *forum non conveniens*.¹⁰ Significantly, in relation to exclusive jurisdiction agreements the Brussels Convention and the Lugano Convention both have the severe drawback that the *Gasser* case¹¹ still applies and the chosen court cannot proceed to hear the case while a first seised non-chosen court in a Contracting State to the Brussels or Lugano Convention is hearing the case.

The chances of cross fertilization of legal concepts from one legal tradition to another in the form of methodological pluralism (eclecticism) or as a catalyst for the synthetization or integration of legal concepts is multiplied manifold due to the interface created between the EU’s harmonised private international law rules and an ever resilient English common law tradition with its own sophisticated and indigenous conflict of laws regime.¹² Indeed, it would be trite to comment that the successive waves of EU private international law regulations emanating from Brussels interact with the procedural, substantive and choice of law rules of the legal systems of Member States and thus provide a unique example of private international law as comparative law in action.¹³ BREXIT will result in the cultural loss of

⁶ *ibid* 210; P Beaumont, *Respecting Reverse Subsidiarity is an excellent strategy for the European Union at The Hague Conference on Private International Law: Currently being well deployed in the Judgments Project*, 2 Centre for Private International Law Aberdeen Working Paper Series, Working Paper No. 2016/3, 4, http://www.abdn.ac.uk/law/documents/CPIL_Working_No_2016_3_by_Beaumont.pdf (accessed 25 August 2016); B Hess, *Back to the Past: BREXIT und das europäische internationale Privat- und Verfahrensrecht*, 36 *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 409 (2016); J Basedow, *Brexit und das Privat- und Wirtschaftsrecht* 24 *Zeitschrift für Europäisches Privatrecht (ZEuP)* 567-572 (2016), notes that the UK is not entitled to join the Lugano Convention as it is not an EFTA Member State (nor an EEA Member) (Article 70).

⁷ Article 1(1) of Protocol 2 on the Uniform Interpretation of the Lugano Convention; The courts of a Contracting State applying the Lugano Convention shall ‘pay due account’ to the principles laid down by any relevant decisions on the Lugano Convention (1988), Brussels I Regulation (2001), Brussels I Recast Regulation (2012), Brussels Convention (1968) and the Convention between the EU and Denmark applying the Brussels I Regulation to that Member State. See TC Hartley, *Choice of Court Agreements Under the European and International Instruments* 15-18 (OUP 2013).

⁸ Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [2001] OJ L12/1 (‘Brussels I Regulation’).

⁹ Article 27 of the Lugano Convention.

¹⁰ *Forum non conveniens* was developed in Scotland and brought into English law in the last quarter of the twentieth century, See RA Brand, *Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments* 37 *Texas International Law Journal* 467, 469-471 (2002).

¹¹ Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693; cf Articles 31(2)-(4) and Recital 22 of the Brussels I Recast Regulation.

¹² See R Michaels, *The Functional Method of Comparative Law* in M Reimann and R Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 339 (OUP 2006).

¹³ See M Reimann, *Comparative Law and Private International Law* in M Reimann and R Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 1363 (OUP 2006).

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the influence of common law concepts in the enforcement of jurisdiction agreements and the management of parallel proceedings in the EU. In similar vein, developments in the harmonised EU private international law sphere will no longer affect the course of international commercial litigation before the English courts.

In the immediate fallout of the BREXIT referendum speculation on the likely future private international law regime between the UK and the EU will not reduce the uncertainty and offer little help to those who must make a decision now.

Choice of English Jurisdiction and Enforcement Risk¹⁴ in the EU

The first question is what the jurisdiction agreement in any particular contract is trying to achieve. If a fundamental objective of the jurisdiction clause is to provide a judgment that will be enforceable throughout the EU, then the uncertainties of the post-referendum world come into play. There is a real risk that, with the departure of the Brussels I Recast Regulation and the uncertainties over Lugano and other issues, an English judgment will not be readily enforceable in the continuing EU and the Lugano Convention Contracting States and *vice versa*. Possible responses where enforceability of a judgment in the continuing EU is an important factor are discussed below.

There are, however, many reasons for a choice of jurisdiction save for the enforceability of the resulting judgment within the continuing EU. For example, the party against whom enforcement is likely to be required may not have any accessible assets in the EU. Most obviously, the party might have assets in the UK or otherwise outside the EU, in which case the issues will be the same pre-BREXIT as post-BREXIT. In some instances, enforceability might not be a major issue. For instance, a party may have sufficient security against which to discharge its counterparty's obligations within the jurisdiction. Or a party may conclude that it is more likely to be the sued rather than sue the counterparty. Or enforcement risk may simply not be a big factor for the particular counterparty. In these situations, a jurisdiction clause may fulfil a more defensive role of ensuring that the party can only be sued in a court in which it has confidence. If so, again the considerations may not have changed significantly as a result of the referendum vote. Post-BREXIT, a jurisdiction clause in favour of the English courts may not require courts in EU Member States to defer to the English courts in quite the same way or for the same reasons as now, but the counter may be that, if so, the English courts will, contrary to the current position, be able to grant anti-suit injunctions to restrain a party from pursuing proceedings in an EU court.¹⁵ A party with any business, presence or assets in the UK cannot afford to ignore an injunction. However, it is possible that Scotland may choose after BREXIT to mirror the Brussels I Regulation regime

¹⁴ See R Fentiman, *International Commercial Litigation*, Chapter 2 (2nd Edition, OUP 2015): Enforcement risk is a constituent part of litigation risk and has to be factored into the costs associated with entering into a particular cross border commercial transaction. It may be defined as the risk that a judgment debtor with worldwide assets will disperse or conceal those assets, and the risk that a judgment obtained in one court will be unenforceable elsewhere.

¹⁵ See n 35 below.

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unilaterally even if it cannot remain a party to the Regulation or the Brussels or Lugano Conventions and hence Scottish courts may respect the CJEU ban on anti-suit injunctions in cases involving EU Member States.¹⁶

EU Enforceability: Practical Solutions

If enforceability of a judgment throughout the continuing EU is important, there are four solutions in circumstances where, pre-referendum, jurisdiction would have been given to the English courts.

First, give jurisdiction to the courts of an EU Member State or a Lugano Convention Contracting State (Norway, Iceland and Switzerland). This depends upon being comfortable with proceedings in that court, including as to its procedures, costs, speed and outcomes. This is already sometimes done in, for example, security agreements where the security in question is located in another EU Member State.

Second, give non-exclusive jurisdiction to the English courts.¹⁷ This cautious approach hedges the parties' choice of jurisdiction and allows the position to be reconsidered at the time when legal proceedings are commenced. If at that time enforcement remains important and an English judgment is enforceable in the EU, then the English courts can be used; if, however, an English judgment is not enforceable in the EU, it will allow the use of other courts. A variant of non-exclusive jurisdiction clauses is the asymmetric or unilateral jurisdiction agreement, which is commonly used in cross border finance contracts.¹⁸ This binds one party to sue exclusively in the primary non-exclusive forum, but allows the other party to commence proceedings in that court or in any other court of competent jurisdiction. The French Cour de cassation has cast some doubt on the validity of these clauses under Article 23 of the Brussels I Regulation in *Mme X v Rothschild*¹⁹ and Article 23 of the Lugano Convention in *ICH v Credit Suisse*.²⁰ However, the position has been somewhat ameliorated by the most recent Cour de cassation decision in *Apple Sales International v eBizcuss*.²¹ Moreover, doubt as to a matter of EU law may be less significant if the UK is outside the EU because the English courts have traditionally enforced these clauses.²² It could, however,

¹⁶ Anti-suit injunctions are called 'interdicts of foreign actions' in Scotland, see PR Beaumont and PE McEleavy, *Anton's Private International Law*, 367-371 (3rd edn, SULI/W Green, 2011).

¹⁷ See A Briggs, *The Subtle Variety of Jurisdiction Agreements*, Lloyd's Maritime and Commercial Law Quarterly 364 [2012].

¹⁸ See M Keyes and BA Marshall, *Jurisdiction Agreements: Exclusive, Optional and Asymmetrical* 11 *Journal of Private International Law* 345 (2015).

¹⁹ *Ms X v Banque Privee Edmond de Rothschild Europe (Societe)* Cass civ, 1ere, 26.9.2012, No 11-26.022, [2013] ILPr 12.

²⁰ *ICH (Societe) v Credit Suisse (Societe)* Cass civ, 1ere, 25.3.2015, No 13-27.264, [2015] ILPr 39.

²¹ *Apple Sales International v eBizcuss* Cass. 1ere Civ, 7.10.2015, No. 14-16.898.

²² See *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588, 592F-594G (CA) (Steyn LJ) (delivering the judgment of the Court of Appeal); *Mauritius Commercial Bank Limited v Hestia Holdings Limited and Sujana Universal Industries Limited* [2013] EWHC 1328 (Comm) (Popplewell J).

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affect EU Member States' courts' approach to the jurisdiction clause, but that is in any event a matter of some uncertainty until finally resolved by the CJEU.²³

Third, arbitration is a possibility. Arbitration is already commonly used if enforcement is important and the counterparty has assets in a location where an English judgment is not enforceable because of the extensive reach of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.²⁴ All EU Member States are parties to the New York Convention, which provides for the enforcement in participating states of an arbitral award given in another participating state. An arbitration seated in a participating state, whether the UK, a continuing EU Member State or elsewhere, should therefore be able to give an award enforceable throughout the EU. The post-BREXIT English courts will also be able to grant anti-suit injunctions against proceedings in an EU Member State court in breach of an English arbitration agreement. Under the Brussels I Recast Regulation, the principle of mutual trust and the principle of effectiveness of EU law (*effet utile*) prevent the courts of one Member State from restraining pre-emptive proceedings brought before the courts of another Member State in breach of an arbitration agreement.²⁵

Fourth, parties could continue with whatever their current policy is. The massive uncertainties surrounding what BREXIT will bring could be treated as meaning that the risks of change are as great as the risks of no change.

EU Enforceability: The Hague Convention on Choice of Court Agreements

There is another solution to the problem of enforceability of a judgment throughout the EU. This is to give the English courts exclusive jurisdiction. The potential benefits of this route arise because the EU (except Denmark) is a party to the 2005 Hague Convention on Choice of Court Agreements (Hague Convention).²⁶ In addition to the EU, Mexico and most recently Singapore have signed and ratified the Convention.²⁷ However, the actual success of the

²³ The CJEU's position on this matter is unclear and the Recast Regulation has not endeavoured to clarify the status of these clauses in the EU law of international civil procedure.

²⁴ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 4739. ('New York Convention')

²⁵ Case C-185/07 *Allianz SpA v West Tankers Inc* [2009] ECR I-00663; Case C-536/13 "*Gazprom*" *OAO v Lietuvos Respublika* ECLI:EU:C:2015:316.

²⁶ Concluded at the 20th Session of the Hague Conference on Private International Law, The Hague, 30 June 2005. On 4 December 2014, the Council adopted the decision to approve the Hague Convention on behalf of the European Union (2014/887/EU, [2014] OJ L353/5) after the European Parliament gave its consent to the approval of the Hague Convention by legislative resolution of 25 November 2014 ([2016] OJ C289/78). Under Article 2 of this Decision, the deposit of the instrument of approval shall take place within one month of 5 June 2015. The Convention shall enter into force for the Union and its Member States on the first day of the month following the expiration of three months after the deposit of the instrument of approval. The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) Regulations 2015, SI 2015/1644, have brought the Hague Convention into force in the UK.

²⁷ See the Hague Conference on Private International Law website for the status table in relation to the Convention, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> (accessed 25 August 2016). The Ukraine signed the Convention on 21 March 2016 and the United States of America on 19 January 2009.

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Hague Convention will depend on further ratifications by the major centres of international litigation.

The Hague Convention provides that the court or courts of a Contracting State designated in an exclusive jurisdiction 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.²⁸ A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive jurisdiction agreement applies.²⁹ A judgment given by a court of a Contracting State designated in an exclusive jurisdiction agreement shall be recognised and enforced in other Contracting States.³⁰

The UK is a party to the Hague Convention as a Member State of the EU, the latter having approved the Convention for all its Member States apart from Denmark. Given the political support that the then Labour Government gave to the Convention when it was being negotiated and concluded between 2003 and 2005 and that the Conservative/Liberal Democrat coalition Government gave to the Convention when the Council of the European Union decided to approve the Convention in 2014 it seems almost certain that post-BREXIT the UK will choose to remain a party to the Hague Convention.³¹ The UK may have to ratify or accede to the Convention itself once it is no longer a Member State of the EU but it will surely do so in a way that avoids any break in the Convention's application.³² The likely outcome post-BREXIT is that the regime applicable between the UK and the EU (apart from Denmark) in relation to exclusive jurisdiction agreements within the scope of the Hague Convention will be the Hague Convention.³³

Under the Hague Convention, a judgment given by an English court that has taken jurisdiction under an exclusive jurisdiction clause will again be enforceable throughout the EU. This position is not, however, without potential transitional wrinkles. Article 16 of the Convention states the Convention applies to exclusive jurisdiction agreements concluded after its entry into force for the state of the chosen court and that the Convention does not apply to proceedings instituted before its entry into force in the state of the court seised. The Convention has, however, already entered into force in the UK because of the EU's ratification of the Convention.

Let's suppose that a contract contains an English exclusive jurisdiction clause but that, post-BREXIT, a court in an EU Member State is seised of proceedings falling within the scope of that clause. What will the EU Member State's court do, assuming that the Hague Convention is not applicable?

²⁸ Article 5 of the Hague Convention.

²⁹ Article 6 of the Hague Convention.

³⁰ Article 8 of the Hague Convention.

³¹ See M Ahmed and P Beaumont, *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*, 2 Centre for Private International Law Aberdeen Working Paper Series, Working Paper No. 2016/5, 24, http://www.abdn.ac.uk/law/documents/CPIL_Working_Paper_2016_5.pdf (accessed 25 August 2016).

³² Ibid.

³³ Ibid.

Post-BREXIT, so far as the continuing EU is concerned the English courts will (subject to any future contrary arrangements with the EU) be in the same position as any other courts outside the EU. The commercial expectation might be that the courts of EU Member States would give effect to the parties' wishes, but it is not entirely clear that this will necessarily be the case. Article 33 of the Brussels I Recast Regulation provides that courts in EU Member States may stay proceedings in favour of courts outside the EU if three conditions are met: first, the non-EU court was first seised; secondly, the non-EU court can give a judgment capable of enforcement in the EU Member State in question; and, thirdly, a stay is necessary for the proper administration of justice. If these three conditions are met, then the court in the EU Member State can stay, and might generally be expected to stay, proceedings in favour of the court outside the EU. But what if any of these conditions is not met (for example, because the court in the EU Member State was seised first)? It is arguable that, despite the fact that the agreement between the parties has been broken by one party starting proceedings in an EU Member State's courts, the courts of EU Member States cannot stay their proceedings in favour of the non-EU court. Before Article 33 was added to the Brussels I Recast Regulation, there was no explicit provision addressing the position of non-EU courts. There is evidence of some Member State court's practice which gives effect to jurisdiction agreements in favour of non-EU courts under the guise of giving 'reflexive effect' to the Regulation's provisions regarding jurisdiction clauses.³⁴ However, as the Brussels I Recast Regulation now specifically addresses the position of non-EU courts, the convenient legal fiction of the doctrine of reflexive effect may be harder to justify in principle.

If, contrary to the assumption made above, the Hague Convention was applicable, the disconnection clause in Article 26(6) of the Convention provides that the Member States shall apply the Convention externally, but amongst each other the EU rules. As a consequence, Articles 5 and 6 of the Hague Convention have codified the reflexive effect of the Brussels I Recast Regulation in relation to exclusive jurisdiction agreements in matters within the scope of the Convention.

Under Article 33 of the Brussels I Recast Regulation, the courts of an EU Member State may consider that they have no power to stay proceedings in favour of the English courts despite an exclusive jurisdiction clause in favour of the English courts. Nonetheless, the English courts may not be without a pragmatic remedy. Under the Regulation, the English courts cannot grant an anti-suit injunction to restrain a party from pursuing proceedings in the courts of another EU Member State brought in breach of the exclusive jurisdiction agreement.³⁵ However, if the UK is no longer an EU Member State, the mutual trust constraints of European civil procedural law will not apply and the English courts would again be free to grant, and would generally grant, anti-suit injunctions ordering parties to stop legal

³⁴ Cf Case C-281/02 *Owusu v Jackson* [2005] ECR I-1383; See A Layton, *The Brussels I Regulation in the International Legal Order: Some Reflections on Reflectiveness* in E Lein (ed.), *The Brussels I Review Proposal Uncovered*, 75 (BIICL, London 2012).

³⁵ Case C-159/02 *Turner v Grovit* [2004] ECR I-03565; Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693; See M Ahmed, *The Enforcement of Settlement and Jurisdiction Agreements and Parallel Proceedings in the European Union: The Alexandros T Litigation in the English Courts* 11 *Journal of Private International Law* 406, 412-415 (2015).

proceedings brought in breach of contract. Failure to obey an injunction would constitute contempt of court, which could lead to a fine, imprisonment and, ultimately, sequestration of assets. A party with any presence or assets in the UK would have to comply with the injunction or reconcile itself to the loss of those assets.

If, contrary to the assumption made above, the Hague Convention was applicable, the courts of an EU Member State that are seised of proceedings in breach of an English exclusive jurisdiction agreement should defer to the English courts according to Article 6 of the Convention. Moreover, the Hague Convention's system of qualified mutual trust may also permit the use of anti-suit injunctions, the damages remedy for breach of exclusive jurisdiction agreements and anti-enforcement injunctions where such relief furthers the objective of the Convention.³⁶

It should be noted that the use of pragmatic remedies for breach of English jurisdiction agreements is allowed under the traditional English common law jurisdictional regime.³⁷ In similar vein and contrary to the current position under the Brussels I regime,³⁸ the post-BREXIT English courts will be able to enforce a foreign jurisdiction agreement by staying proceedings brought in breach of the clause.³⁹

Conclusions

It has been observed that it is almost certain that the Brussels I Recast Regulation will cease to apply in the UK after BREXIT and as a result the near automatic recognition and enforcement of English court judgments in the continuing EU (and Lugano Convention Contracting States) and *vice versa* will be in jeopardy. Contrary to some recent speculation, it is politically unlikely that the Brussels Convention will revive and the option to adhere to the Lugano Convention also does not seem to be viable for a newly 'liberated' UK.

BREXIT will also result in the cultural loss of the influence of common law concepts in the enforcement of jurisdiction agreements and the management of parallel proceedings in the EU. Similarly, developments in the harmonised EU private international law sphere will no longer affect the course of international commercial litigation before the English courts.

This article has suggested practical solutions to minimise the venue and enforcement risk arising from English jurisdiction agreements in relation to the EU. It has been argued that non-exclusive jurisdiction agreements including asymmetric jurisdiction agreements could be effectively employed by cross border transactional lawyers to hedge the contracting parties'

³⁶ See Ahmed and Beaumont, *Exclusive Choice of Court Agreements*, op cit at 15.

³⁷ See A Briggs, *Agreements on Jurisdiction and Choice of Law*, Chapter 6 (OUP 2008).

³⁸ In *Catalyst Investment Group v Lewinsohn* [2009] EWHC 1964 (Ch), [2010] Ch. 218, Barling J interpreted Case C-281/02 *Owusu v Jackson* [2005] ECR I-1383 and decided that the English courts have no power to decline jurisdiction, properly founded on one of the Brussels I grounds of jurisdiction, in favour of a court outside the EU even if it was seised first of an action; cf *Ferrexpo AG v Gilson Investments Limited and ors* [2012] EWHC 721 (Comm) (Andrew Smith J).

³⁹ See *The Eleftheria* [1970] P 94; *The El Amria* [1981] 2 Lloyd's Rep 119; *The Sennar (No 2)* [1985] 1 WLR 490.

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choice of jurisdiction. Where recognition and enforcement in the EU is an important consideration, a non-exclusive jurisdiction agreement will allow the parties to sue in a forum capable of delivering such a judgment.

Significantly, it has been argued that the Hague Convention can be harnessed to regulate English exclusive jurisdiction agreements in relation to the EU in matters within the scope of the Convention. Articles 5 and 6 of the Hague Convention have codified the reflexive effect of the Brussels I Recast Regulation in relation to exclusive jurisdiction agreements. If the courts of a post-BREXIT EU Member State are seised in a case concerning an English exclusive jurisdiction agreement, Article 6 of the Hague Convention should accord deference to the elected forum. It has been noted that anti-suit injunctions, the damages remedy for breach of exclusive jurisdiction agreements and anti-enforcement agreements are in principle compatible with the Hague Convention's system of qualified mutual trust. Moreover, recourse to pragmatic remedies for breach of English jurisdiction agreements is allowed under the traditional English common law jurisdictional regime.

Whilst the Hague Convention may not offer a comprehensive jurisdictional regime, it may serve as a useful partial measure, until perhaps the revised Hague Judgments Project bears fruition.⁴⁰

⁴⁰ In 2012, the Council on General Affairs and Policy of the Hague Conference on Private International Law agreed that work on the 'Judgments Project' should resume. In 2016, the Council welcomed the completion by the Working Group on the Judgments Project of a Proposed Draft Text, and decided to set up a Special Commission to prepare a draft Convention; See P Beaumont, *The Revised Judgments Project in The Hague*, *Nederlands Internationaal Privaatrecht* 532, 532-533 [2014].