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The Commercial Bar Association

BREXIT EMERGENCY PACK

WHAT YOU NEED TO KNOW ABOUT LIFE AFTER 1 JANUARY 2021

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1. **Brexit Overview – Commercial Law Practice, What Changes, What Stays the Same**

What Changes?

European Law

On 1 January 2021, the effect of the European Communities Act 1972 will cease – s.1 [European Union \(Withdrawal\) Act 2018](#) (as amended). No references to the CJEU can be made from 1 January 2021 – s. 6(1)(b), 2018 Act.

The 2018 Act, as amended by the [EU \(Withdrawal Agreement\) Act 2020](#), creates retained EU law. Retained EU law consists of: (i) “*EU-derived domestic legislation*” – s. 2, 2018 Act; (ii) “*direct EU legislation*” – s. 3, 2018 Act; and (iii) rights, powers, liabilities, obligations, restrictions, remedies and procedures, previously recognised and available in UK law – s. 4, 2018 Act.

English Courts will no longer be bound by changes in EU law after 1 January 2021, but may have regard to it if relevant - s. 6(1)(a) and s. 6(2), 2018 Act. The Supreme Court may depart from CJEU case law (applying the same test as it would in deciding whether to depart from its own case law, i.e. to depart from a previous decision when it appears right to do so [1966] 1 WLR1234) – s.6(4) and s. 6(5), 2018 Act. It is anticipated the Court of Appeal will also be

able to depart from CJEU case law (also applying the above Supreme Court test): see the draft [European Union \(Withdrawal\) Act 2018 \(Relevant Court\) \(Retained EU Case Law\) Regulations 2020](#).

Jurisdiction

From 1 January 2021, the UK will not be a party to Brussels Recast. Nor will the UK be a party to Lugano 2007. The UK's application to accede to Lugano 2007 was made on 8 April 2020, but it is now clear that accession will not take place before 1 January 2021. This is discussed further in Section 2 (below).

CPR

The [CPR Regulations](#) (see below) make numerous changes to the CPR from 1 January 2021, including (but not limited to) changes to: (i) service (Part 6); (ii) enforcement of judgments (Part 74); (iii) taking of evidence (Part 34); (iv) default judgment (Part 12); (v) security for costs (Part 25). The [Ministry of Justice's 107th Update – Practice Direction Amendments](#) also comes into force on 1 January 2021.

Statutory Instruments

The Ministry of Justice has issued 13 Statutory Instruments which take effect on 1 January 2021, in order to address various failures/deficiencies of retained EU law, the following 8 of which may be particularly relevant to commercial practitioners. They are:

1. [The Civil Procedure Rules 1998 \(Amendment\) \(EU Exit\) Regulations 2019 \(SI 2019/521\)](#)

The CPR make various provisions for procedure by reference to certain EU instruments. Because those EU instruments are being revoked or amended, these Regulations remove or amend the corresponding provisions in the CPR.

2. [The Civil Jurisdiction and Judgments \(Amendment\) \(EU Exit\) Regulations 2019 \(SI 2019/479\)](#)

These Regulations make amendments to legislation in the field of civil judicial co-operation, including rules of jurisdiction and recognition and enforcement of judgments. They are necessary because previous reciprocal arrangements no longer exist.

3. [The Law Applicable to Contractual Obligations and Non-Contractual Obligations \(Amendment\) \(EU Exit\) Regulations 2019 \(SI 2019/834\)](#)

These Regulations make amendments to legislation in the field of private international law and, in particular, amend legislation determining the law applicable to contractual and non-

contractual obligations in the case of conflict of laws, including amendments to Rome I and Rome II.

4. [The Cross-Border Mediation \(EU Directive\) \(EU Exit\) Regulations 2019 \(SI 2019/469\)](#)

These Regulations revoke the Cross-Border Mediation (EU Directive) Regulations 2011, subject to saving and transitional provisions.

5. [The Service of Documents and the Taking of Evidence in Civil and Commercial Matters \(Revocation and Saving Provision\) \(EU Exit\) Regulations 2018 \(SI 2018/1257\)](#)

These Regulations make amendments to legislation in the field of cross-border judicial cooperation regarding the service of documents and the taking of evidence in civil and commercial matters. They revoke the Service Regulation and the Evidence Regulation, subject to saving and transitional provisions.

6. [The European Enforcement Order, European Order for Payment and European Small Claims Procedure \(Amendment\) \(EU Exit\) Regulations 2018 \(SI 2018/1311\)](#)

These Regulations make amendments to legislation in the field of cross-border civil judicial cooperation relating to (i) the European Enforcement Order (EEO) (ii) the European order for payment procedure (EOPP) (iii) the European Small Claims Procedure (ESCP).

7. [The Civil Jurisdiction and Judgments \(Hague Convention on Choice of Court Agreements 2005\) \(EU Exit\) Regulations 2018 \(SI 2018/1124\)](#)

These Regulations make provision in relation to the directly effective rights etc derived from the 2005 Hague Convention in domestic law, both in relation to choice of court agreements that will lose the benefit of the convention upon exit day and in relation to choice of court agreements to which the 2005 Hague Convention will apply on the United Kingdom's (re)accession. See Section 3 below on how applicable these Regulations will likely be, in view of the Private International Law (Implementation of Agreements) Bill.

8. [The Jurisdiction, Judgments, & Applicable Law \(Amendment\) \(EU Exit\) Regulations 2020](#)
(This is in draft at the moment and has not yet been passed).

These Regulations are intended to be a “fixing” SI, and which will amend the other SIs (above).

What Stays the Same?

Hague Convention

The UK has acceded to the 2005 Hague Convention on Choice of Courts, and will be a party to it from 1 January 2021. It is expected to be given force of law in domestic law by the Private

International Law (Implementations of Agreements) Bill. The UK’s view is that the Convention will apply to the UK from 1 October 2015 (see Private International Law (Implementation of Agreements) Bill Schedule 5, paragraph 7; the EU’s view is that it will apply to the UK from 1 January 2021. This is discussed further in Section 3 (below).

Governing Law

Rome I and Rome II will form part of retained EU law, as amended by [The Law Applicable to Contractual Obligations and Non-Contractual Obligations \(Amendment\) \(EU Exit\) Regulations 2019 \(SI 2019/834\)](#)

Arbitration

The recognition and enforcement of arbitral awards, including under the New York Convention, is unaffected by Brexit. However, the English Courts (Supreme Court and the Court of Appeal – see above) may not follow the decision of the decision of the CJEU in *West Tankers Inc v Allianz SpA* (Case C-185/07) [2009] AC 1138, and may instead grant anti-suit injunctions restraining proceedings brought in another EU Member State.

Freddie Popplewell
Essex Court Chambers

2. Rules for Establishing Jurisdiction Post Brussels Recast

Position regarding Brussels Regulation (recast) and Lugano Convention

Position after 31 December 2020

1. The Brussels Regulation (recast) will be “*revoked*”: [Regulation 89](#) of the [Civil Jurisdiction and Judgments \(Amendment\) \(EU Exit\) Regulations 2019 \(SI 2019/479\)](#) (“the **2019 Regulations**”).
2. [Regulation 82](#) of the 2019 Regulations provides that “[*a*]ny rights, powers, liabilities, obligations, restrictions, remedies and procedures” surviving through the [European Union \(Withdrawal\) Act 2018](#) and “*derived from*” the Lugano Convention “*cease to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly) on exit day*”.

Transitional provisions

The 2019 Regulations are subject to the following transitional provisions as currently drafted:

1. There is a transitional ‘savings’ provision for “*proceedings of which [a court in any part of the United Kingdom] was seised before exit day and which are not concluded before exit day*”: [Regulation 92\(1\)\(a\)](#). This covers both the Brussels Regulation (recast) and the Lugano Convention: [Regulations 92\(2\)\(d\) & \(f\)](#).
2. However, [Regulation 93\(2\)](#) contains a discretion to decline jurisdiction which would otherwise be taken under those transitional provisions:

“Where before exit day a court in any part of the United Kingdom (the UK court) was seised of proceedings to which a relevant instrument applies, and a court in a State bound by that relevant instrument is subsequently seised of proceedings involving the same cause of action and between the same parties, the UK Court may after exit day decline jurisdiction if, and only if, it considers that it would be unjust not to do so”.

However, the [Ministry of Justice Guidance dated 30 September 2020](#) states at [1.2] that “*the Regulations will be amended by a further instrument (the Civil, Criminal and Family Justice (Amendment) (EU Exit) Regulations 2020) in order to align the existing savings provisions with the requirements of Title VI of the Withdrawal Agreement*”.

[Title VI of the EU-UK Withdrawal Agreement](#) provides that the provisions concerning jurisdiction of the Brussels Regulation (recast) shall continue to apply in situations involving the United Kingdom:

“...in respect of legal proceedings instituted before the end of the transition period and in respect of proceedings or actions that are related to such legal proceedings pursuant to Articles 29, 30 and 31 [of the Brussels Regulation (recast)]” (Article 67(1)).

In relation to recognition and enforcement, the Brussels Regulation (recast) shall continue to apply to:

“...judgments given in legal proceedings instituted before the end of the transition period, and to authentic instruments formally drawn up or registered and court settlements approved or concluded before the end of the transition period” (Article 67(2)).

Since the publication of the MOJ guidance on 30 September 2020, the Civil, Criminal and Family Justice (Amendment) (EU Exit) Regulations 2020 have been replaced with the [draft Jurisdiction, Judgments and Applicable Law \(Amendment\) \(EU Exit\) Regulations 2020](#). The draft as currently published does not amend the 2019 Regulations so as to align with Title VI of the Withdrawal Agreement.¹

¹ Correct at timing of writing, 8 December 2020.

Amended Regulations may well be forthcoming in due course. In any event, the EU-UK Withdrawal Agreement is given direct force of law in the UK by [s.7A European Union \(Withdrawal\) Act 2018](#),² which also provides that every enactment “*is to be read and has effect subject to*” the force and effect of the Withdrawal Agreement. The MOJ Guidance confirms the UK Government view that the treatment of “*transitional cases*” under the Brussels Regulation (Recast) is “*governed by*” Articles 67 and 69 of the Withdrawal Agreement.³

It may well be that the transitional provisions set out above will be amended in relation to the Brussels Regulation (recast), in particular because at present the general discretion in Regulation 93(2) to decline jurisdiction over a case of which the court was seised before exit day is likely to be seen as contrary to the continuing application of the Brussels Regulation (recast) following [Case C-281/02 Owusu v Jackson \[2005\] ECR I-1445](#).

Save for the transitional provisions (and in the absence of any agreement before 31 December 2020) the rules for establishing jurisdiction post-Brussels Recast in respect of EU-27 Defendants will essentially be the same as the ‘common law’ rules currently applied to non-EU Defendants.

Service out of the jurisdiction: permission?

Current position

[CPR r.6.33\(1\); 6.33\(2\)](#): no need for permission to serve out in relation to Lugano Convention claims and Brussels Regulation (recast) claims (respectively)

When will a party be able to serve out without permission after 31 December 2020?

1. Consumer/employee claims: amended CPR r.6.33(2)

- Amended r.6.33(2) to cover claims by consumers and employees under the new [ss. 15A-15E of the Civil Jurisdictions and Judgments Act 1982](#) (“the 1982 Act”) only (see [The Civil Procedure Rules 1998 \(Amendment\) \(EU Exit\) Regulations 2019, Reg. 4\(16\)](#)).
- Query the position in relation to claims issued, but not served, before 31 December 2020. Brussels Regulation (recast) applies to such claims, but note the absence of a savings provision providing for continued application of the current r.6.33(2) to claims issued before 31 December 2020.

² As amended by [s.5 European Union \(Withdrawal Agreement\) Act 2020](#).

³ Article 69 EU-UK Withdrawal Agreement concerns the continuing application of [Council Directive 2002/8/EC](#) on the availability of legal aid in such cases.

2. The 2005 Hague Convention on Choice of Court Agreements: [CPR 6.33\(2B\)](#)
 - Note the limited scope of the 2005 Hague Convention; it only applies to exclusive jurisdiction agreements entered into after the 2005 Hague Convention came into force for the State of the chosen court.
 - When did the 2005 Hague Convention come into force for the UK? Note the contrasting UK/EU Commission views: 1 October 2015, the date of the UK’s initial accession (see [para 7 of Schedule 5 of the Private International Law \(Implementation of Agreements\) Bill](#)) vs. 1 January 2021, the date of the UK’s re-accession in its own right (see [s.3.3 of the European Commission’s Notice to Stakeholders dated 27 August 2020](#)).
3. Choice of court agreements in favour of the courts of England & Wales (where the 2005 Hague Convention does not apply): future CPR 6.33(2C)
 - See the [Approved minutes of the Civil Procedure Rule Committee \(Friday 9th October 2020\)](#).
 - CPRC dealt with the proposal by the Lord Chancellor’s Advisory Committee on Private International Law to introduce a new rule, 6.33(2C), allowing service out without permission where the claimant relies upon a choice of court agreement in favour of the courts of England & Wales. The proposed changes were agreed, subject to final drafting.

When will permission to serve out be required after 31 December 2020?

Unless a claim falls under one of the surviving exceptions set out in CPR r.6.32 – 6.33, the claimant will need permission to serve out under CPR r.6.36 and to satisfy the court (in the usual way) that:

- there is a good arguable case that the claim falls within or more of the grounds of jurisdiction under [paragraph 3.1 of Practice Direction 6B](#);
- there is a serious issue to be tried on the merits of the case; and
- in all the circumstances, England is clearly or distinctly the appropriate forum for the trial of the dispute, and the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

Service out of the jurisdiction: acknowledgment of service

Current position

For the current time limits in relation to claims served out of the jurisdiction without permission, see [CPR r.6.35](#).

Transitional provisions

The current rules will continue to apply where a claim form has been served out of the jurisdiction before the end of the transition period ([The Civil Procedure Rules 1998 \(Amendment\) \(EU Exit\) Regulations 2019, Reg. 18\(3\)](#)).

Position after 31 December 2020

CPR r.6.35(3) and (4) will be omitted. Time periods for acknowledgement of service will be governed by [Practice Direction 6B, paras 6.1 – 6.5](#); these refer to the Table in para 8, which sets out the relevant number of days for acknowledgement of service for each country.

The EU Service Regulation/Hague Service Convention

The [EU Service Regulation](#) will no longer apply after the end of the transition period, subject to transitional provisions.

It will continue to apply to documents received for the purposes of service before the end of the transition period by certain agencies and officials: [Article 68\(a\) of the Withdrawal Agreement](#); [Reg.9 of The Service of Documents and Taking of Evidence in Civil and Commercial Matters \(Revocation and Savings Provisions\) \(EU Exit\) Regulations 2018](#).

The Hague Service Convention will apply to most requests for service between the UK and EU Member States. The UK is a party to the Hague Service Convention in its own right. Following Austria's ratification of the Hague Service Convention on 14 July 2020 and its subsequent entry into force, all EU Member States are now party to the Hague Service Convention.

[The Hague Service Convention](#) provides for service through a “central authority” established by each State, but also permits service by other means including, in the absence of objection by the contracting state:

- (i) through diplomatic or consular agents (Art.8);
- (ii) by postal channels (Art.10(a)); and
- (iii) through judicial officers (Art.10(b)-(c)).

See the [HCCH website](#) for an up-to-date record of each contracting state's objections.

Substantive heads of jurisdiction after 31 December 2020

In accordance with the above, in the majority of general commercial cases the substantive heads of jurisdiction will be the ‘gateways’ listed in paragraph 3.1 of Practice Direction 6B.

However, the new [sections 15A to 15E of the 1982 Act](#) set out substantive heads of jurisdiction for: “*matters relating to consumer contracts where the consumer is domiciled in the United Kingdom*” and “*matters relating to individual contracts of employment*”: see section 15A of the 1982 Act. Those new sections will come into force on 31 December 2020. The relevant rules are set out in the following sections:

1. Section 15B: “[*P*]roceedings whose subject-matter is a matter relating to a consumer contract where the consumer is domiciled in the United Kingdom”.
2. Section 15C: “[*P*]roceedings whose subject-matter is a matter relating to an individual contract of employment”.

The relevant definitions, including of “*consumer*” and “*consumer contract*”, are set out in section 15E.

In respect of sections 15A-E, section 42A of the 1982 Act essentially retains the ‘Brussels scheme definition of the domicile of “*corporation[s]*” or “*association[s]*”’: see [section 42A\(1\)](#).

The Future

The United Kingdom formally applied to join the Lugano Convention on 8 April 2020, but it will only be invited to (re)accede to that convention if it obtains the unanimous agreement of the contracting parties. Switzerland, Norway and Iceland have already indicated their support, but the EU and Denmark have not.

Even if they were to do so now, pursuant to Article 72 of the Lugano Convention, that convention would “*enter into force only in relations between the acceding State [the UK] and the Contracting Parties which have not made any objections to the accession before the first day of the third month following the deposit of the instrument of accession*”: see [Article 72\(4\)](#).

There is now no prospect that that three-month period would expire before 31 December 2020. The UK may, however, successfully join the Lugano Convention at some point in the future.

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Kristina Lukacova
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3. Enforcement of Exclusive Jurisdiction Clauses under the Hague Convention 2005

Sources

The UK has deposited its instrument of accession, meaning the [Hague Convention on Choice of Court Agreements \(30 June 2005\)](#) (the “Convention”) will continue to apply following the end of the transition period.⁴

The Hague Convention will be given effect in England & Wales via the [Private International Law \(Implementation of Agreements\) Bill](#), which is currently awaiting royal assent.⁵ It will provide for a new s.3D of the [Civil Jurisdiction and Judgments Act 1982](#), which will state that “[t]he 2005 Hague Convention shall have the force of law in the United Kingdom” subject to any declarations made by the UK upon its accession.

Note that there are also Regulations – the [Civil Jurisdiction and Judgments \(Hague Convention on Choice of Court Agreements 2005\) \(EU Exit\) Regulations 2018 \(SI 2018/1124\)](#), though these will be edited almost into irrelevance when the Bill comes into force.⁶

Entry into force in UK

Article 16(1) provides that the Convention shall apply to exclusive choice of court agreements **concluded** after the Convention’s entry into force in the State of the chosen court.

It is controversial whether this will cover exclusive choice of court agreements in favour of the English courts entered into before 1 January 2021:

1. The [Ministry of Justice Guidance](#) states the UK’s view that the Convention “*will continue to apply to the UK (without interruption) from its original entry into force date of 1st October 2015*” and that is reflected in paragraph 7, Schedule 5 of the [Private International Law \(Implementation of Agreements\) Bill](#);
2. The [European Commission’s Notice to Stakeholders \(27 August 2020\)](#) s.3.3 states the opposite view: the Convention will apply to “*...agreements concluded after the Convention enters into force in the United Kingdom as party in its own right to the Convention*”;
3. The courts of England & Wales will be bound to follow the UK statute, though there is potential for divergent interpretations to cause issues on recognition and enforcement in EU member states.

⁴ The UK was previously bound via the [EU’s accession](#), which continued to bind the UK until the end of the transition period under Art 129 [EU-UK Withdrawal Agreement](#). As given effect by [s.5 European Union \(Withdrawal Agreement\) Act 2020](#).

⁵ Correct at time of writing, 6 December 2020

⁶ See Para 3, Schedule 5, [Private International Law \(Implementation of Agreements\) Bill](#). What is left will be [minor amendments to other legislation](#) and [revocation of some retained EU Council Decisions](#).

Contracting States

Apart from the UK, the Convention currently [applies in](#):

1. EU member states (from 1 October 2015, but 1 September 2018 in Denmark);
2. Mexico (from 1 October 2015);
3. Singapore (from 1 October 2016); and
4. Montenegro (from 1 August 2018).⁷

Subject Matter Scope

The Convention applies “*in international cases to exclusive choice of court agreements concluded in civil or commercial matters*” subject to a long list of exclusions (Article 1(1)) “*International cases*” are defined in Article 1(2) – effectively all cases except those where all “*elements relevant to the dispute*” (other than the forum) are connected with a single contracting state.

Subject-matter exclusions set out in Article 2, include among others:

1. Agreements in consumer and employment contracts;
2. Status and legal capacity of natural persons;
3. Insolvency;
4. Carriage of passengers or goods;
5. Marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage;
6. Competition;
7. Personal injury;
8. Property damage (except where it arises from a contract);
9. Validity, nullity or dissolution of legal persons and validity of decisions of their organs;
10. IP rights other than copyright, except breach of contract relating to such rights; and
11. Arbitration/related proceedings.

The UK has made a [declaration](#) that it will **not** apply the Convention to insurance contracts, except:

1. Reinsurance contracts;
2. Choice of court agreements entered after the dispute has arisen;
3. Policyholder and insurer domiciled/resident in same state and agreement in favour of the courts of the state; and
4. “Large risks” insurance, including ships, aircraft, rolling stock, or any other policy where the insured carries on a business of a certain size.

Neither the UK nor the EU has made a declaration under Article 22 that it will recognise and enforce judgments given under non-exclusive choice of court agreements. It is therefore controversial to what extent the Convention will apply to “asymmetric” or “one-sided” choice

⁷ It has also been signed but not ratified/acceded to by China and the USA.

of court agreements, which give one party a range of courts to choose from but limit the other party to one court, as is common in international loan agreements.⁸

Exclusive Choice of Court Agreements

The convention applies to “*exclusive choice of court agreements*”, i.e. agreements that designate the courts of **one contracting state** (or one or more specific courts of one contracting state) to the **exclusion of the jurisdiction of any other court** (Article 3(a));

A choice of court agreement designating the courts of one contracting state (or one or more specific courts of one contracting state) is **deemed exclusive** unless the parties provide otherwise (Article 3(b)).

Formal Requirements

An exclusive choice of court agreement must be concluded or documented:

1. In writing; or
2. By any other means of communication which renders information accessible so as to be usable for subsequent reference (Article 3(c)).

Jurisdiction of Chosen Court

The court designated in an exclusive choice of court agreement shall have jurisdiction to resolve a dispute to which the agreement applies, and must not decline jurisdiction on the ground that the dispute should be decided in the courts of another state (Article 5).

Obligations of Court not Chosen

The courts of a contracting state not designated in the agreement shall suspend (stay) or dismiss proceedings to which an exclusive choice of court agreement applies unless:

1. The agreement is null and void under law of the state of the chosen court;
2. A party lacked capacity to conclude the agreement under the law of the forum;
3. Giving effect to the agreement would give rise to manifest injustice or would be manifestly contrary to the public policy of the forum;
4. For exceptional reasons beyond control of parties, agreement cannot be performed; or
5. The chosen court has declined jurisdiction (Article 6).

⁸ The [M Dogauchi and T Hartley, Explanatory Report \(Prel Doc No 25, March 2004\)](#), [49] and [50] and [\(Prel Doc No 26, December 2004\)](#), [71] and [72] suggest that such agreements would not fall within the Convention, or would only fall within the convention in very limited circumstances; cf the (*obiter*) suggestion in [Etihad Airways PJSC v Prof. Dr. Lucas Flother \[2019\] EWHC 3107 \(Comm\)](#), [216] to [217], per Jacobs J, that the Convention would apply to claims by a borrower who has agreed to the exclusive jurisdiction of the courts of a Convention state for those claims.

Interim Measures of Protection

Interim measures of protection are **not** covered by the Convention. The Convention does not require or preclude the grant of interim measures by courts of contracting states (Article 7).

Recognition and Enforcement

A judgment of a court of a contracting state designated in an exclusive choice of court agreement shall be recognised and enforced subject to the terms of the Convention (Article 8).

The Convention provides, among other things:

1. The enforcing court is not permitted to review the merits of the decision;
2. Judgments must be recognised and/or enforced to the extent recognisable and/or enforceable in state of origin; and
3. Recognition and enforcement may be postponed if the judgment is subject to review (appeal) in the state of origin, or if the time limit for seeking review has not expired.

Article 9 provides a list of reasons for refusing recognition and enforcement, including:

1. The agreement null and void **under the law of the chosen court**;
2. A party lacked capacity to conclude agreement **under law of enforcing state**;
3. Certain issues relating to service;
4. Fraud/public policy;
5. The judgment is inconsistent with an earlier judgment; and
6. Judgments **may** be refused recognition and enforcement if and to the extent they provide for punitive or exemplary damages.

There are further provisions on the mechanics of recognition and enforcement before the courts of England & Wales in [s.4B Civil Jurisdiction and Judgments Act 1982](#).

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4 Pump Court

Annexe: 2005 Hague Choice-of-Court Convention: Supplementary Texts

Conflicts between Hague 2005 and Lugano 2007

Vienna Convention on the Law of Treaties 1969, Article 30

Application of successive treaties relating to the same subject matter

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States Parties to both treaties the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

Asymmetric Choice-of-Court Agreements

Explanatory Report

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

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

Minutes of the Proceedings

Hague Conference on Private International Law, *Proceedings of the Twentieth Session*, Volume III, Choice of Court, Minutes No. 3, Meeting of Wednesday 15 June 2005 (morning), page 578:

‘**The Chair** concluded the debate noting that there was no support for the proposal to amend Article 3(a). He noted moreover that the view of the Commission was that asymmetric agreements were not covered by the Convention and that the Convention was not designed for clauses of this sort.’

It should be noted that here the “Commission” means the Conference that produced the final text, not the EU Commission.

Antisuit Injunctions

Recent cases granting counter-antisuit injunctions

Munich Court of Appeal (*Oberlandesgericht München*) 12 December 2019

Paris Court of Appeal (*Cour d'appel de Paris*), 3 March 2020

Enforcement under the Brussels Regulation of fines for disobedience to injunctions

[Case C-406/09 *Realchemie Nederland v. Bayer CropScience*](#) [2011] ECR I-09773

Trevor Hartley

11 December 2020