

**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**

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**A. Introduction**

On 1 October 2015, the Hague Convention on Choice of Court Agreements ('Hague Convention') entered into force in 28 Contracting States, including Mexico and all the Member States of the European Union, except Denmark.<sup>1</sup> Singapore has recently ratified the Hague Convention on 2 June 2016 and the Convention will apply between Singapore and the other Contracting States as from 1 October 2016.<sup>2</sup> The Brussels I Regulation (Recast) [or 'Recast Regulation'] applies as of 10 January 2015 to legal proceedings instituted and to

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<sup>1</sup> Concluded at the 20<sup>th</sup> 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 Art 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. See *infra* notes 95-97 for subsequent developments.

<sup>2</sup> 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 on 28 July 2016. It is anticipated that the Hague Convention will help enhance the enforceability of Singapore International Commercial Court judgments in other Contracting States: See Man Yip, "The Resolution of Disputes before the Singapore International Commercial Court" (2016) 65 *International and Comparative Law Quarterly* 439, 468. The Ukraine signed the Convention on 21 March 2016 and the United States of America on 19 January 2009.

judgments rendered on or after that date.<sup>3</sup> In addition to legal issues that may arise under each instrument independently, some issues may manifest themselves at the interface between the Hague Convention and the Recast Regulation. Both sets of issues are likely to garner the attention of cross-border commercial litigators, transactional lawyers and private international law academics.

This article seeks to examine the scope for anti-suit injunctions to support exclusive jurisdiction agreements and parallel proceedings under the Hague Convention and at the interface between the Hague Convention and the Recast Regulation. It will be argued that the Hague Convention's system of 'qualified' or 'partial' mutual trust may permit the use an anti-suit injunction, the damages remedy for breach of an exclusive choice of court agreement and an anti-enforcement injunction where such relief furthers the objective of the Convention. However, intra-EU Hague Convention cases may arguably not permit anti-suit injunctions for breach of exclusive choice of court agreements as they may be deemed to be an infringement of the principle of mutual trust and the principle of effectiveness of EU law (*effet utile*).<sup>4</sup> An attempt will be made to map the relationship between Article 31(2) of the Recast Regulation and Articles 5 and 6 of the Hague Convention. It will be argued that Professors Hartley and Dogauchi's Official Explanatory Report<sup>5</sup> and the jurisprudence of the CJEU on mutual trust and the interface between the Brussels I Regulation<sup>6</sup> and the CMR<sup>7</sup> suggests that the conflict may be resolved by narrowly construing and characterising the right to litigate in a non-chosen forum as an exception rather than the norm and by allowing Article 31(2) of the Recast Regulation free rein to stay proceedings in any non-chosen Member State court seised.

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<sup>3</sup> Art 81 of 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.

<sup>4</sup> In matters not expressly covered by the terms of an EU instrument such as the Brussels I Regulation (Recast), Member States may apply national substantive and procedural rules provided that they do not render the application of EU law impossible or excessively difficult: Case 288/82 *Duijnstee v Goderbauer* [1983] ECR 3663, [13]; Case C-159/02 *Turner v Grovit* [2004] ECR I-3565, [29].

<sup>5</sup> Permanent Bureau of the Conference, *Convention of 30 June 2005 on Choice of Court Agreements: Text and Explanatory Report by Trevor Hartley and Masato Dogauchi* (HCCH Publications 2013) <<http://www.hcch.net/upload/expl37final.pdf>> accessed 27 May 2016.

<sup>6</sup> 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.

<sup>7</sup> Convention on the Contract for the International Carriage of Goods by Road, signed in Geneva on 19 May 1956, as amended by the Protocol signed in Geneva on 5 July 1978 ('the CMR').

First, the origins and concept of the Hague Convention will be considered along with the idea of the interface between the international litigation regimes of the Recast Regulation and the Hague Convention which have been coordinated through a ‘disconnection clause’<sup>8</sup> choosing either the European or the international instrument to govern the transnational private dispute.<sup>9</sup> Moreover, some preliminary remarks about the classification of exclusive choice of court agreements under the Hague Convention will serve as an effective prelude to an outline of the scope and defining characteristics of the Hague Convention. This will be followed by an in-depth examination of anti-suit injunctions to uphold exclusive choice of court agreements and concurrent proceedings under the Hague Convention and in intra-EU Hague Convention cases. The various strands of the argument are drawn together and assessed in the conclusion. The article will try to give an early view on the implications for the topics 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.

## **B. The concept of the Hague Convention, conflicts of international litigation regimes and the classification of choice of court agreements**

The origins of the Hague Convention lie in the efforts to salvage something from the wreckage of the most ambitious project undertaken by the Hague Conference on Private International Law<sup>10</sup> – The Hague Judgments Convention, (a failed global attempt at a ‘mixed’ convention).<sup>11</sup> The Hague Convention on Choice of Court Agreements is designed to create a

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<sup>8</sup> See Art 26(6) of the Hague Convention.

<sup>9</sup> See Jan-Jaap Kuipers, *EU Law and Private International Law: The Interrelationship in Contractual Obligations* (Brill, 2011) 18, notes that the coherence of Union law is protected by the disconnection clause, which provides that Member States shall apply the international instrument externally, but amongst each other the Union rules. Therefore, the disconnection clause allocates or distributes regulatory authority between the EU and the global framework governing exclusive choice of court agreements and furthers the cause of the unification of private international law rules.

<sup>10</sup> The Hague Conference of Private International Law is an international intergovernmental organization facilitating the negotiation and conclusion of international multilateral conventions on private international law. It was founded in 1893 and according to Art 1 of the Statute of the Hague Conference on Private International Law its purpose is to ‘work for the progressive unification of the rules of private international law’.

<sup>11</sup> 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 Paul 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” (2016) 2 *Centre for Private International Law Aberdeen Working Paper Series*, Working Paper No. 2016/3, see [http://www.abdn.ac.uk/law/documents/CPIL\\_Working\\_No\\_2016\\_3\\_by\\_Beaumont.pdf](http://www.abdn.ac.uk/law/documents/CPIL_Working_No_2016_3_by_Beaumont.pdf) last accessed 27 July

mandatory international legal regime for the enforcement of exclusive jurisdiction agreements in commercial transactions and the recognition and enforcement of judgments resulting from proceedings based on such agreements.<sup>12</sup> The Hague Convention operates in parallel with the very successful 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>13</sup> The choice of court agreement provisions in the Brussels I Regulation (Recast) have been aligned with the Hague Convention in order to ensure better coordination and to secure the consistent enforcement of jurisdiction agreements both within the EU and globally.<sup>14</sup> The rules coordinating conflicts between the private international law regimes of the Hague Convention and the Recast Regulation have been referred to as ‘tertiary rules’<sup>15</sup> forming part of an increasingly multi layered,

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2016 ; Paul Beaumont, “The Revised Judgments Project in The Hague” [2014] *Nederlands Internationaal Privaatrecht* 532, 532-533; Trevor Hartley, *Choice of Court Agreements under the European and International Instruments* (Oxford University Press, 2013) Chapter 1, 18-19; Ronald A Brand and Paul M Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (Cambridge University Press 2008) Chapter 1; Hartley and Dogauchi, *Explanatory Report (supra n 5)* Part I: Preface, ‘Origins of the Convention’; Ronald A Brand and Scott R Jablonski, *Forum Non Conveniens: History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements* (CILE Studies, Volume 3, OUP 2007) Chapter 8, 141-148.

<sup>12</sup> See generally, Hartley, *Choice of Court Agreements under the European and International Instruments (ibid)*; Paul Beaumont, “Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status” (2009) 5 *Journal of Private International Law* 125; Brand and Herrup (*ibid*); Andrea Schulz, “The Hague Convention of 30 June 2005 on Choice of Court Agreements” (2006) 2 *Journal of Private International Law* 243; TC Hartley, “The Hague Choice of Court Convention” (2006) 31 *European Law Review* 414; Christian Thiele, “The Hague Convention on Choice of Court Agreements: Was it Worth the Effort?” in Eckart Gottschalk and others (eds) *Conflict of Laws in a Globalized World* (Cambridge University Press, 2007) 63; TC Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law* (2<sup>nd</sup> Edn, Cambridge University Press 2015) 220-222.

<sup>13</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June, 1958, 330 UNTS 4739 (‘New York Convention’); cf Richard Garnett, “The Hague Choice of Court Convention: Magnum Opus or Much Ado about Nothing?” (2009) 5 *Journal of Private International Law* 161, 171-173, doubts whether the Hague Convention is a true litigation counterpart of the New York Convention. This may be attributed to the presence of a wider range of excluded subject matter under Art 2 compared to international arbitration, the potentially wider defences to enforcement of agreements (particularly the ‘manifest injustice’ ground) and the scope for Contracting States to remove certain areas from the Convention under Art 21. Moreover, international arbitration offers advantages to parties relating to the process itself including neutrality, judicial support and arbitral institutions of the seat of arbitration, procedural flexibility, privacy and confidentiality.

<sup>14</sup> B Hess, T Pfeiffer and P Schlosser, “Report on the Application of Regulation Brussels I in the Member States” (Study JLS/C4/2005/03, September 2007) (‘Heidelberg Report’) [338]-[344], [390], 95-97, 112; Tena Ratkovic´ and Dora Zgrabljic´ Rotar, “Choice-of-Court Agreements under the Brussels I Regulation (Recast)” (2013) 9 *Journal of Private International Law* 245, 249-250.

<sup>15</sup> Alex Mills, “Variable Geometry, Peer Governance, and the Public International Perspective on Private International Law” in Horatia Muir Watt and Diego P Fernandez Arroyo (eds), *Private International Law and Global Governance* (Oxford University Press, 2014) 245, 257; An early version of Alex Mills’ chapter was presented to the Sciences Po Workshop on *Private International Law as Global Governance* in March 2012. <<http://ssrn.com/abstract=2025616>> accessed 27 May 2016: Mills classifies ‘conflicts of conflict of laws’ as ‘tertiary rules’ because they operate at a level higher than private international law rules which he terms ‘secondary rules’ dealing with the allocation of regulatory authority in (primary) substantive private law;

multilateral and 'multi-speed'<sup>16</sup> regional and international legal order. According to the Hague Convention, the Convention will take precedence over the Recast Regulation if there is an actual incompatibility between the two instruments but excluding the situations where the parties reside exclusively within EU Member States and where recognition or enforcement of a judgment by an EU court is being sought within the EU.<sup>17</sup>

Briggs briefly discusses the possible impact of the Hague Convention in the concluding chapter of his monograph on jurisdiction and choice of law agreements.<sup>18</sup> He is critical of the exclusion of non-exclusive choice of court agreements from the scope of the Convention given 'their importance in commercial contract drafting'<sup>19</sup> in practice and the rigidity of the Convention when it requires the mandatory enforcement of a choice of court agreement regardless of the impact on third parties.<sup>20</sup> He nevertheless concludes that the Hague Convention lends support to the view that choice of court agreements are 'contractual in nature, and should be enforced because contracts should be enforced.'<sup>21</sup> However, this article will emphasize that the Hague Convention does not deal with questions of the contractual enforcement of choice of court agreements via anti-suit injunctions or the damages remedy. Instead the primary solution it proffers is rather different in nature. It would be unfair to affirm that such agreements are *intrinsically* contractual in nature. The

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Nikitas Hatzimihail, "General Report: Transnational Civil Litigation Between European Integration and Global Aspirations" in Arnaud Nuyts and Nadine Watté (eds), *International Civil Litigation in Europe and Relations with Third States* (Bruylant, 2005) 595, 654 employs the term 'conflict of conventions' to describe what in the context of the Hague Convention and the Recast Regulation should rather be termed as a 'conflict of instruments'. See also, Neil Walker, *Intimations of Global Law* (Cambridge University Press, 2015) 117.

<sup>16</sup> 'Multi-speed' Europe is the term used to describe the idea of a method of differentiated integration whereby common objectives are pursued by a group of Member States both able and willing to advance, it being implied that the others will follow later. (Europa.eu Glossary) <[http://europa.eu/legislation\\_summaries/glossary/multispeed\\_europe\\_en.htm](http://europa.eu/legislation_summaries/glossary/multispeed_europe_en.htm)> accessed 27 May 2016. See also 'Enhanced Cooperation' and 'Variable-geometry Europe'.

<sup>17</sup> Art 26(6) of the Hague Convention; Hartley and Doguchi, *Explanatory Report (supra n 5)* [267]; Hartley, *Choice of Court Agreements under the European and International Instruments (supra n 11)* Chapter 6, 121-126.

<sup>18</sup> Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008) Chapter 13, 528-532.

<sup>19</sup> *Ibid*, 529; cf This exclusion is partially mitigated by the fact that Art 3(b) of the Convention presumes agreements to be exclusive unless the parties have expressly provided otherwise and that Contracting States may make a declaration under Art 22 that they will recognise and enforce judgments given by courts of other Contracting States designated in non-exclusive choice of court agreements.

<sup>20</sup> Briggs, *Agreements (supra n 18)* 531; See *Donohue v Armco Inc* [2001] UKHL 64; cf Thiele (*supra n 12*) 81, rejects any scope for court discretion in the Convention text. He even extends such inflexible reasoning to a court enforcing a judgment regardless of whether a ground of non-recognition is available. It is submitted that there is no support for such an assertion in the text of Art 9 of the Convention, the Official Explanatory Report or the *travaux préparatoires* leading up to the conclusion of the Convention.

<sup>21</sup> Briggs, *Agreements (supra n 18)* 531-532.

effects from the arguably *extrinsic* scope that a Convention premised on a system of partial or qualified mutual trust must be taken into account.<sup>22</sup> Before delving into the issues of whether a jurisdiction agreement can be reinforced by national private law remedies, whether it can be binding on the parties as a contractual agreement even if it is ineffective under the Convention and the interplay between the Hague Convention and the Recast Regulation, it is necessary to highlight the scope and the defining characteristics of the Convention.

### **C. Scope of the Hague Convention**

The Hague Convention applies to exclusive choice of court agreements in international cases in civil and commercial matters.<sup>23</sup> Consumer and employment contracts are excluded from the scope of the Hague Convention.<sup>24</sup> Together with further exclusions under Article 2(2), this leads to the result that the Hague Convention primarily applies in ‘business to business’ commercial cases. The Hague Convention only applies in international cases. The definition of what is an international case differs between jurisdictional issues (Chapter II) and recognition and enforcement issues (Chapter III). For the Hague Convention’s jurisdictional rules to apply, a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.<sup>25</sup> For the purposes of obtaining the recognition and enforcement of a judgment in a Contracting State, it is sufficient that the judgment presented is foreign.<sup>26</sup>

### **D. Defining characteristics of the Hague Convention**

The basic principles of the Hague Convention can be summarised in a few sentences.<sup>27</sup> The chosen court in an exclusive choice of court agreement shall have jurisdiction to decide a dispute which falls within its purview, unless the agreement is null and void under the law of

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<sup>22</sup> For the concept of a system of ‘qualified’ or ‘partial’ mutual trust permitting remedies for breach of exclusive jurisdiction agreements see, *infra* n 67-70.

<sup>23</sup> Art 1(1) of the Hague Convention; See Schulz (*supra* n 12) 248-250; Brand and Herrup (*supra* n 11) Chapter 4; Thiele (*supra* n 11) 67-73.

<sup>24</sup> Art 2(1) of the Hague Convention.

<sup>25</sup> Art 1(2) of the Hague Convention.

<sup>26</sup> Art 1(3) of the Hague Convention.

<sup>27</sup> Hartley, *Choice of Court Agreements under the European and International Instruments* (*supra* n 11) Chapter 1, 21-22; Schulz (*supra* n 12) 254-258; Brand and Herrup (*supra* n 11) Chapter 2, 11-14; Hartley and Dogauchi, *Explanatory Report* (*supra* n 5) [1].

that state.<sup>28</sup> Any court other than the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies.<sup>29</sup> A judgment given by a chosen court shall be recognised and enforced in other Contracting States and recognition and enforcement may be refused only on the grounds specified in the Hague Convention.<sup>30</sup> Article 22 provides an optional fourth basic rule allowing each Contracting State the opportunity to declare that, on the basis of reciprocity, its courts will recognise and enforce judgments given by courts of other Contracting States designated in a non-exclusive choice of court agreement.<sup>31</sup> Article 22 is based on the assumption that some Contracting States may opt for enhanced judicial cooperation beyond the minimum mandatory framework of the Hague Convention.

The Hague Convention also gives effect to the principle of severability:<sup>32</sup>

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.

The substantive validity of the exclusive choice of court agreement in the Hague Convention is subject to the law of the state of the chosen court including its private international law rules.<sup>33</sup> There is an indication in the Explanatory Report to the Hague Convention that most ‘consent’ questions are governed by the choice of law rules established to determine substantive validity and capacity but that some issues require the basic factual requirements of consent to exist before there is an agreement.<sup>34</sup> However, one of us has previously rejected the argument that issues of ‘consent’ are governed by either ‘the law of the forum – including its choice of law rules’<sup>35</sup> or by an independent interpretation of “agreement” or by an independent evaluation of the factual requirements of consent in order to establish

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<sup>28</sup> Art 5 of the Hague Convention.

<sup>29</sup> Art 6 of the Hague Convention.

<sup>30</sup> Art 8 of the Hague Convention.

<sup>31</sup> Art 22 of the Hague Convention.

<sup>32</sup> Art 3(d) of the Hague Convention; Brand and Herrup (*supra* n 11) Chapter 4, 46-47.

<sup>33</sup> Art 5(1) of the Hague Convention; Hartley and Dogauchi, *Explanatory Report* (*supra* n 5) [126]; Hartley, *Choice of Court Agreements under the European and International Instruments* (*supra* n 11) Chapter 7, 165-171; Brand and Herrup (*supra* n 11) Chapter 5, 80-82.

<sup>34</sup> Hartley and Dogauchi, *Explanatory Report* (*supra* n 5) [94]-[96].

<sup>35</sup> Brand and Herrup (*supra* n 11) 79.

an agreement.<sup>36</sup> Instead, the Hague Convention provides a complete system of rules to determine whether there is an exclusive choice of court agreement for the purposes of the Convention. Formal validity issues are governed by the harmonised rules in Article 3(c), substantive validity issues are governed by the law of the State of the chosen court including its private international law rules, and capacity issues are governed by the law of the court seised including its private international law rules.<sup>37</sup>

A court designated by a choice of court agreement has no power under the Hague Convention to stay its proceedings on *forum non conveniens* grounds or to stay its proceedings on the basis of the *lis alibi pendens* doctrine.<sup>38</sup> This should be interpreted as the conferral of a right on the parties to invoke the jurisdiction of the chosen court. However, in relation to non-international cases, Article 19 of the Hague Convention allows a Contracting State to declare that its courts will not exercise jurisdiction when, except for the location of the chosen court, there is no connection between that State and the parties or the dispute. Thus, if a declaration pursuant to Article 19 has been made, the possibility of declining jurisdiction effectively trumps the rule in Article 5(2).<sup>39</sup>

#### **E. Anti-suit injunctions to uphold exclusive choice of court agreements and concurrent proceedings under the Hague Convention**

The Hague Convention does not entirely resolve the *Gasser*<sup>40</sup> problem of which court should interpret the choice of court agreement as it does not confer sole competence on the court putatively chosen to do so.<sup>41</sup> Where the parties have agreed to the exclusive jurisdiction of the English courts, and the courts of another Hague Contracting State are seised, the other

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<sup>36</sup> Beaumont, *Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status* (*supra* n 12) 138-140.

<sup>37</sup> *Ibid.* Contrast Hartley, *Choice of Court Agreements under the European and International Instruments* (*supra* n 11) 133.

<sup>38</sup> Art 5(2) of the Hague Convention; See Brand and Herrup (*supra* n 11) Chapter 5, 82-84; Brand and Jablonski (*supra* n 11) Chapter 9, 208.

<sup>39</sup> Brand and Herrup (*ibid*) Chapter 5, 84; Schulz (*supra* n 12) 259; Thiele (*supra* n 12) 74; Beaumont, *Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status* (*supra* n 12) 149. No party to the Convention has made the Art 19 declaration so far, see <https://www.hcch.net/en/instruments/conventions/status-table/print/?cid=98> accessed 27 July 2016.

<sup>40</sup> Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693. The CJEU decided that the court first seised (Italy) should determine whether the choice of court agreement giving exclusive jurisdiction to the Austrian courts was valid and applicable to the case. The Austrian courts were obliged to wait for the decision of the Italian court on its jurisdiction, even if it were to take many years, before they could hear the case.

<sup>41</sup> Arts 5 and 6 of the Hague Convention.



court must normally decline to exercise jurisdiction.<sup>42</sup> The court other than the chosen court must decline jurisdiction if it is established that there is a valid and exclusive choice of court agreement in favour of the English courts and the claim falls within the scope of the choice of court agreement and the Hague Convention. At the least, the other court would need to establish a *prima facie* case that such an agreement confers jurisdiction on the English courts. It need not decline jurisdiction, however, principally in the following situations:

- (a) if the agreement is invalid under the law of the state of the chosen court;
- (b) a party lacked the capacity to conclude the agreement under the law of the state of the court seised;
- (c) if giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the state of the court seised;<sup>43</sup>
- (d) if for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed.<sup>44</sup>

Therefore the legal risk of pre-emptive proceedings in breach of an English exclusive choice of court agreement is reduced but not removed in cases subject to the Hague Convention on Choice of Court Agreements.<sup>45</sup> The interpretation of the scope for pre-emptive litigation in relation to the threshold issue and the exceptions to the obligation to decline jurisdiction may come under judicial scrutiny and as a result acquire further clarity in the yet to develop jurisprudence of the Hague Convention.<sup>46</sup>

The Hague Convention's regime does not counter the potential for pre-emptive proceedings in every situation. First, the Hague Convention can only apply if an English exclusive jurisdiction agreement is challenged in a Contracting State. Second, it does not apply to asymmetric jurisdiction agreements, which are frequently encountered in

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<sup>42</sup> Art 6 of the Hague Convention.

<sup>43</sup> Hartley and Dogauchi, *Explanatory Report* (*supra* n 5) [151]-[153]; Hartley, *Choice of Court Agreements under the European and International Instruments* (*supra* n 11) Chapter 8, 184.

<sup>44</sup> The exceptions in (c) and (d) are intended to apply 'only in the most exceptional circumstances': See Hartley and Dogauchi, *Explanatory Report* (*supra* n 5) [148]; Hartley, *Choice of Court Agreements under the European and International Instruments* (*supra* n 11) Chapter 8, 183.

<sup>45</sup> Richard Fentiman, *International Commercial Litigation* (2<sup>nd</sup> edn, Oxford University Press, 2015) 97.

<sup>46</sup> For the scope for pre-emptive litigation on the threshold issue and the court first seised's need to establish whether its duty to stay proceedings is engaged in the different context of Article 31(2) of the Brussels I Recast Regulation, see Fentiman, *ibid*, 100.

international commercial transactions.<sup>47</sup> Although there is no requirement that the parties should have equal rights, it was agreed by the Diplomatic Session that, in order to be covered by the Hague Convention, the agreement must be exclusive irrespective of the party bringing the proceedings.<sup>48</sup> Moreover, the grounds for displacing an agreement provided in the Hague Convention also offer significant opportunities to undermine a jurisdiction agreement, and to create uncertainty as to their status. Despite the enhancement of the enforcement of choice of court agreements in some cases, the potential for tactical forum shopping remains along with the burden on a defendant in foreign proceedings to mount a defence and incur costs and expenses in those proceedings.

The lack of a *lis alibi pendens* mechanism<sup>49</sup> or a court first seised rule to coordinate proceedings and the apparent tolerance of ‘parallel proceedings’<sup>50</sup> suggests that the Hague Convention does not adhere to the strict multilateral jurisdiction and judgments model of the Brussels I Regulation premised on the mutual trust principle. Therefore, the issue of whether national private law remedies such as anti-suit injunctions and damages for breach of choice of court agreements might be relied upon may receive a different answer under the Hague Convention than under Brussels I.

The use of the word ‘agreement’, the specific provision for the principle of severability along with a choice of law rule for the substantive validity of a jurisdiction agreement in the Hague Convention lends support to arguments in favour of an essentially contractual justification for choice of court agreements. The referral of issues relating to material validity, a substantive element of a jurisdiction agreement, to the law of the chosen forum including its private international law rules recognises the complex ‘hybrid’ nature of a choice of court agreement incorporating a mix of substantive and procedural components. Article 3(d) of the Hague Convention offers an additional layer of protection for choice of court agreements by emphasizing that an attack on the validity of the substantive contract

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<sup>47</sup> Hartley and Dogauchi, *Explanatory Report* (*supra* n 5) [106]; Hartley, *Choice of Court Agreements under the European and International Instruments* (*supra* n 11) Chapter 7, 143-144.

<sup>48</sup> Minutes No 3 of the Second Commission Meeting of Wednesday 15 June 2005 (morning) in *Proceedings of the Twentieth Session of the Hague Conference on Private International Law* (Permanent Bureau of the Conference, Intersentia, 2010) 577, 577-578.

<sup>49</sup> Art 5(2) of the Hague Convention; cf Art 27 of the Brussels I Regulation and Art 29 of the Recast Regulation.

<sup>50</sup> Brand and Herrup (*supra* n 11) Chapter 5, 88; Hartley, *Choice of Court Agreements under the European and International Instruments* (*supra* n 11) Chapter 11, 231; Hartley and Dogauchi, *Explanatory Report* (*supra* n 5) [132]-[134].

does not by itself impeach the validity of the independent choice of court agreement. This ensures that the forum 'chosen' by the parties exercises adjudicatory authority even where the very existence of the substantive contract is in dispute. The principles of party autonomy and legal certainty justify the exercise of jurisdiction by the chosen court where the validity of the substantive contract is impugned.

Article 7 of the Hague Convention states that the Convention does not affect the granting of interim measures of protection:<sup>51</sup>

Interim measures of protection are not governed by this Convention. This Convention neither requires nor precludes the grant, refusal or termination of interim measures of protection by a court of a Contracting State and does not affect whether or not a party may request or a court should grant, refuse or terminate such measures.

Although anti-suit injunctions might be classified as interim measures of protection, they are not specified as such in the Official Explanatory Report.<sup>52</sup> However, the Explanatory Reports on the earlier Draft Conventions on Choice of Court Agreements have cited an anti-suit injunction precluding a party from bringing proceedings in a court other than that chosen as an example of an interim measure of protection.<sup>53</sup>

A plenary discussion between official delegates recorded in Minutes No 9 of a Second Commission meeting at the Diplomatic Session which finalised the Hague Choice of Court Convention provides support to the argument that anti-suit injunctions may be

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<sup>51</sup> Art 7 of the Hague Convention; See Brand and Herrup (*supra* n 11) Chapter 5, 95-96.

<sup>52</sup> Hartley, *Choice of Court Agreements under the European and International Instruments* (*supra* n 11) Chapter 10, 215-216; Hartley and Dogauchi, *Explanatory Report* (*supra* n 5) [160]-[163]; cf Burkhard Hess, "The Draft Hague Convention on Choice of Court Agreements, External Competencies of the European Union and Recent Case Law of the European Court of Justice" in Arnaud Nuyts and Nadine Watté (eds.), *International Civil Litigation in Europe and Relations with Third States* (Bruylant, 2005) 263, 281-282, argues that, in principle, anti-suit injunctions should be allowed as the EU notion of mutual trust does not apply between Contracting States of the Hague Convention. He even suggests that an express exclusive jurisdiction of the designated court to order such measures together with a corresponding obligation on all courts of the Contracting States to recognise and enforce such orders should be incorporated into the Hague Convention.

<sup>53</sup> TC Hartley and M Dogauchi, "Explanatory Report on the Preliminary Draft Convention on Exclusive Choice of Court Agreements" (Preliminary Document No 26 of December 2004) in *Proceedings of the Twentieth Session of the Hague Conference on Private International Law* (Permanent Bureau of the Conference, Intersentia 2010) 167, 195-197, [131]; TC Hartley and M Dogauchi, "Explanatory Report on the Preliminary Draft Convention on Choice of Court Agreements" (Preliminary Document No 25 of March 2004) (hcch.net) <[http://www.hcch.net/upload/wop/jdgm\\_pd25e.pdf](http://www.hcch.net/upload/wop/jdgm_pd25e.pdf)> accessed 27 May 2016, 24, [101].

awarded to support the enforcement of choice of court agreements by Contracting States.<sup>54</sup> Significantly, Mr. Paul R Beaumont of the United Kingdom delegation sought to clarify the position in relation to anti-suit injunctions by differentiating the formal 'process' from the desired 'outcome'.<sup>55</sup> Where anti-suit injunctions uphold choice of court agreements and thus help to achieve the intended outcome of the Convention, there was a consensus among the delegates in the meeting that the Convention did not limit or constrain national courts of Contracting States from granting the remedy.<sup>56</sup>

The primary meaning of the term 'interim measures of protection' is measures intended to protect the position of the parties while the proceedings are pending.<sup>57</sup> After mentioning freezing orders, interim injunctions and orders for the production of evidence the Official Explanatory Report states:<sup>58</sup>

All these measures are intended to support the choice of court agreement by making it more effective. They thus help to achieve the objective of the Convention. Nevertheless, they remain outside its scope.

Tellingly the Explanatory Report goes on to say that:

If an interim measure – for example, an injunction – granted by that court is subsequently made permanent, it will be enforceable under the Convention in other Contracting States.

Arguably, an anti-suit injunction granted by an English court to uphold an English exclusive jurisdiction clause is a measure intended to make the choice of court agreement more effective. This opens the possibility for a party faced with proceedings brought in clear

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<sup>54</sup> Minutes No 9 of the Second Commission Meeting of Monday 20 June 2005 (morning) in *Proceedings of the Twentieth Session of the Hague Conference on Private International Law* (Permanent Bureau of the Conference, Intersentia 2010) 622, 623-624.

<sup>55</sup> *Ibid* 624.

<sup>56</sup> *Ibid*. The delegates who clearly held a view that anti-suit injunctions to uphold choice of court agreements were compatible with the Hague Convention included Mr Paul R Beaumont (United Kingdom), Mr Trevor C Hartley (co-Reporter), Mr J Kovar (United States of America), Mr David Bennett (Australia), and Mr Gottfried Musger (Austria). The Chair [Mr Andreas Bucher (Switzerland)] noted that the co-Reporters would make what had been said on this clear, and that there would also be a process for commenting on the Explanatory Report. Sadly his wish on this point that the co-reporters would make the matter clear in the final Explanatory Report was not fulfilled.

<sup>57</sup> Hartley, *Choice of Court Agreements under the European and International Instruments* (*supra* n 11) Chapter 10, 216.

<sup>58</sup> Hartley and Dogauchi, *Explanatory Report* (*supra* n 5) [160].

breach of an English exclusive jurisdiction agreement to apply to the English courts for an anti-suit injunction in Hague Convention cases.<sup>59</sup> The *lex fori* will govern the issue of remedies for breach of English exclusive choice of court agreements as the Hague Convention is silent on the matter.<sup>60</sup> If the English court is the chosen court and has at some point made the anti-suit injunction permanent then it would seem from the Explanatory Report that the permanent injunction is an enforceable judgment within the scope of the Convention. On the other hand, the operation of national law in relation to interim measures of protection is not completely unfettered by the Hague Convention.<sup>61</sup> Considerations of general treaty law may place constraints on the operation of national law. Thus, there is a legitimate question as to whether a court not chosen could issue an anti-suit injunction against proceedings in a court chosen in an exclusive choice of court agreement.<sup>62</sup> It is submitted, that in these circumstances, the use of anti-suit injunctions will actually impede the sound operation of the Hague Convention and jeopardize the enforcement of jurisdictional party autonomy. Thus, there is a strong argument that the

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<sup>59</sup> David Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (2<sup>nd</sup> Edn, Sweet & Maxwell, 2010) 410-411.

<sup>60</sup> *Ibid.*

<sup>61</sup> Brand and Herrup (*supra* n 11) Chapter 5, 96; Hartley and Dogauchi, *Explanatory Report on the Preliminary Draft Convention on Exclusive Choice of Court Agreements (December 2004)* (*supra* n 53) 167, 193, [120]-[121]; Hartley and Dogauchi, *Explanatory Report on the Preliminary Draft Convention on Choice of Court Agreements (March 2004)* (*supra* n 53) 22, [88]-[89]; See also Andrea Schulz, "Reflection Paper to Assist in the Preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters" (Preliminary Document No 19 of August 2002) in *Proceedings of the Twentieth Session of the Hague Conference on Private International Law* (Permanent Bureau of the Conference, Intersentia 2010) 11, 25, [77], who identified whether the Convention should contain a rule prohibiting the courts of a Contracting State from issuing anti-suit injunctions with regard to proceedings before the court in another Contracting State which was designated by an exclusive choice of court clause.

<sup>62</sup> Under public international law treaty interpretation is based on the requirements of Arts 31 and 32 of the Vienna Convention on the Law of Treaties at least for States bound by the Convention, see [http://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf) accessed 10 August 2016. As at 10 August 2016 the Vienna Convention on the Law of Treaties has 114 State Parties, see [https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtmsg\\_no=XXIII-1&chapter=23&Temp=mtmsg3&clang=en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtmsg_no=XXIII-1&chapter=23&Temp=mtmsg3&clang=en) accessed 10 August 2016. Resort to the preparatory work is allowed under Art 32 if the meaning of a Convention is "ambiguous or obscure" from the application of Art 31 or if it confirms the meaning arrived at from the application of Art 31. Arguably the circumstances in which anti-suit injunctions can be used in relation to the Hague Convention are not clear from reading the wording of the Convention and taking account of its context and its object and purpose but even if they are clear the preparatory work in terms of the discussion of this issue at the Diplomatic Session confirms the correct interpretation. Therefore resort to the preparatory work on the use of anti-suit injunctions in relation to the Hague Convention – in particular the published discussion on this issue at the Diplomatic Session – is appropriate for a court seeking to interpret the Hague Convention in a uniform manner as required by Art 23 of that Convention.

Hague Convention will not permit the use of anti-suit injunctions to render choice of court agreements ineffective.<sup>63</sup>

It has been observed that anti-suit injunctions granted to uphold English exclusive jurisdiction clauses are measures intended to make such agreements more effective. However, the principal method of enforcing choice of court agreements in both the Hague Convention and the Brussels I Regulation (Recast) is jurisdictional or procedural and not contractual in nature. The nominated court in a choice of court agreement shall exercise jurisdiction whilst all other courts are required to stay and eventually decline jurisdiction.<sup>64</sup> In the case of the Brussels I Regulation (Recast) a 'reverse *lis pendens* rule'<sup>65</sup> according primacy to the choice of court agreement rather than the court first seised is the envisaged method of enforcing jurisdictional party autonomy within the EU.<sup>66</sup> The prospects of remedies enforcing choice of court agreements making much headway in the European Union is necessarily curtailed by a multilateral jurisdictional system that prizes the overarching principle of mutual trust and systemic objectives more than the enforcement of private rights and obligations embodied in an exclusive jurisdiction agreement.<sup>67</sup>

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<sup>63</sup> Brand and Herrup (*supra* n 11) Chapter 5, 96; See Minutes No 9 of the Second Commission Meeting of Monday 20 June 2005 (morning) in *Proceedings of the Twentieth Session of the Hague Conference on Private International Law* (Permanent Bureau of the Conference, Intersentia, 2010) 622, 623-624. The delegates who clearly held a view that anti-suit injunctions preventing parties from bringing proceedings in the chosen court were incompatible with the Hague Convention were the same as those listed in n 56 above.

<sup>64</sup> Art 6 of the Hague Convention; Arts 31(2) and 31(3) of the Brussels I Regulation (Recast).

<sup>65</sup> Hartley, *Choice-of-Court Agreements under the European and International Instruments* (*supra* n 11) 228, [11.17]; TC Hartley, "Choice-of-court agreements and the new Brussels I Regulation" (2013) 129 *Law Quarterly Review* 309, 312.

<sup>66</sup> For criticism of the *kompetenz-kompetenz* of the 'allegedly' chosen forum in a choice of court agreement, See Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693, Opinion of AG Léger, [74]; A Briggs, "What should be done about Jurisdiction Agreements" (2010) 12 *Yearbook of Private International Law* 311, 319-322; A Briggs, "The Brussels I bis Regulation Appears on the Horizon" [2011] *Lloyd's Maritime and Commercial Law Quarterly* 157, 162-164.

<sup>67</sup> 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" (2015) 11 *Journal of Private International Law* 406, 438; Martin Illmer, "Chapter 2 – Article 1" in Andrew Dickinson and Eva Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press, 2015) 79; G Cuniberti and M Requejo, "La sanction des clauses d'élection de for par l'octroi de dommages et intérêts", *ERA Forum* 2010-1 (SSRN, 18 February 2010) <ssrn.com/abstract=1689417> accessed 27 May 2016; Briggs, *Agreements* (*supra* n 18) Chapter 8, 330-338; Hartley, *Choice of Court Agreements under the European and International Instruments* (*supra* n 11) Chapter 10, 220; J Harris, "Agreements on Jurisdiction and Choice of Law: Where Next?" [2009] *Lloyds Maritime and Commercial Law Quarterly* 537, 547; CJS Knight, "The Damage of Damages: *Agreements on Jurisdiction and Choice of Law*" (2008) 4 *Journal of Private International Law* 501, 509; E Peel, "Introduction" in P de Vareilles-Sommieres (ed), *Forum Shopping in the European Judicial Area* (Hart Publishing, 2007) 1, 15-17; R Fentiman, "Parallel Proceedings and Jurisdiction Agreements in Europe" in *ibid*, 43-45; A Nuyts, "The Enforcement of Jurisdiction Agreements Further to *Gasser* and the Community Principle of Abuse of Right" in *ibid*, 57; P Briza,

In contrast, the Hague Convention is premised on a system of qualified or partial mutual trust which suggests that the arguments for upholding choice of court agreements through anti-suit injunctions may be pursued here with a greater likelihood of success.<sup>68</sup> However, it should be noted, that anti-suit injunctions as opposed to a more general class of injunctions were not specifically discussed as a method for upholding exclusive jurisdiction agreements in the final Explanatory Report.<sup>69</sup> The judgment of a Contracting State which rules on the validity of a choice of court agreement selecting that state itself shall be recognised and enforced in other Contracting States.<sup>70</sup> However, the judgment of a Contracting State which rules on the validity of a choice of court agreement selecting another Contracting State will not be entitled to recognition and enforcement in other Contracting States.<sup>71</sup> The application of an anti-suit injunction and the damages remedy may be justified against the assumption of jurisdiction by a Contracting State without regard to the presence of a valid choice of court agreement in favour of another Contracting State. Thus, the Hague Convention might allow an English court to second guess the findings of

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“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?” (2009) 5 *Journal of Private International Law* 537, 548–554; cf T Raphael, *The Anti-Suit Injunction* (Oxford University Press, 2008) 294; F Blobel and P Späth, “The Tale of Multilateral Trust and the European Law of Civil Procedure” (2005) 30 *European Law Review* 528, 545– 546, highlight the counterproductive effects of secondary remedies on the principle of mutual trust in the European Union; A Dutta and C Heinze, “Prozessführungsverbote im englischen und europäischen Zivilverfahrensrecht” (2005) *Zeitschrift für Europäisches Privatrecht (ZEUP)* 428, 458–461, suggest that damages in relation of the foreign court’s substantive liability award are impermissible, but that damages in respect of litigation costs are more defensible, although still doubtful; G Carducci, “The New EU Regulation 1215/2012 of 12 December 2012 on Jurisdiction and International Arbitration” (2013) 29 *Arbitration International* 467, 489, is more optimistic regarding the compatibility of damages for breach of an arbitration agreement with the Brussels I Regulation; see also the Opinion of AG Wathelet in Case C-536/13 *Gazprom OAO* EU:C:2014:2414, FN 87, who regarded an award of damages as compatible with the Brussels I Regulation, although it was not in issue in that case.

<sup>68</sup> Harris (*ibid*) 560; Hartley, *Choice of Court Agreements under the European and International Instruments* (*supra* n 11) Chapter 10, 220; Raphael (*ibid*) Chapter 1, 20 n 97; Fentiman, *International Commercial Litigation* (2015) (*supra* n 45) 98; Briggs, *Agreements* (*supra* n 18) 531-532. There is a risk that if a case is referred to the CJEU concerning an anti-suit injunction from a non-EU Hague Contracting State that is trying to uphold an exclusive choice of court agreement in favour of the courts of the State granting the injunction that the CJEU will regard such an injunction as contrary to the Convention. Hopefully the CJEU will not do so because it carefully considers the *travaux préparatoires* of the Convention and accepts that there is no obligation on non-EU Contracting States to the Convention not to grant such injunctions and that such an obligation cannot be inferred from a notion of “mutual trust” in this context. There is some hope for this outcome given that in Case C-536/13 *Gazprom OAO* EU:C:2015:316, esp paras 35-44, the CJEU recognised that there is no obligation on arbitral bodies not to grant anti-suit injunctions in relation to proceedings pending in the courts of an EU Member State.

<sup>69</sup> See Hartley and Dogauchi, *Explanatory Report* (*supra* n 5).

<sup>70</sup> Art 8(1) of the Hague Convention.

<sup>71</sup> Brand and Herrup (*supra* n 11) Chapter 6, 100; Hartley, *Choice of Court Agreements under the European and International Instruments* (*supra* n 11) Chapter 9, 195; Hartley and Dogauchi, *Explanatory Report* (*supra* n 5) [164]-[181].

another Contracting State as to the validity and effectiveness of an English choice of court agreement and award damages for breach of the jurisdiction clause. However, it should be noted that, the Hague Convention is a codified regime regulating the validity and effectiveness of choice of court agreements globally.<sup>72</sup> The application of remedies to enforce jurisdiction agreements by some Contracting States may create a rift in the yet to develop jurisprudence of the Hague Convention and without an international court interpreting the meaning of the global Convention it is likely that the uniform application of the Convention might be compromised.

#### **F. Exclusive choice of court agreements and concurrent proceedings in intra-EU Hague Convention cases**

Following the conclusion and ratification of the Lugano Convention (2007),<sup>73</sup> which fell entirely within the sphere of the exclusive competence of the EU,<sup>74</sup> the Hague Convention was also approved by the EU on behalf of the Member States (except Denmark).<sup>75</sup> The fact that the EU is a party to the Hague Convention has important consequences within the Union. The Hague Convention has the status of EU law within the European Union (except Denmark)<sup>76</sup> and the CJEU will have the final word on its interpretation as far as the EU Member States are concerned.<sup>77</sup> The Hague Convention as EU law is directly applicable,<sup>78</sup>

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<sup>72</sup> See Art 23 of the Hague Convention which highlights its international character and the need to promote uniformity in its application; Hartley and Doguchi, *Explanatory Report* (*supra* n 5) [256]. The equivalent provision in the preliminary draft Convention 1999 is Art 38(1). The commentary on this issue is in the Nygh/Pocar Report, Prel Doc 11, August 2000, 118-119, available at <https://assets.hcch.net/docs/638883f3-0c0a-46c6-b646-7a099d9bd95e.pdf> accessed 11 August 2016.

<sup>73</sup> [2009] OJ L147/1; See Explanatory Report by Professor Fausto Pocar: [2009] OJ C319/1.

<sup>74</sup> See *Lugano Convention* Opinion 1/03, [2006] ECR I-1145; Opinion 1/13, ECLI:EU:C:2014:2303 of the CJEU (Grand Chamber) confirms that the exclusive competence of the EU encompasses the acceptance of the accession of a third State to the Hague Convention on the civil aspects of international child abduction concluded on 25 October 1980, see Paul Beaumont, "A Critical Analysis of the Judicial Activism of the Court of Justice of the European Union in Opinion 1/13" (2015) 1 *Centre for Private International Law Aberdeen Working Paper Series*, Working Paper No. 2015/1 <[http://www.abdn.ac.uk/law/documents/Opinion\\_on\\_Child\\_Abduction - Judicial Activism by the CJEU - By Beaumont.pdf](http://www.abdn.ac.uk/law/documents/Opinion_on_Child_Abduction_-_Judicial_Activism_by_the_CJEU_-_By_Beaumont.pdf)> accessed 27 May 2016 and in Pietro Franzina (ed), *The External Action of the EU in the Field of Private International Law after Opinion 1/13* (Intersentia, 2016) 19-37; and generally, Hugh Hutchison, "The External Competence of the European Union in Private International Law" (University of Aberdeen LLM Thesis, 2012).

<sup>75</sup> See Council Decision 2014/887/EU, *supra* n 1.

<sup>76</sup> Hartley, *Choice of Court Agreements under the European and International Instruments* (*supra* n 11) Chapter 1, 22-23

<sup>77</sup> *Ibid* 23.



would almost certainly fulfil the requirements for direct effect<sup>79</sup> and would prevail over the law of the Member States in case of conflict.<sup>80</sup> The CJEU would interpret the Hague Convention through the preliminary reference procedure from the courts of the Member States of the EU.<sup>81</sup>

The possibility of anti-suit injunctions receiving another fatal blow in the context of the Hague Convention by a CJEU seeking to harmonize its approach to anti-suit relief in the Brussels-Lugano regime and under the Hague Convention cannot be foreclosed.<sup>82</sup> However, in a post-BREXIT landscape this is much less likely to happen because the main jurisdiction in the current EU that might grant anti-suit injunctions to uphold exclusive choice of court agreements, the UK, will by then no longer be in the EU.<sup>83</sup> Nonetheless, this is a sensitive issue lying at the interface between the Recast Regulation and the Hague Convention. Let's suppose that two non-EU domiciliaries who are resident in Hague Convention Contracting States enter into an exclusive choice of court agreement for the Irish courts or one non-EU domiciliary who is resident in a Hague Convention Contracting State enters into an Irish

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<sup>78</sup> The principle of direct applicability refers to the extent to which EU measures take effect in the legal system of each Member State without the need for further implementation by the Member States themselves. Authority for this interpretation is Art 288 of the Treaty on the Functioning of the European Union ("TFEU") which states specifically that a Regulation "shall be binding in its entirety and directly applicable in all Member States". Therefore, Regulations shall take effect in the legal system of each Member State without the need for any further implementation.

<sup>79</sup> The principle of direct effect can be interpreted as meaning the extent to which EU law can produce legal rights and obligations which can be used in an action before a national court. The ECJ decision in *Van Gend en Loos v Nederlandse Administratie der Belastingen* (26/62) [1963] ECR 1, [1963] CMLR 105 states that "[Union] law has an authority which can be invoked by their nationals before those courts and tribunals". See Paul Craig and Grainne De Burca, *EU Law: Text, Cases and Materials* (5<sup>th</sup> edn, Oxford University Press, 2011) Chapter 7.

<sup>80</sup> In *Costa v ENEL* (6/64) [1964] ECR 585 the ECJ espoused the principle of supremacy of EC law and stated that EC law could not "be overridden by domestic legal provisions, however framed, without being deprived of its character as [Union] law and without the legal basis of the [Union] itself being called into question". See TC Hartley, *The Foundations of European Union Law* (8th edn, Oxford University Press, 2010) Chapter 7; Craig and De Burca (*ibid*) Chapter 9.

<sup>81</sup> Art 267 TFEU; See Hartley, *Foundations (ibid)* Chapter 9; Craig and De Burca (*supra* n 79) Chapter 13.

<sup>82</sup> See Case C-159/02 *Turner v. Grovit* [2005] ECR I-3565; [2004] 2 Lloyd's Rep 169; Case C-185/07 *Allianz SpA (formerly Riunione Adriatica di Sicurtà SpA) v. West Tankers Inc (The Front Comor)* [2009] 1 Lloyd's Rep 413. But see also our analysis *supra* n 67.

<sup>83</sup> We are assuming that in the BREXIT deal between the UK and the rest of the EU the Brussels I Regulation will cease to apply, apart perhaps for some transitional provisions, and will not be replaced by either the Brussels Convention or the Lugano Convention both of which also have the principle of mutual trust and do not allow anti-suit injunctions by courts applying those Conventions in relation to courts in other Contracting States for matters within their scope. The possibility of those two Conventions reviving for the UK after BREXIT is discussed by Andrew Dickinson, "Back to the future: the UK's EU exit and the conflict of laws" (2016) 12 *Journal of Private International Law* 195. However, like him, we regard it as politically unlikely that the UK will continue to apply either of those Conventions after BREXIT.

exclusive choice of court agreement with an EU domiciliary.<sup>84</sup> The Hague Convention is applicable pursuant to Article 26 of the same Convention.<sup>85</sup> One of the parties commences pre-emptive torpedo proceedings in the Italian courts for a declaration of non-liability in breach of the Irish exclusive choice of court agreement. The question is whether the aggrieved party can legally and legitimately seek injunctive relief or in principle claim monetary compensation for breach of contract before the Irish courts.<sup>86</sup> As the dispute involves proceedings before the courts of two Member States, there are strong arguments of principle based on mutual trust and the *effet utile* of EU law which may override the underlying *ethos* of the Hague Convention and disallow a claim for an anti-suit injunction and damages for breach of choice of court agreements.<sup>87</sup> In *Nipponkoa*, the CJEU has recently held that the application of an international convention under Article 71 of the Brussels I Regulation:<sup>88</sup>

cannot compromise the principles which underlie judicial co-operation in civil and commercial matters in the European Union, such as the principles, recalled in recitals 6, 11, 12 and 15 to 17 in the preamble to Regulation 44/2001, of free movement of judgments in civil and commercial matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, sound administration of justice,

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<sup>84</sup> An Irish exclusive jurisdiction agreement is employed in the example because after BREXIT Ireland will be the only remaining EU Member State with a pure common law legal system (though both Cyprus and Malta have elements of common law).

<sup>85</sup> See Art 26(6)(a) of the Hague Convention; Hartley, *Choice of Court Agreements under the European and International Instruments* (supra n 11) Chapter 6, 122-123; Hartley and Dogauchi, *Explanatory Report* (supra n 5) [291]-[304]; See Marta Pertegás, “The Revision of the Brussels I Regulation: A View from the Hague Conference” in Eva Lein (ed), *The Brussels I Review Proposal Uncovered* (BIICL, 2012) 193, 199-200; Francisco Garcimartin, “Chapter 9 – Article 25” in Andrew Dickinson and Eva Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press, 2015) 284.

<sup>86</sup> The damages remedy has been recognised by the English courts even in the context of the Brussels I Regulation: see *infra* n 98; *Union Discount Co Ltd v Zoller and Others* [2001] EWCA Civ 1755, [2002] 1 WLR 1517 (Schiemann LJ); and *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749, [36] (Lord Bingham) and [48] (Lord Hobhouse).

<sup>87</sup> The interface between the New York Convention and the Brussels I Regulation also proscribes anti-suit injunctions in support of arbitration agreements. Where proceedings before the courts of two Member States are involved, the principle of mutual trust and the *effet utile* of EU law will 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. See the recent decision of the CJEU’s Grand Chamber in Case C-536/13 *Gazprom OAO* EU:C:2015:316, [32]-[34], which purports to circumscribe the mutual trust principle and *effet utile* of EU law to court to court proceedings in Member States as in the paradigm case of C-185/07 *West Tankers* EU:C:2009:69 [29]-[31]; See also, Illmer, *Chapter 2 – Article 1* (supra n 67) 86.

<sup>88</sup> Case C-452/12 *Nipponkoa Insurance Co (Europe) Ltd v Interzuid Transport BV* ECLI:EU:C:2013:858, [2014] I.L.Pr. 10, [36]; See also to similar effect, Case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG* ECLI:EU:C:2010:243, [2010] I.L.Pr. 35, [49]; See Pippa Rogerson, “Chapter 17 – Article 71” in Andrew Dickinson and Eva Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press, 2015) 569-571.

minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice in the European Union.

Arguably, an anti-suit injunction in the context of an intra-EU Hague Convention case will contradict these fundamental principles of EU law including the overarching mutual trust principle.

It should be noted that such an interpretation would militate against the underlying *ethos* of the Convention *per se*, whose system of partial or qualified mutual trust may allow recourse to anti-suit injunctions and the damages remedy to enforce exclusive choice of court agreements. Secondly, a difference of approach to the interpretation of the Hague Convention in relation to the availability of remedies within the EU and globally would widen the divide between European Union and common law world practice, jeopardize the enforcement of jurisdictional party autonomy and limit the scope for pragmatic solutions to the conflicts of jurisdiction in Hague Convention cases within the EU. On the other hand, in relation to Hague Convention cases where the pre-BREXIT English or Irish courts are chosen by an exclusive choice of court agreement and pre-emptive torpedo proceedings are launched in a non-EU Member State, there is no similar or comparable legal impediment to the pre-BREXIT English or Irish courts enforcing the agreement by injunctive relief or by an action for damages for breach of contract.

Notwithstanding the incompatibility of anti-suit injunctions with the European Judicial Area, it is argued that Article 31(2) of the Brussels I Regulation (Recast) may still be applied by EU courts within the scope of application of the Hague Convention. The *ethos* of the Hague Convention allows for the most appropriate conception of Article 6 of the Hague Convention. If Article 6 of the Hague Convention is understood as a merely permissive rule, which does not oblige the non-designated court to decide on the validity and effectiveness of the clause but merely *permits* it do so, Member States may apply the mandatory provisions of Article 31(2)-(3) consistently with the Hague Convention.<sup>89</sup> However, Article 6

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<sup>89</sup> Hartley and Dogauchi, *Explanatory Report* (*supra* n 5) [300]; Heidelberg Report (*supra* n 14) [391]; Article 26(1) of the Hague Convention; Francisco Garcimartin, "Chapter 11 – Article 31(2)-(4)" in Andrew Dickinson and Eva Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press, 2015) 343; cf Matthias Weller, "Choice of Forum Agreements under the Brussels I Recast and under the Hague Convention: Coherence or Clash?" Presentation at the plenary session of the 10<sup>th</sup> Anniversary of the *Journal of Private International Law* Conference 2015 (4<sup>th</sup> September 2015), argues that a clash exists between the two instruments in relation to the *lis pendens* rule and suggests that the effects of the incompatibility may be minimised by recognizing the

might alternatively be understood as a provision that confers a *right* on the claimant to have the case heard when one of the exceptions to that provision applies irrespective of whether the designated court has been seised or not. If we adopted this latter conception, which departs from the opinion of Hartley and Dogauchi in the Official Explanatory Report,<sup>90</sup> there would be a conflict between the two instruments and the Hague Convention should in principle prevail,<sup>91</sup> assuming that the Hague Convention applies because one of the parties is resident in a Contracting State which is not a Member State.<sup>92</sup> However, as noted above, in the recent decision in *Nipponkoa* concerning the application of an international convention under Article 71 of the Brussels I Regulation the CJEU has held that the fundamental principles underlying judicial co-operation in civil and commercial matters in the EU cannot be compromised - the 'minimisation of the risk of concurrent proceedings' is one of these overriding principles.<sup>93</sup> It further ruled that Article 71 of Brussels I Regulation must be interpreted as meaning that it precludes an interpretation of Article 31(2) of the CMR according to which an action for a negative declaration or a negative declaratory judgment in one Member State does not have the same cause of action as an action for indemnity between the same parties in another Member State. The relevant provisions of the CMR could be applied in the European Union only if they enabled the objectives of the free movement of judgments in civil and commercial matters and of mutual trust in the administration of justice in the European Union to be achieved under conditions at least as favourable as those resulting from the application of the Brussels I Regulation.<sup>94</sup> The CJEU's interpretation of Article 27 of the Brussels I Regulation prevailed over a contradictory

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preclusive *res judicata* effect of the judgment validating the choice of court agreement in the chosen court in the other Member State court seised with the proceedings. See Case C-456/11 *Gothaer Allgemeine Versicherung AG v Samskip GmbH* ECLI:EU:C:2012:719, [2013] QB 548. However, the authors disagree with this approach and argue that the principle of mutual trust and other fundamental principles animating the corpus of rules in the Brussels I Regulation may not permit a contradictory interpretation of Art 6 of the Hague Convention taking root in the first place. See Case C-452/12 *Nipponkoa Insurance Co (Europe) Ltd v Interzuid Transport BV* ECLI:EU:C:2013:858, [2014] I.L.Pr. 10, [36].

<sup>90</sup> Hartley and Dogauchi, *Explanatory Report (supra n 5)* [300].

<sup>91</sup> Art 71 of the Brussels I Regulation (Recast).

<sup>92</sup> Art 26(6) of the Hague Convention.

<sup>93</sup> Case C-452/12 *Nipponkoa Insurance Co (Europe) Ltd v Interzuid Transport BV* ECLI:EU:C:2013:858, [2014] I.L.Pr. 10, [36]; See also to similar effect, Case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG* ECLI:EU:C:2010:243, [2010] I.L.Pr. 35, [49].

<sup>94</sup> Case C-452/12 *Nipponkoa Insurance Co (Europe) Ltd v Interzuid Transport BV* ECLI:EU:C:2013:858, [2014] I.L.Pr. 10, [37]-[38]; Case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG* ECLI:EU:C:2010:243, [2010] I.L.Pr. 35, [55].

interpretation of the *lis pendens* mechanism in the CMR.<sup>95</sup> Therefore, in the context of the Hague Convention mutual trust and the other animating principles of the Brussels I Regulation may also override any interpretation of Article 6 of the Convention which does not conform to the operation of the reverse *lis pendens* mechanism in Article 31(2) of the Recast Regulation. As a result, the interpretative approach adopted by the Hartley and Dogauchi Report has much to commend it as it follows the path of least resistance by seeking to resolve any differences in relation to the Recast Regulation and simultaneously helps control the incidence of parallel proceedings and irreconcilable judgments, which are significant objectives under the Brussels I Regulation.

A concrete example will help to illustrate both the issue of the perceived incompatibility of injunctive relief for breach of a choice of court agreement with Hague Convention cases inside the EU and the mandatory operation of Article 31(2)-(3) of the Recast Regulation in Hague Convention cases within the EU:

Party A is domiciled in Spain and Party B is domiciled in Mexico. Both parties have agreed on the exclusive jurisdiction of the Irish Courts. Party A sues first in Madrid. Party B chooses either to strategically not sue in Ireland and later attempt to claim damages for the ‘wasted’ costs incurred for litigating in Madrid<sup>96</sup> or sues after the Spanish court has rendered a decision that the Irish exclusive jurisdiction clause is inapplicable or invalid.<sup>97</sup> According to the analysis considered above, Party B may not be able to obtain anti-suit relief against the proceedings commenced and continued in Madrid or in principle recover damages for breach of the Irish exclusive choice of

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<sup>95</sup> The CJEU has adopted a ‘relatively wide interpretation’ of same cause of action in the *lis pendens* provision of the Brussels I regime: Case C-144/86 *Gubisch Maschinenfabrik KG v Giulio Palumbo* [1987] ECR 4861, [8]; Case C-406/92 *The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj"* [1994] ECR I-05439; See Ahmed, *The enforcement of settlement and jurisdiction agreements* (*supra* n 64) 418-420; Pippa Rogerson, *Collier's Conflict of Laws* (4<sup>th</sup> edn, Cambridge University Press, 2013) 123.

<sup>96</sup> In the context of Art 31(2) of the Recast Regulation *per se* see: Fentiman, *International Commercial Litigation* (*supra* n 45) 118, alludes to the possibility that the party relying on the exclusive jurisdiction agreement could elect not to initiate protective proceedings under Art 31(2) in the agreed court and rely instead on an action in damages. However, it should be noted that the availability of damages in such cases is speculative and might not be permitted by the CJEU because the party relying on the jurisdiction agreement has failed to take advantage of the systemic solution provided by the Recast Regulation of seising the chosen court before the court first seised has adjudicated on the applicability and validity of the jurisdiction agreement.

<sup>97</sup> In the context of Art 31(2) of the Recast Regulation *per se* see, Quim Forner-Delaygua, “Changes to jurisdiction based on exclusive jurisdiction agreements under the Brussels I Regulation Recast” (2015) 11 *Journal of Private International Law* 379, 392; Monica Herranz Ballesteros, “The Regime of Party Autonomy in the Brussels I Recast: The Solutions Adopted for Agreements on Jurisdiction” (2014) 10 *Journal of Private International Law* 291, 307.

court agreement,<sup>98</sup> even though the case falls within the remit of the Hague Convention. However, it has been argued that the Spanish judge will be obliged to suspend the proceedings in accordance with Article 31(2) of the Recast Regulation if the Irish Court has been seised, notwithstanding the applicability of the Hague Convention.

It should be noted that the application of the reverse *lis pendens* rule in Article 31(2) of the Recast Regulation will substantially reduce the chances of a non-chosen court in the EU ruling on the validity and applicability of an exclusive jurisdiction agreement if the chosen court has been seised.

The entry into force of the Hague Convention on Choice of Court Agreements is a major step towards increased legal security for European companies conducting business in non-EU Contracting States.<sup>99</sup> However, the actual success of the Hague Convention will depend on further ratifications by the major centres for international litigation.<sup>100</sup>

## **G. Conclusions**

It has been argued that the Hague Convention's system of 'qualified' or 'partial' mutual trust may permit anti-suit injunctions, actions for damages for breach of exclusive jurisdiction agreements and anti-enforcement injunctions where such remedies further the objective of the Convention. The text of the Hague Convention and the Explanatory Report by Professors Trevor Hartley and Masato Dogauchi are not explicit on this issue. However, the *procès-verbal* of the Diplomatic Session of the Hague Convention reveal widespread support for the proposition that the formal 'process' should be differentiated from the desired 'outcome' when considering whether anti-suit injunctions are permitted under the Convention. Where

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<sup>98</sup> Cf The pragmatic English Court of Appeal decision awarding damages in the context of the Brussels I Regulation *per se*: *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2014] EWCA Civ 1010 [15]-[17] (Longmore LJ); Longmore LJ's landmark ruling on the compatibility of an award of damages for breach of an English exclusive jurisdiction agreement with EU law was endorsed and reiterated in *Marzillier, Dr Meier & Dr Guntner Rechtsanwalts-gesellschaft MbH v AMT Futures Ltd* [2015] EWCA Civ 143, [61]-[62] (Christopher Clarke LJ); See M Ahmed, "Case Comment: *Marzillier, Dr Meier & Dr Guntner Rechtsanwalts-gesellschaft MbH v AMT Futures Ltd* [2015] EWCA Civ 143" (2015) 6 *Aberdeen Student Law Review* 118.

<sup>99</sup> See *supra* n 1. On 1 October 2015, the Convention of 30 June 2005 on Choice of Court Agreements entered into force in 28 States (Mexico and all the Member States of the European Union, except Denmark).

<sup>100</sup> Gottfried Musger, "The 2005 Hague Convention on Choice of Court and Brussels I Recast" at the European Parliament Workshop on *Cross-border activities in the EU – Making life easier for citizens* (PE: 510.003) (26 February 2015, Brussels) 317, 333-335; The major business partners of the EU include Canada, China, Korea, Russia, Turkey and the USA.

anti-suit injunctions uphold choice of court agreements and thus help achieve the intended ‘outcome’ of the Convention, there was a consensus among the official delegates at the Diplomatic Session that the Convention did not limit or constrain national courts of Contracting States from granting the remedy.

However, intra-EU Hague Convention cases may arguably not permit remedies for breach of exclusive choice of court agreements as they may be deemed to be an infringement of the principle of mutual trust and the principle of effectiveness of EU law (*effet utile*) which animate the multilateral jurisdiction and judgments order of the Brussels I Recast Regulation.

The dynamics of the relationship between Article 31(2) of the Recast Regulation and Articles 5 and 6 of the Hague Convention was mapped in this article. In a case where the Hague Convention should apply rather than the Recast Regulation because one of the parties is resident in a non-EU Contracting State to the Convention even though the chosen court is in a Member State of the EU (see Article 26(6)(a) of the Convention) one would expect Article 6 of the Convention to be applied by any non-chosen court in the EU. However, the fundamental nature of the Article 31(2) *lis pendens* mechanism in the Brussels I Recast may warrant the pursuance of a different line of analysis. It has been argued that the Hartley-Dogauchi Report’s interpretative approach has much to commend it as it follows the path of least resistance by narrowly construing the right to sue in a non-chosen forum as an exception rather than the norm. This exceptional nature of the right to sue in the non-chosen forum under the Hague Convention can be achieved effectively by applying Article 31(2) of the Brussels I Recast’s reverse *lis pendens* rule. This will usually result in the stay of the proceedings in the non-chosen court as soon as the chosen court is seised. As a consequence, the incidence of parallel proceedings and irreconcilable judgments are curbed, which are significant objectives in their own right under the Recast Regulation. It is hoped that the yet to develop jurisprudence of the CJEU on the emergent Hague Convention and the Recast Regulation will offer definitive and authoritative answers to the issues addressed in this article.

The implications of BREXIT on this topic are not yet fully clear. The UK is a party to the Hague Choice of Court Agreements 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. 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. BREXIT will almost certainly see the end of the application of the Brussels I Recast in the UK and although it is outside the scope of this article it seems highly unlikely that either the Brussels Convention or the Lugano Convention will remain in force for the UK.<sup>101</sup> Therefore the likely outcome post-BREXIT is that the regime applicable between the UK and the EU (apart from Denmark<sup>102</sup>) in relation to exclusive choice of court agreements within the scope of the Hague Convention will be the Hague Convention. The UK will be able to grant anti-suit injunctions to uphold exclusive choice of court agreements in favour of the courts in the UK even when one of the parties has brought an action contrary to that agreement in an EU Member State.<sup>103</sup> The EU Member State will apply Article 6 of the Hague Convention rather than Article 31(2) of the Brussels I Regulation Recast when deciding whether to decline jurisdiction in favour of the chosen court(s) in the UK.

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<sup>101</sup> Those issues are discussed by Dickinson, *supra* n 83. In relation to exclusive choice of court agreements the Brussels Convention and the Lugano Convention both have the severe drawback that the *Gasser* case (*supra* n 40) 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.

<sup>102</sup> Though it is hoped that before too long Denmark will ratify the Hague Convention.

<sup>103</sup> The statement in the text should be qualified by saying that it is possible that Scotland may choose after BREXIT to mirror the Brussels I Regulation regime 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 (interdicts of foreign actions as they are called in Scotland, see P Beaumont and P McEleavy, *Anton's Private International Law* (3<sup>rd</sup> edn, SULI/W Green, 2011) 367-371) in cases involving EU Member States even where the Hague Convention applies.