# I thought we were exclusive? Some issues with the Hague Convention on Choice of Court, Brussels Ia and Brexit

*This blog post is by Dr Mukarrum Ahmed (Lancaster University) and Professor Paul Beaumont (University of Aberdeen). It presents a condensed version of their article in the August 2017 issue of the Journal of Private International Law. The blog post includes specific references to the actual journal article to enable the reader to branch off into the detailed discussion where relevant. It also takes account of recent developments in the Brexit negotiation that took place after the journal article was completed.*

On 1 October 2015, the Hague Convention on Choice of Court Agreements 2005 ('Hague Convention') entered into force in 28 Contracting States, including Mexico and all the Member States of the European Union, except Denmark. The Convention has applied between Singapore and the other Contracting States since 1 October 2016. China, Ukraine and the USA have signed the Convention indicating that they hope to ratify it in the future (see the official status table for the Convention on the Hague Conference on Private International Law's website). The Brussels Ia Regulation, which is the European Union's device for jurisdictional and enforcement matters, applies as of 10 January 2015 to legal proceedings instituted and to judgments rendered on or after that date. In addition to legal issues that may arise independently under the Hague Convention, some issues may manifest themselves at the interface between the Hague Convention and the Brussels Ia Regulation. Both sets of issues are likely to garner the attention of cross-border commercial litigators, transactional lawyers and private international law academics. The article examines anti-suit injunctions, concurrent proceedings and the implications of Brexit in the context of the Hague Convention and its relationship with the Brussels Ia Regulation. (See pages 387-389 of the article)

It is 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. (See pages 394-402 of the article) 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 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. (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, 623–24) Conversely, where the remedy impedes the sound operation of the Convention by effectively derailing proceedings in the chosen court, there was also a consensus of the official delegates at the meeting that the Convention will not permit national courts of the Contracting States to grant anti-suit injunctions.

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 Ia Regulation (see pages 403-405 of the article; C-159/02 *Turner v Grovit* [2004] ECR I-3565). If an aggrieved party does not commence proceedings in the chosen forum or commences such proceedings after the non-chosen court has rendered a decision on the validity of the choice of court agreement, the recognition and enforcement of that ruling highlights an interesting contrast between the Brussels Ia Regulation and the Hague Convention. It appears that the non-chosen court's decision on the validity of the choice of court agreement is entitled to recognition and enforcement under the Brussels Ia Regulation. (See C-456/11 *Gothaer Allgemeine Versicherung AG v Samskip GmbH* EU:C:2012:719, [2013] QB 548) The Hague Convention does not similarly protect the ruling of a non-chosen court. In fact, only a judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States. (See

Article 8(1) of the Hague Convention) Therefore, the ruling of a non-chosen court is not entitled to recognition and enforcement under the Hague Convention's system of 'qualified' or 'partial' mutual trust. This provides a ready explanation for the compatibility of anti-suit injunctions with the Hague Convention but does not proceed any further to transpose the same conclusion into the very different context of the Brussels Ia Regulation which prioritizes the principle of mutual trust.

The dynamics of the relationship between Article 31(2) of the Brussels Ia Regulation and Articles 5 and 6 of the Hague Convention is mapped in the article (at pages 405-408). In a case where the Hague Convention should apply rather than the Brussels Ia 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 Hague 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 under the Brussels Ia Regulation may warrant the pursuance of a different line of analysis. (See Case C-452/12 *Nipponkoa Insurance Co (Europe) Ltd v Interzuid Transport BV* 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* EU:C:2010:243, [2010] I.L.Pr. 35, [49]) It is 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. The exceptional nature of the right to sue in the non-chosen forum under the Hague Convention can be effectively reconciled with Article 31(2) of the Brussels Ia Regulation. 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 Brussels Ia Regulation. It is hoped that the yet to develop jurisprudence of the CJEU on the emergent Hague Convention and the Brussels Ia Regulation will offer definitive and authoritative answers to the issues discussed in the article.

The implications of Brexit on this topic are not yet fully clear. (See pages 409-410 of the article) 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. The UK will do what is

necessary to remain a party to the Convention after Brexit. In its recently published negotiating paper – only available after the article in the Journal of Private International Law was completed – the UK Government has explicitly stated that:

"It is our intention to continue to be a leading member in the Hague Conference and to participate in those Hague Conventions to which we are already a party and those which we currently participate in by virtue of our membership of the EU." (see *Providing a cross-border civil judicial cooperation framework* (PDF) at para 22).

The UK will no doubt avoid any break in the Convention's application. Brexit will almost certainly see the end of the application of the Brussels Ia Regulation in the UK. The reason being that its uniform interpretation is secured by the CJEU through the preliminary ruling system under the Treaty on the Functioning of the European Union (TFEU). The UK is not willing to accept that jurisdiction post-Brexit ("Leaving the EU will therefore bring an end to the direct jurisdiction of the CJEU in the UK, because the CJEU derives its jurisdiction and authority from the EU Treaties." see *Providing a cross-border civil judicial cooperation framework* at para 20). So although the UK negotiators are asking for a bespoke deal with the EU to continue something like Brussels Ia ("The UK will therefore seek an agreement with the EU that allows for close and comprehensive cross-border civil judicial cooperation on a reciprocal basis, which reflects closely the substantive principles of cooperation under the current EU framework" see *Providing a cross-border civil judicial cooperation framework* at para 19) it seems improbable that the EU will agree to such a bespoke deal just with the UK when the UK does not accept the CJEU preliminary ruling system. The EU may well say that the option for close partners of the EU in this field is the Lugano Convention. The UK Government has indicated that it would like to remain part of the Lugano Convention (see *Providing a cross-border civil judicial cooperation framework* at para 22). In doing so it would continue to mandate the UK courts to take account of the jurisprudence of the CJEU -when that court is interpreting Brussels Ia or the Lugano Convention – when UK courts are interpreting the Lugano Convention (see the opaque statement by the UK Government that "the UK and the EU will need to ensure future civil judicial cooperation takes into account regional legal arrangements, including the fact that the CJEU will remain the ultimate arbiter of EU law within the EU." see *Providing a cross-border civil judicial cooperation*

*framework* at para 20). However, unless the Lugano Convention is renegotiated it does not contain a good solution in relation to conflicts of jurisdiction for exclusive choice of court agreements because it has not been amended to reflect Article 31(2) of Brussels Ia and therefore still gives priority to the non-chosen court when it is seised first and the exclusively chosen court is seised second in accordance with the *Gasser* decision of the CJEU (see Case C-116/02 [2003] ECR I-14693). Renegotiation of the Lugano Convention is not even on the agenda at the moment although the *Gasser* problem may be discussed at the Experts' Meeting pursuant to Article 5 Protocol 2 of the Lugano Convention on 16 and 17 October 2017 in Basel, Switzerland (Professor Beaumont is attending that meeting as an invited expert). Revision of the Lugano Convention would be a good thing, as would Norway and Switzerland becoming parties to the Hague Convention. It seems that at least until the Lugano Convention is revised and a means is found for the UK to be a party to it (difficult if the UK does not stay in EFTA), the likely outcome post-Brexit is that the regime applicable between the UK and the EU (apart from Denmark) 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. The EU Member States will apply Article 6 of the Hague Convention rather than Article 31(2) of the Brussels Ia Regulation when deciding whether to decline jurisdiction in favour of the chosen court(s) in the UK.

Whilst the Hague Convention only offers a comprehensive jurisdictional regime for cases involving exclusive choice of court agreements, it does give substantial protection to the jurisdiction of UK courts designated in such an agreement which will be respected in the rest of the EU regardless of the outcome of the Brexit negotiations. Post-Brexit the recognition and enforcement regime for judgments not falling within the scope of the Hague Choice of Court Agreements Convention could be the new Hague Judgments Convention currently being negotiated in The Hague (see Working Paper No. 2016/3- Respecting Reverse Subsidiarity as an excellent strategy for the European Union at The Hague Conference on Private International Law – reflections in the context of the Judgments Project? by Paul Beaumont). Professor Beaumont will continue to be a part of the EU Negotiating team for that Convention at the Special Commission in the Hague from 13-17 November 2017. It is greatly to be welcomed that the UK Government has

affirmed its commitment to an internationalist and not just a regional approach to civil judicial co-operation:

"The UK is committed to increasing international civil judicial cooperation with third parties through our active participation in the Hague Conference on Private International Law and the United Nations Commission on International Trade Law… We will continue to be an active and supportive member of these bodies, as we are clear on the value of international and intergovernmental cooperation in this area." See *Providing a cross-border civil judicial cooperation framework* at para 21.

One good thing that could come from Brexit is the powerful combination of the EU and the UK both adopting a truly internationalist perspective in the Hague Conference on Private International Law in order to genuinely enhance civil judicial co-operation throughout the world.  The UK can be one of the leaders of the common law world while using its decades of experience of European co-operation to help build bridges to the civil law countries in Europe, Africa, Asia and Latin America.