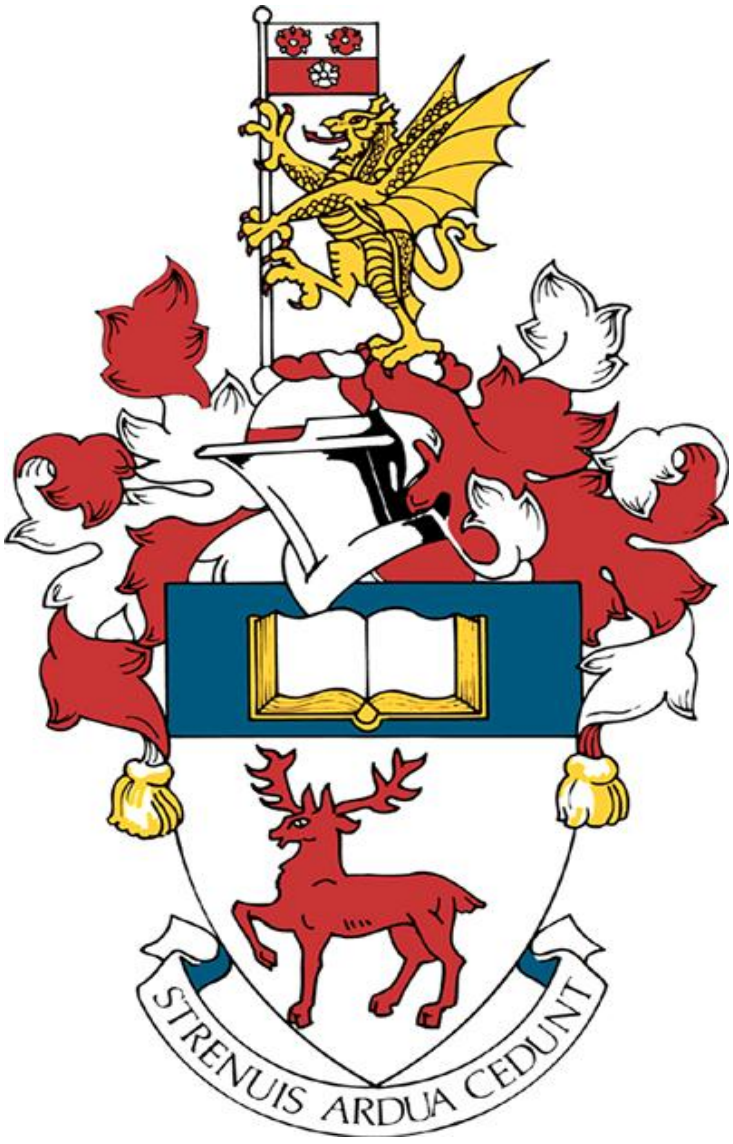
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Enhancing Party Autonomy under the Hague Convention on Choice of Court Agreements 2005: Comparative Analysis with the 2012 EU Brussels Recast Regulation and 1958 New York Arbitration Convention

by

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Abstract

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Thesis for the degree of Doctor of Philosophy

Enhancing Party Autonomy under the Hague Convention on Choice of Court Agreements 2005: Comparative Analysis with the 2012 EU Brussels Recast Regulation and 1958 New York Arbitration Convention

Aygun Mammadzada

The Hague Convention on Choice of Court Agreements 2005 ['HCCCA'] is the first and sole global treaty giving effect to party autonomy through uniform rules on recognition and enforcement of exclusive jurisdiction agreements and resulting judgments in international litigation. The importance of the instrument is arguably increasing with the anticipated width of ratifications. Notably, the contribution of the Convention to the continuation of judicial cooperation post-Brexit expands its momentousness.

This research critically analyses the effectiveness of the HCCCA in providing party autonomy and suggests possible ways to influence its potential success. By examining the remaining gaps in the treaty, the study tries to enhance the provision of party autonomy and encourage the states to join the Convention.

The thesis reveals that as a vital PIL instrument, the Convention frames party autonomy as a product of an evolutionary process and internationalisation of freedom of contract, furthermore, validates the liberalistic and paternalistic aspects of the principle. It presents key elements of the HCCCA supporting the principle and generally acclaims it as the universal mechanism giving fresh life to international litigation and choice of court agreements. Furthermore, it predicts the expanding influence of the HCCCA and particularly emphasises interaction with the

complementary Hague Judgments Convention 2019 in enhancing parties' choices and levelling the playing field in international dispute resolution.

Since the Hague Conference aimed to learn lessons from the successful Brussels regime and provide guarantees for jurisdiction agreements similar to what the New York Arbitration Convention provided for arbitration agreements, the study compares and associates equivalent perspectives of the three instruments. Based on these assessments, the research identifies strengths and possible weaknesses of the HCCCA, further draws criticisms on inconsistencies and lack of uniformities.

The thesis seeks several proposals for legislative, institutional, practical, and political measures to enhance effectiveness and more reliable accommodation of the party autonomy principle. It encourages the Hague Conference to revise the Convention preferably by supplementary protocols, establish special commissions and expert groups together with the EU Commission and UNIDROIT, and to endeavour for the institution of the international Hague Court for achieving harmonised interpretation and consistent application of the treaty as well as avoiding considerable ambiguities and non-uniformities arising out of various national laws. It also argues that the expansion of judicial cooperation and economic relations is of significant importance in attaining real success through wider ratifications. In this regard, enlargement of the political ties and increased collaboration between the national authorities play a vital role in enhancing the choice of court agreements and promoting the effectiveness of the HCCCA.

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Research Thesis: Declaration of Authorship

Print name: Aygun Mammadzada

Title of thesis: *Enhancing Party Autonomy under the Hague Convention on Choice of Court Agreeements 2005*

I declare that this thesis and the work presented in it is my own and has been generated by me as the result of my own original research.

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;
2. Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
3. Where I have consulted the published work of others, this is always clearly attributed;
4. Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
5. I have acknowledged all main sources of help;
6. Where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;
7. None of this work has been published before submission

Signed ..... Date: 1 December 2021

Ms Aygun Mammadzada

Acknowledgments

On that day, it was my turn to leave the family, home, and city and return to Southampton to follow my grander dreams… Today, while wrapping up the most incredible project of my life, I recall all the challenges and glories I received during this journey. My PhD years were not meant to be the easiest, but is it not the reason they are the most rewarding years of my life? While defying the fear of change, holding my head high and succeeding in the things that I once have thought of being unattainable, it always gets scary at first. It gets even scarier later by staying committed to the ultimate goal while facing mixed feelings and miseries: flying to the seventh heaven out of little achievements or occasionally struggling the loneliness. But what I have found at the end of all these ups and downs is my resilience to stay committed and work hard, find peace and appreciate all the blessings that my adventure has brought to me. Still, more than anything else, I have found my inner self and strengths against all the weaknesses.

I have been lucky enough to be surrounded by many loving and supportive people who have consistently encouraged and lifted me high. Besides my faith and confidence, it is all those caring and believing hearts whose names are here or not – to whom I owe my gratitude wholeheartedly.

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I am blessed to have a great family whose continuous support and trust are always with me regardless of the distance. I am more blessed to have my nephews Fateh and Azer, who have always cheered me up during the most challenging times. It is my family and lovely parents who have made me who I am. I hope I have deserved your endless love and have made you feel proud!

TO MY PARENTS, WHOSE ENDLESS LOVE, FAITH AND SUPPORT HAVE MADE ME WHO I AM …

Key abbreviations

['BIR']: Brussels I Regulation
['BRR']: Brussels Recast Regulation
['CJEU']: Court of Justice of the European Union
['HCCCA']: Hague Convention on Choice of Court Agreements
['HCCH']: Hague Conference on Private International Law
['HJC']: Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Hague Judgments Convention)
['ICC']: International Court of Arbitration
['NYC']: United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
['PIL']: Private International Law

Chapter 1 INTRODUCTION

1.1 Party autonomy and objective of the thesis

Party autonomy is a universal principle of modern private international law[1] allowing the parties to determine their relationship. The general acceptance of party autonomy justifies its transformation into the "unifying principle of modern private international law."[2] Along with a free choice of law, widespread acceptance of dispute resolution agreements, be it jurisdiction or arbitration clauses, has been a significant factor in promoting party autonomy.

In the age of globalisation, steady growth in international trade and investment creates many potential disputes between parties to cross-border business transactions. Subsequent to their substantive dispute, parties could argue on jurisdiction, venue, or fate of the proceedings.[3] Disagreements over jurisdiction become a preliminary issue for the cases before a court[4], having a tremendous impact on the final decision. It is stated that the "venue is worth fighting over because outcome often turns on the forum."[5] A claimant should not waste his time or expenses if "the court concerned may consider itself less competent than another."[6] Such disputes and contradictory views on the forum are likely to multiply because of uncertainties arising from Brexit.

Party autonomy meets parties' expectations and enables them to resolve disputes at a neutral forum with a decreased potential for conflicts over a venue. Parties replace the default regime and decide on the fate of their relationships by referring their disputes to the chosen forum. The Hague Convention on Choice of Court Agreements 2005 ['HCCCA'] is the first global treaty giving effect to the principle through uniform

[1] Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press 2018) 2.
[2] Symeonides C. Symeon, *Codifying Choice of Law Around the World* (Oxford University Press 2014) 114. See also ibid.
[3] In this regard, Richard Fentiman evaluates strategic choices of the litigants as to avoid litigation risks related to the venue and defends procedural contract doctrine while assessing anatomy of the dispute resolution clauses as the mechanism for resolving any disputes and the venue or venues for the process. See Richard Fentiman, *International Commercial Litigation* (2nd edn, Oxford University Press 2015) para 1.06-1.101.
[4] Christopher D Bougen, 'Conflicting Approaches to Conflicts of Jurisdiction: The Brussels Convention and *Forum Non Conveniens*' (2002) 33 Victoria University of Wellington Law Review 261.
[5] Kevin M Clermont and Theodore Eisenberg, 'Exercising the Evil of Forum-Shopping' (1995) 80 Cornell Law Review 1507.
[6] Bougen (n 4); Schlosser report [1979] O.J. C59/71 [1].

rules on recognition and enforcement of jurisdiction agreements and resulting judgments in civil and commercial matters. While the principle has long been ensured in international arbitration and within the European Union, no such instrument had existed in international litigation until the Hague Conference ['HCCH'] reached the HCCCA in 2005. The increasing importance of the framework, particularly at the crossroads of post-Brexit, has stimulated the author to undertake this research.

In the light of the above, the research question is: "How effective is the HCCCA in the provision of party autonomy in international litigation?" The significance of this research associates with the current status and potential applicability of the Convention. While the thesis sometimes critiques the HCCCA, it generally endorses the treaty and predicts its expanding success. In other words, the study aims to determine not only the strengths of the HCCCA and effectiveness of the provision of party autonomy, but it also identifies the weaknesses and lack of uniformity that restrain the instrument from reaching its fullest potential to level the playing field. Although the ratification status of the HCCCA has been expanding, the fact that the largest economies such as the US and China have not ratified it might be less success for the treaty. In this sense, the thesis explores the ways to enhance the effectiveness of the HCCCA, widen the extent of the ratifications and enhance legal certainty and predictability.

The thesis takes party autonomy as the starting point to meet these targets and elaborates on its theoretical and historical underpinnings. Upon investigating different theories behind the formation of the principle and examining the interaction of party autonomy with the related concepts, the study reveals that the modern understanding of the principle has gone through an evolutionary process and has been shaped by the combination of assumptions characteristic of individualism, liberalism, and paternalism. The emergence of the states necessitated state intervention and interference for social welfare and economic prosperity, and the national legislations restated autonomy of the parties in the form of freedom of contract. Moreover, acceptance of submission was essential in recognising the parties' wills establishing a jurisdictional ground which was not only in the states' authority and territorial sovereignty, and choice of forum was justified based on equity and justice for the parties. By globalisation and expansion of international trade, private international law developed into a specific body of law; meantime, upon gaining international character, freedom of contract transformed into the party autonomy principle.

On the other hand, while parties' autonomy to regulate their relations and determine the forum and law applicable to their disputes is internationally accepted, parties might become subjects of privatised governance by exercising this power. Such an act might go beyond contractual freedom as the parties choose their sovereign state and law, and this forum shopping might bring negative consequences. While the liberal intervention of the state is necessary for balancing public interests and private expectations, parties might experience paternalistic interference as legitimate and moral constraints for preventing possible risks. The study observes that, as an eminent private international law ['PIL'] instrument, the HCCCA frames party autonomy as a product of this evolutionary process and validates liberalistic and paternalistic patterns of the provision of the principle.

The thesis further explores the background bringing a need for an instrument giving effect to the principle at a global level and traces the official negotiation processes leading to the formation of the HCCCA. While the initial proposal targeted an instrument wider in scope, complexities arising out of different legal systems and specific traditions of each state led to narrowing its ambit to only exclusive choice of court agreements which also brought global prominence of the HCCCA for securing the party autonomy principle. The sovereignty of the states was the primary reason behind the challenges to reach a consensus on an international treaty regulating jurisdiction except the ground based on the parties' autonomous wills. This was also related to the liberalism policies promoting international commerce and economic growth.

The study further identifies the three fundamental rules of the HCCCA serving party autonomy: the chosen court must hear the case; any other court than the chosen one must dismiss the case; the judgment rendered by the chosen court must be recognised and enforced in the other Contracting States.[7] Special attention is given to the classification of choice of court agreements and determination of exclusivity. Notwithstanding the exclusion of non-exclusive jurisdiction agreements from the scope of the HCCCA, the thesis also analyses formulations and outcomes of their breach with particular emphasis on the fact that the English judges have often ruled on the exclusive nature of asymmetrical agreements. This practice might widen the application perspectives of the HCCCA by the UK's accession to the treaty in its rights.

[7] Exceptions apply. For the discussion of the three fundamental rules of the HCCCA see thesis, 3.3.4.

Following the HCCH's initial goals to learn lessons from the successful Brussels regime and achieve guarantees for jurisdiction agreements similar to the arbitration agreements, the study compares and associates equivalent perspectives shared by the Brussels Recast Regulation ['BRR'] and New York Arbitration Convention ['NYC']. The comparative analysis involves the following key elements of party autonomy:

- Effects and validity of forum selection clauses (including substantive and material validity)
- Material scope
- Parallel proceedings
- Consequences of a breach[8]
- Recognition and enforcement of final decisions

Finally, the thesis scrutinises the inevitable role of the HCCCA in addressing challenges for choice of court agreements post-Brexit and assesses the ratification status of the Convention. Putting particular emphasis on the non-ratification of the HCCCA by the US and China, the study draws a serious critique on the treaty's limited nature, which might refrain from global consensus and wider ratifications. The discussions stimulate broadening economic relations and judicial cooperation between the national authorities for reaching further accessions. The Hague Judgments Convention 2019 ['HJC'] is especially underlined as a sister instrument of the HCCCA to balance the dispute resolution landscape and enhance the effectiveness of the parties' choices. It is also submitted that since the tools complement each other, their ratification status is interrelated; in other words, it is likely that ratification of either by a State would bring accession to another.

Based on the discussions, the study suggests that uniform provision of party autonomy by the HCCCA can be enhanced if the existing gaps are filled, and international harmonisation is reinforced, bringing more ratifications. The research encourages the HCCH and Contracting States to take legislative, institutional, practical, and political measures to achieve true success and intensify effectiveness.

1.2 Significance of the research and audience

[8] The thesis briefly discusses consequences and remedies for the breach since they enhance provision of parties' wills; nonetheless, the matter falls out of the scope of this study and deserves another independent research in itself.

Despite extensive practical work on the choice of forum and law agreements, there has been a lack of academic engagement with the party autonomy principle as a specific development.[9] Similarly, regardless of the extensive examination of the HCCCA, there is hardly any comprehensive critical analysis of the document and comparative assessment of the provision of the principle associating similar outlooks shared by the BRR and NYC.

This research aims to fill the gap in the existing literature and offer potential solutions towards enhancing party autonomy in transnational litigation. In this relevance, the discussions particularly underline a lack of judicial practice on applying the HCCCA. Moreover, since Brexit is a relatively recent episode in the portrait of private international law, the momentousness of the discussions on the relevant implications adds extra value to this research. Upon determining the shortages and lack of uniformity, the study suggests revising the text of the HCCCA intext or through supplementary protocols. The study further advances establishing the particular expert groups by the HCCH together with the UNCITRAL and EU Commission. Moreover, the institution of the international Hague Court for the uniform interpretation of the Convention and harmonisation of the rules.

The assessments reveal the theoretical and practical relevance of the thesis and bring it well-suited for both academics and practitioners, especially for the officers and representatives at the Permanent Bureau and Diplomatic Sessions of the HCCH who would be entitled to consider the proposals for reviewing the operation of the HCCCA and reforming its text.

1.3 Structure and methodology

Chapter 1 introduces the objectives, significance, and audience of the study together with the structure and methodology of the thesis. Chapter 2 reveals theoretical underpinnings and historical foundations of the party autonomy paradigm. It also explores the philosophical understanding of the principle based on individualistic, liberalistic, and paternalistic approaches to autonomy and assesses the

[9] For the discussion of the limited scope of the academic work on the party autonomy principle see Alex Mills, ‘Conceptualising Party Autonomy in Private International Law’ (2019) 2 Revue Critique de Droit International Privé 405.

transformation of the doctrine into a legal principle. Further, it specifies the justifications given to the principle and its layers in private international law. Chapter 3 scrutinises the Hague perspective of party autonomy as a progressive development encompassing several normative attempts apart from the HCCCA. Distinguishing various efforts made by the HCCH to harmonise private international law and provision of party autonomy facilitates identifying the reasons behind the failure of the ancestors of the HCCCA and learning lessons from the previous experiences.

Furthermore, the Chapter identifies the three fundamental rules of the Convention as its cornerstones, and the discussions in the following chapters rigorously reflect them. Chapter 4 examines the party autonomy angles of the HCCCA and commences the comparative assessment part of the thesis. It details the principal elements of the HCCCA serving party autonomy and unfolds the limitations and shortages. Discussions in Chapter 5 and Chapter 6 derive from the comparative assessments in Chapter 4 and speculate on the analysis of the equivalent components of the BRR and NYC. Chapter 7 reveals the significant challenges for choice of court agreements after Brexit and presents the HCCCA to ensure certainty and parties' autonomy by adequately responding to the possible difficulties faced in the reshaped legal area. The chapter further assesses ratification perspectives of the HCCCA and examines the ways to achieve more accessions and promote effectiveness. The final chapter – Conclusion discloses the main findings of the research and summarises the author's proposals.

This doctrinal research undertakes a qualitative analysis of the primary (legislative frameworks – conventions and national statutory and case law) and secondary resources (books, journal articles, reports, academic commentaries, and online databases). The English authorities and CJEU case law take more weight while attention is occasionally called to the case-law of the other national jurisdictions. The study also applies elements of the comparative analysis while assessing the interface between the three regimes of the provision of party autonomy (the HCCCA, BRR, and NYC).

Chapter 2 THEORETICAL UNDERPINNINGS AND HISTORICAL FOUNDATIONS OF THE PARTY AUTONOMY PRINCIPLE

2.1 Introduction

The present chapter examines the theoretical and historical backgrounds of the concepts deriving from the objective of the thesis. It analyses different theories behind the formation of party autonomy as the central concept of this research and the fundamental principle of conflict of laws.[10] It shows that party autonomy as a changing and ever-growing notion has not developed spontaneously; instead, it has undergone an evolutionary process before transforming into its modern interpretation. Early philosophical assumptions and individualism shaped freedom and moral aspects of autonomy. By the emergence of the states and industrialisation, the social contract theory of autonomy was formed, and liberalism ideas necessitated state intervention to provide autonomy.

On the other hand, paternalism entailed state interference and limitations over autonomy for social welfare and economic prosperity. The regulative power of the states became essential for the provision of autonomy, and national legislations restated freedom of contract. By globalisation, expansion of international trade and relations between private actors, private international law developed as a specific body of law separate from international law; upon gaining international character, freedom of contract shifted to party autonomy, and the legal principle became subject of the international treaties in the form of a choice of law and forum. Submission by the defendant was significant in recognising the parties' wills establishing a jurisdictional ground not only in the states' authority. Jurisdiction was no longer considered a matter of territorial sovereignty only, and the choice of forum was justified based on equity and justice for the parties. As an eminent PIL instrument, the HCCCA reflects the patterns of this evolutionary process, frames party autonomy as its product and validates the liberalistic and paternalistic aspects of the principle.

[10] At least, as far as Western liberal democracies are concerned.

2.2 An overview of the myriad interpretations and historical background of the autonomy concept

2.2.1 Individualism: Moral aspects of autonomy and its relation to freedom

Autonomy in its simplest form is defined as "the quality or state of being self-governing," or "self-directing freedom and especially moral independence"[11]; as stated, *"autonomous individual is responsible for and committed to own desire or actions."*[12] Moral and political thinkers have traditionally perceived autonomy as independence and associated it with individualism.[13] Grounded on the Kantian thoughts of practical reason and construction of ethics and moral philosophy[14], autonomy prevents paternalistic interference in people's lives.[15] An individual – a natural or legal person, expresses their freedom while acting autonomously. Indeed, all natural persons are legal persons, nevertheless, not all legal persons are considered natural persons. While a natural person functions on his/her own, legal persons perform their autonomy through natural persons.

Autonomy doctrine also includes an individual's responsibility not to breach others' rights and freedoms while articulating their free thoughts and decisions. Self-imposition of the concept embraces moral obligations of a certain individual and others' responsibilities to respect the prior.[16] The combination of a individual's independence

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[11] Feinberg differentiates the meaning of autonomy in the context of a person's capacity to self-government, the actual condition of this government, a private ideal of that self-governing pen, and complex rights or freedoms expressing that person's sovereignty over himself. See Joel Feinberg "Autonomy" in John Philip Christman (ed.), *The Inner Citadel: Essays on Individual Autonomy* (Oxford University Press 1989); **Gerald Dworkin**, *The Theory and Practice of Autonomy* (Cambridge University Press 1988) 61; Richard Arneson "Autonomy and Preference Formation" in Jules Coleman and Allen Buchanan (eds.), *In Harm's Way: Essays in Honor of Joel Feinberg* (Cambridge University Press 1994). Similarly, King developed this view and expressed that "let people choose for themselves, unless we know their interests better than they can", See Iain King, *How to Make Good Decisions and Be Right All the Time* (Bloomsbury Publishing 2008) 100.
Although autonomy is defined in a close link with free wills and accordingly an autonomous individual expresses his independent desire, sometimes a distinction is made between these two concepts. It is claimed that they are different ideas and a person can hold one without possessing the other. See 'Autonomy' <https://philosophyterms.com/autonomy/> accessed 25 November 2021; <https://www.merriam-webster.com/dictionary/autonomy> accessed 25 November; <https://dictionary.cambridge.org/dictionary/english/autonomy> accessed 25 November. See also Willem H. Van Boom and Anthony Ogus, 'Introducing, Defining and Balancing Autonomy v. Paternalism' (2010) 3(1) Erasmus Law Review 1.

[12] Ibid. Relevant to this, the latin *saying "casum sentit dominus"* means that "*the owner bears the bad luck".*

[13] John Christman "Autonomy in Moral and Political Philosophy" in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Spring 2018).

[14] Robert Johnson and Adam Cureton "Kant's Moral Philosophy" in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Spring 2019).

[15] Dworkin (n 11) 121-129.

[16] Christman (n 13).

and obligations together with their responsibilities for any breach characterises them as personally and socially autonomous. Dworkin presents a broader interpretation of the notion and believes that “personal autonomy” is not restricted to moral obligations, albeit it is a trait relevant to almost every aspect of an individual’s life.[17]

As regards to responsibility of individuals as part of their autonomy, another distinctive feature of legal persons is revealed. While legal actions are brought by ‘humans’ for account of legal entities, not natural persons, rather entities become responsible. In case of corporations, this peculiarity is reflected in the corporate veil principle which defines the company as a separate legal entity than its shareholders. Based on this key feature, corporations but not its owners, directors, shareholders or emloyees, are supposed to be liable for their own duties or debts. This feature of the autonomy of legal persons or corporate autonomy is further revealed in the consequences of the legal acts.[18] For instance, Apple Inc. is an American multinational company with several individuals sitting at the board of directors, executive managers, chief executives, chairmen, 154000 employees (as of 2021), 519 stores (as of 2022) and more than 200 suppliers.[19] While Apple Inc. coordinate its operations in various ways and act through i.e., those individuals and retails stores etc., the relevants acts as well as legal operations are attributable to the company itself. Bargaining parties who are natural persons negotiate provisions in support of the mutual advantage or joint gain, whereas conducts of legal persons are larger in scale. Relevantly, economic analyses reveal that trading parties conclude an agreement indicating the most favourable mechanism, which is an efficient solution for their current or potential disputes with greater social benefits and social surplus, considering different points, in the context of particular transaction or certain type of transactions and counter-party. From my standpoint, this analytical vision may be true only if the contracting parties are big international companies whose deals have an essential impact on a great number of

[17] Dworkin (n 11) 34-47.

[18] Corporate veil identifies autonomy and legal personality of corporations by determining their limited liability. The principle was established in the case Salomon v A Salomon & Co Ltd [1896] UKHL 1, [1897] AC 22, where The House of Lords held that a duly and properly incorporated company, should be seen as an independent person and owners or shareholders of the company was not liable to pay its debts. The ruling was also upheld in *Macaura v Northern Assurance Co Ltd* [1925] AC 619. On another note, corporate veil can be “lifted” or “pierced” *which makes officers* (owners, directors and shareholders) of the corporation liable for the debts. Such a consequence might be resulted from evasion of legal duty, wrongful trading, agency or fraud. See: *Standard Chartered Bank v Pakistan National Shipping Corporation* [2002] UKHL 43, *Petrodel Resources Ltd v Prest [2013]* UKSC 34.

[19] See: <https://en.wikipedia.org/wiki/Apple_Inc> accessed 12 June 2022.

employees rather than individuals negotiating privately for their own needs and interests.[20]

Individualism involves an individual's right to freedom and self-realisation.[21] In this context, freedom is assessed extensively, referring to autonomy in the all-inclusive sense. While individualism equates freedom to autonomy, the two concepts have also been distinguished. It is alleged that one's freedom lies in the ability to act without external or internal barriers and with sufficient resources to make one's desire effective.[22] In contrast, autonomy is the independence and authenticity of that desire.[23] Besides, there are some assertions that freedom concerns only particular acts, while autonomy is a global notion.[24] The distinction between freedom and autonomy lies in the internal aspect of a person's independence and expression of this independence and willingness by his deliberate actions.[25]

Moreover, while freedom reflects a lack of external impediment to a person's will, it also necessitates rules to guide decisions and acts.[26] From my perspective, the personal autonomy of an individual expresses their intrinsic freedom. On the other hand, a complete portrayal of autonomy is presented along with the expression of those wills by one's actions and the regulative nature of the applicable laws. The latter ensures morality by prohibiting any conduct against the autonomy of an individual and other people. Personal independence is more than their moral obligations, extending to a person's legal obligations and rights or freedoms as understood by liberalistic interpretations. Morality paired with social norms renders an individual fully autonomous. Together with this link, individualism ideas transfer into liberalism.

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[20] Keith N. Hylton, "Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis" [2000], 8 Supreme Court Economic Review 209; Theodore Eisenberg and Miller Geofrey, "The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in Publicly-Held Companies' Contracts" (2006) New York University Law and Economics Working Papers, Paper 70, 1,2; Gary B. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (6th edn, Kluwer Law International 2021).

[21] Ellen Meiksins Wood, Mind and Politics: An Approach to the Meaning of Liberal and Socialist Individualism (University of California Press 1972) 6-7.

[22] Dworkin (n 11); Christman (n 13).

[23] Ibid.

[24] Ibid; cf Dworkin (n 11) 13–15 and 19–20.

[25] In this relevance, Christman gives an example of an addicted smoker who is an autonomous person, however, is helplessly unable or not free to control his behaviour over this particular act. See Christman (n 13) 13–14.

[26] Ibid.

2.2.2 Liberalistic interpretation of autonomy: Classical and modern liberalism

Further theories detach autonomy from individualism under the impact of the Enlightenment. Based on the moral philosophy of autonomy, liberalism became a political philosophy recognising an individual's liberties and freedoms, particularly their freedom of choice.[27] By commercialisation, urbanisation, and establishment of social classes, recognition of the state power for prosperity, defeating poverty, economic crisis, and provision of good order became inevitable. Unlike absolute monarchy and states' privilege, liberalism ideas sought democracy and asserted the importance of the legitimate government in the provision of the freedoms of individuals and promotion of the economy and free trade.

Therefore, while the theories link to each other, individualism is construed based on an individual's supremacy and moral worth.[28] Supporters of individualism highly dignify a person's wills and ambitions based on his independence and self-reliance and their superiority over the states, governments, or social groups.[29] In contrast, liberalism understands individual rights as a person's liberty based on equality of opportunities as its primary objective.[30] The main postulates of the theory include autonomy and an autonomous person to justify its underlying principles and support of the legitimate government in reaching these objectives.[31]

Two discrete forms of the ideology are revealed in classical and modern (social) liberalism, which are distinctive in the core hypotheses they advocate. Classical liberalism is strongly tied to the individualism and autonomy concept by preventing any restraint over the free wills or actions of a person and respecting the rationality of the humans. John Locke's philosophical thoughts, especially his postulate that "no one ought to harm another in his life, health, liberty, or possessions", [32] fostered classical

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[27] The related definition of a Latin concept *"liberalis*" is *"a free man"*.

[28] Steven M. Lukes 'Individualism' (Britannica, 20 July 1998) <https://www.britannica.com/topic/individualism> accessed 25 November 2021.

[29] Wood (n 18) 6.

[30] Harry K. Girvetz 'Liberalism' (Britannica, 19 September 1998) <https://www.britannica.com/topic/individualism> accessed 25 November 2021.

[31] Dworkin (n 11); Christman (n 13); John Rawls, *A theory of justice* (Harvard University Press 1971). In this regard, Kymlicka adds that "no particular task is set for us by society, and no particular cultural practice has authority that is beyond individual judgement and possible rejection". See Will Kymlicka, *Liberalism, Community and Culture* (Oxford University Press 1989) 50.

[32] John Locke, *The Two Treatises of Civil Government* (first published 1764).

liberalism. Classical liberalists rely on a *laissez-faire* system with no government interference to the economy and free market. One of the core basics of this branch of ideology is a minimal state that asserts an individual's positive rights, including natural and property rights.[33] The state is viewed as “a necessary evil” since it contributes to the equilibrium within civil society.

Following the Enlightenment, the liberal conceptualisation of autonomy impacted revolutionist Europe in the 17th century. The British Revolution in 1688-1689, American Revolution in 1765-1791, French Revolution in 1789-1799 brought the establishment of liberal democracies. Upon the foundation of the first modern liberal state in America, the American Declaration of Independence articulated that “all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that to insure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.”[34] These ideas enhanced development of neo-classical liberalism in the 19th century. The latter pronounced “limited government” as the most salient element and underlined entire exercise of individual freedom in a state which should be as small as possible.

Social liberalism represents ideas of the modern liberal democratic governments, which are actively engaged in international trade and commerce. Unlike classical liberalism, social liberalism promotes social and economic interference by the state to the extent that it is worthy of providing liberties.[35]

This line of thoughts is often related to industrialisation and social inequality, unemployment, poverty, or illnesses. The theory reinforces the regulation of the economy and free market by the state and contrasts with the minimalism principles of classical liberalism. The civil and political rights of an individual or citizen are also regulated and expanded by the government. Yet, only reasonable state intervention can fix the situation while promoting wellbeing and ensuring autonomy and freedoms.[36] As a result, an individual's freedom is congruent with the common good

[33] Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge University Press 2013).

[34] Thomas Jefferson, *Declaration of Independence*, 4 July 1776 <www.loc.gov/item/mtjbib000159/> accessed 25 November 2021.

[35] Social liberalism is also known as modern liberalism in the United States and left liberalism in Germany.

[36] For more discussions see Lloyd Gordon, *The two faces of liberalism: How the Hoover-Roosevelt debate shapes the 21st century* (1st edn, M&M Scrivener Press 2006); John Gray, *Two Faces of Liberalism* (New Press 2000).

in a social-liberal state. Social liberalism ideas are aligned with the post-War regulatory trends of the 20th century and reflected in the growing importance of regulating cross-border relations. Harmonisation efforts of the international organisations and the ever-increasing body of international legal frameworks brought the development of private international law. After World War II, the HCCH was established as a fundamental international organisation in the field, aiming at the progressive unification of the private international law rules. The instruments developed by the Conference, including the HCCCA, presented liberal ideas by determining the Parties' aims. As defined by liberalism, the Contracting States promote international trade and investment through enhanced judicial cooperation in civil or commercial matters.

Further, state intervention is reflected in the objective of building a legal regime that serves to certainty and parties' autonomy by ensuring the effectiveness of their free choices. The effectiveness of the parties' exclusive choice of court agreements is provided only upon the active engagement of the Contracting States and alignment of the national laws with the objectives of the HCCCA. Yet, the HCCCA does not always override national laws, and indeed, parties' free choices might not be given effect in certain instances.[37]

2.2.3 Paternalism and autonomy

Paternalistic elements impose restrictions and exceptions over individuals' autonomy. *While individualism and liberalism vindicate the free wills and autonomous actions of a person, paternalism calls for interference with an individual's independent decision for preventing the risk of potential harm. Moreover,* while liberalism observes freedom of contract as an "institutional guarantee" of individual autonomy and contract law, paternalism justifies limiting liberty by state intervention.[38] It aims at the protection of individuals without considering their consent.[39] Such interference could be paternalistic only if it serves an individual's welfare and happiness, adds to his interests and needs[40] , or prevents one from causing harm to himself.[41] It was justified

[37] For the related discussions see thesis, 3.3.4.2 and Chapter 4.
[38] Anthony Ogus, *Costs and Cautionary Tales -Economic Insights for the Law* (Bloomsbury Publishing 2006) 234.
[39] Ibid, at 138.
[40] Ibid.
[41] E Garzón Valdés, "On Justifying Legal Paternalism" (1990) 3 Ratio Juris 173; Van Boom and Ogus (n 11).

as an extension of individual welfare by social welfare, principally owing to “spillover effects” of personal decisions for the society or “externalities.”

On the other hand, paternalistic actions imply a person's inability to judge what is best for his benefit for protecting weaker parties.[42] In this sense, Christman argues that paternalistic interventions, on the one hand, aim at a person’s good; on the other hand, such public acts unduly offend autonomy.[43] He further contends that as long as one can consider his options and make his own decisions, my interference in his wills, regardless of aiming at his benefit or good, still shows less respect towards him, rather than if I let him make mistakes.[44] Likewise, Mill rejects paternalism, alleging that it implies treating individuals as if they are children.[45] Indeed, while paternalism might contradict contract law concepts and autonomy ideas, restrictions are fair as long as they add to efficacy and security of the whole community and more significant benefits and bring mutual advantages for the society and individuals. Thus, apart from a mere understanding of coercion by the state, some sophisticated approaches interpret paternalism based on “a hypothetical contract” with an individual.[46] However, this interpretation's “contract” element does not sound reasonable since the latter has discretionary rather than obligatory nature.

The limitations that the HCCCA determines may be understood as instances of paternalism.[47] Similarly, paternalistic patterns are ubiquitous in the states' legislation and found in overriding mandatory rules and public policy exceptions over an individual’s autonomy.[48] While the Contracting States give force to the choice of court

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[42] Ibid.

[43] Christman (n 13).

[44] Ibid.

[45] Joel Feinberg, *Harm to Self* (Oxford University Press, 1986) 4. As stated, "it is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood". See John Stuart Mill "On Liberty" in John Gray (ed), *On Liberty, Utilitarianism and Other Essays* (2nd edn, Oxford University Press, 2005).

[46] See Ogus (n 35) 234. Furthermore, there is another concept which is called new paternalism aiming at “designing policies to help individuals” to make better choices rather than anti-paternalistic views of classic liberalism. See Cserne Peter, *Freedom of contract and paternalism: Prospects and limits of an economic approach, Basingstoke* (Palgrave Macmillan, 2012).

[47] Paternalism, a word with the early roots in Latin, “pater” or “paternus” meaning "father" or "fatherly", is understood as an action restricting an individual’s or group’s freedom or autonomy for enhancing their own good. See Gerald Dworkin "Paternalism" in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2010). In Cambridge English Dictionary, the notion is described as “a father” controlling his children and determining what they would be allowed to, excluding their responsibility and freedom of choice.

[48] The theory proves itself true since public policy is a global notion applying in a wide universal social context and having an impact on social relations and states of other people rather than a sole individual. Moreover, public policy grounds intend to prevent negative effects of an individual’s boundless freedom

agreements, parties' autonomy might be limited if there is any public policy reason. A choice of court agreement and resulting judgment shall be given effect unless nullity, voidance, or public policy reasons.[49] Further, the HCCCA shall not affect the privileges and immunities of States or international organisations regarding themselves and their property.[50] It neither affects the rules on jurisdiction related to subject matter or the value of the claim nor on the internal allocation of jurisdiction among the courts of a Contracting State. With this restriction, the HCCCA shows that where the chosen court has discretion as to whether to transfer a case, due consideration should be given to the parties' choice. In this sense, the HCCCA intends to balance the public-state orientations of paternalism and private-party-centred perspectives.[51]

2.3 Historical origins of autonomy: from the initial thoughts to the legal doctrine

Party autonomy is both an old and new phenomenon.[52] Civil and common law relied on a territorial or personal connection with a defendant or dispute while deciding on jurisdictional issues. Those matters were linked to state power, and objective factors restrained individual autonomy. The historical background of the principle reveals that it has developed as an exceptional jurisdictional ground because there is no objective factual connection between the parties or the dispute and a territorial legal order.[53] The shift in favour of fairness for the parties and their autonomy also facilitated the management of litigation risks arising out of cross-border commerce and globalisation.[54]

Choices of law and forum as "cornerstones" of private international law are relatively new 'inventions,' and their adoption within the party autonomy principle has been disputable throughout the years.[55] Theoretical roots of the principle are claimed to date

rather than only his own mistakes. Nevertheless, it should also be stated that as will be discussed, unless there is not any definite interpretation or precise definition of public policy, assertion by Christman would become real since courts of different states could potentially misuse it and deprive parties of their autonomy or free choices. For the discussions on public policy see Chapter 3.

[49] For the discussions on public policy see thesis, 3.3.4.2.2.

[50] HCCCA, Article 2(6).

[51] For the related discussions see: 2.4.2.

[52] Mills (n 1), 65.

[53] Ibid, 31.

[54] Ibid, 39.

[55] Giesela Ruhl, "Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency" (2007) 3(1) Comparative Research in Law and Political

back to Ptolemaic Egypt, ensured at the multistate level by the first decree in Hellenic Egypt circa 120-118 B.C.[56] It provided that where parties chose the law governing their contract, they also opted for the courts of that jurisdiction. In Roman law, 'pacta sunt servanda' legitimised contractual obligations and rendered parties' autonomous choices enforceable.[57] In the early middle ages, in Europe, the law was related to personal status or identity as a member of a tribal or ethnic affiliation rather than territorial location.[58] Later statutist medieval scholarship identified the applicable law or statute based on personal or territorial relation. Again, it left no space for party autonomy, as this approach was based on the forms of state authority. Nevertheless, it displaced the existing tribal law.[59] The ancient Roman law accepted that a plaintiff could bring proceedings in the place of domicile of the defendant generally, or either in the place where a contract was made or to be performed or where the act giving rise to the claim including a delict or tort occurred or in rem proceedings, in the place where a property was located.[60]

In the sixteenth century, Hobbes described a person in a state of nature, free to determine his interests, wills, and behaviours while acting in a way he thought was the best for him. Based on his representation theory, he believed that a social contract was crucial for preserving peace by the sovereign's power and wills, no subject than the representative-monarch could be free.[61] Locke also confirmed in his theory of natural law that human beings were free and equal in the state of nature by their birth. Everyone had a natural right to defend his life, health, liberty, and possessions. Unlike Hobbes, he supported the limited government, which is the mainstream of modern liberal democratic states.[62] At the same time, parties' free agreements were

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Economy Research Paper No. 4/2007; Eckart Gottschalk, Ralf Michaels, Giesela Rühl & Jan von Hein (eds.), *Conflict of Laws in a Globalised World* (Cambridge University Press 2007) 8. See also: Watt (n 102) 253; Mills (n 1), 30.

[56] Symeon C Symeonides, "The Hague principles on choice of law for international contracts: some preliminary comments" (2013) 61(4) American Journal of Comparative Law 873, 875.

[57] Commentaries show that history of choice of law as one wing of party autonomy doctrine in its practical sense, goes back to the Middle Ages and it follows the history of PIL. For more on the history of the principle see: Peter Nygh, *Autonomy in International Contracts* (Clarendon Press, 1999) 3-14.

[58] Subsequently, a party could make a declaration of their ethnicity or profession *iuris* for defining the law governing their legal relations. This kind of mutual declarations could be seen as an "early ancestor" of party autonomy. See: Mills (n 1) 44-45; Alex Mills, *The Confluence of Public and Private International Law* (Cambridge University Press, 2009) Chapter 2; Alex Mills, "The Private History of International Law" (2006) 55 International and Comparative Law Quarterly 1.

[59] Ibid, cf Mills (n 1) 46.

[60] Joseph Story, *Commentary on the Conflict of Laws* (Hilliard, Gray and Co, 1834) 532-536.

[61] Ibid.

[62] Locke's ideas did not replicate Hobbes' views on the absolute power of the monarch and rejection of the individuals' freedom or wills. He further established the consent theory which indicated that once an

recognised based on Dumoulin's views, who was considered the founder of modern party autonomy.[63] He believed subjective intentions of the parties and expression of their expectations to be decisive for the choice of applicable law.[64] In support of *quinimo ius est in tacita et verisimili mente contrahentium*[65], he stated that *locus contractus,* in other words, place of contracting, is random for applying the law.[66] He further submitted that "the supreme law in the sphere of the law of contracts was the will of the parties."[67] Additionally, Huber viewed party autonomy as a natural extension of freedom of contract, and based on this, parties were able to create a vested right according to a foreign legal order.[68]

Story and Savigny followed Huber's approach by expressing the view about the prevailing power of parties' presumed intentions regarding contractual obligations in the absence of concrete location or if it was hard to determine.[69] In a relevant case, the court emphasised the importance of party autonomy, but in the form of their intentions and wilful actions, as stated by Lord Mansfield.[70] At the same time, courts began to highlight the importance of the clearly expressed party intentions.[71] Party intentions became the "leading light in determining the law applicable to a contract" rather than a supporting circumstance.[72] Later cases presented that the law of the place of contract or performance could be governing but not conclusive, as the parties should have expressly declared their intentions as to which law would be applicable.[73] Dicey also asserted that the parties' express, implied, or 'imputed' intention would

individual got at the age of discretion and exempted from his father's paternal authority, he was free to decide under which government he wants to put himself. Therefore, nothing than his own free will could make him dependent on any political power. For more see: Locke (n 29), para 118-119.

[63] Mills (n 1) 47. See also: Mo Zhang, "Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law" (2006) 20 Emory International Law Review 511; Nygh (n 54) 4.

[64] His implied intention theory was what afterwards formulated a separate choice of law rule and jurisdiction, therefore, party autonomy. See: Ibid.

[65] Tacit agreements were concluded by implying or inferring without directly expressing and parties could imply this choice by performance of their contract.

[66] Nygh (n 54) 4; Hessel E. Yntema, "Autonomy in Choice of Law" (1952) 1 American Journal of Comparative Law 341, 342.

[67] Pavel Kalenský, *Trends of Private International Law* (Springer, 1971) 65.

[68] Mills (n 1) 49.

[69] Nygh (n 54).

[70] *Palmes Robinson, Esq. v Anne Bland, Spinster Administratrix de bonis non of Sir John Bland, Bart. Deceased* [1760] 97 E.R. 717. It was further held that the governing law of the contract was the one with the most real connection to the contract, generally the place of performance, notwithstanding the real intention of the parties. See also: J. Westlake, A Treatise on Private International Law with Principal Reference to its Practice in England (W. Maxwell, 1880) 237.

[71] *Chamberlain v Napier* [1880] 15 Ch D 614; *Chartered Mercantile Bank of India v Netherlands Co* [1883] 10 QBD 521.

[72] Mills (n 1) 55.

[73] *Re Missouri Steamship Company* [1889] 42 Ch D 321; *Hamlyn v Talisker Distillery* [1894] AC 202.

define the applicable law.[74] The priority would be given to the parties' intentions. If there were no express intentions of the parties, the court would determine the law based on surrounding circumstances.[75]

Relevantly, Kant's theory underpinned innate rights of freedom and a duty to realise and preserve that freedom by entering into a social contract in a civil society.[76] Rousseau's social contract theory assessed how to build a genuinely free and voluntary political society in which individuals have mutual obligations. He stated that "man is born free, and everywhere he is in chains"[77] and differentiated natural, civil, democratic, and moral freedom, each having its characteristics. Like Locke, Rosseau confirmed that the only thing that could make an individual lose his natural liberty or freedom was a contract by his wish attaching him to the general will and gain civil and political liberty.[78]

Unlike his, predecessors Mill envisioned that the essential freedom of an individual was his right to "life, liberty, and the pursuit of happiness,"[79] and a social contract based on the individuals' free will established a state whose power was restricted by those rights. In other words, individuals were free to do anything as long as they did not harm others.[80]

Later, in the middle of the eighteenth century, will theory was introduced to the common law tradition by Gordley, emphasising the intentions of the parties over established public determination.[81] As "the end of the enforcement of fully executory contracts"[82] and a response to the new social and economic conditions, will theories were readily accepted and supported by both liberal and traditional theory representatives.[83]

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[74] Albert Venn Dicey, *A Digest of the Law of England with reference to the Conflict of Laws* (Stevens and Sons, 1896) 567.
[75] *R v International Trustee for the Protection of Bondholders* [1937] AC 500, 529; *Vita Food Products Inc v Unus Shipping Co. Ltd* [1939] AC 277. At 290, it was stated that unless the intention is expressed in bona fide and legal and there is not any ground of public policy, the chosen law would be applicable.
[76] Frederick Rauscher, "Kant's Social and Political Philosophy" in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Spring 2017).
[77] Jean Jacques Rousseau, *The Social Contract* (first published 1762, Penguin 2004).
[78] ibid.
[79] Mill (n 43).
[80] ibid.
[81] John V. Orth, "Contract and the Common law", in Harry N. Scheiber (ed.), *The State and Freedom of Contract* (Stanford University Press, 1998) 49.
[82] Patrick S. Atiyah, *The rise and fall of freedom of contract* (Clarendon Press 1979) 49.
[83] Gordley James, "Contract, Property and the Will-The Civil Law and Common Law Tradition", in Harry N. Scheiber (ed.), *The State and Freedom of Contract* (Stanford University Press, 1998) 83.

Traditionally common law grasped party autonomy as one of the fundamental values and law's ideologies.[84] On the other hand, English law has defended the objective test of the most real connection.[85] A plaintiff could sue the defendant where the relevant event occurred.[86] Impracticality and inconvenience of the traditional rule and a requirement for a local jury made a shift in jurisdiction rules from the location of the events to the defendant's location.[87] Indeed, both Roman and common law approaches relied on a territorial or personal connection to justify the state's regulatory authority over a defendant or a dispute.[88] The case law prevented individuals from excluding public authority over them and conferring or taking away jurisdiction of the national courts.[89] Jurisdiction was assessed as a matter of territorial sovereignty and public governance. Later cases manifested the erosion of such connection between the public authority and private international law jurisdiction, and it was stated that English proceedings would have stayed on the ground of an agreement between the Dutch master and Dutch seamen of a ship, and the seamen would be expected to sue in the Netherlands.[90] The decision did not rule on the jurisdictional grounds; however, it came very close to party autonomy, however, was relevant in only the maritime context.[91] Following, submission was admitted as a ground of jurisdiction and justified based on territorial connection.[92] Moreover, since territorial jurisdiction was rooted in the theory of implied submission, parties' express submission would potentially provide a separate basis for jurisdiction.[93] Acceptance of submission fostered evaluation of private international law jurisdiction principles in the light of fairness to individual defendants instead of the state power.[94]

In the late nineteenth century, party autonomy and designation of the forum were accepted in cases beyond the maritime context, encompassing both arbitration and

[84] Worthington Sarah, "Common Law Values: The Role of Party Autonomy in Private Law" (2015) University of Cambridge, Legal Studies Research Paper Series, 2015, No 33.
[85] Ibid. The objective test of the most real connection considers grounds for the application of *forum non conveniens* by the English and other common law authorities, as parties should be held to their bargain and burden of proof, unless there are some "exceptional cases".
[86] Mills (n 1) 32.
[87] Ibid.
[88] Ibid, 33.
[89] *Kill v. Hollister* [1746] 95 ER 532; *Gienar v. Meyer* [1796] 126 ER 728, *Scott v. Avery* [1856] 10 ER 1121. For more see: Mills (n 1) 33.
[90] *Gienar v Meyer,* [731].
[91] Mills (n 1) 34.
[92] Ibid, 34-35.
[93] Ibid.
[94] Ibid.

jurisdiction agreements.[95] Courts were permitted to stay proceedings where the parties had entered into a binding arbitration agreement.[96] It was held that a reference to 'arbitration' agreements in the Act should also be understood to include exclusive jurisdiction agreements in favour of foreign courts.[97] Such a stay was not mandatory, and a private agreement did not oust the jurisdiction of the national courts[98]; however, the court had the discretion to do so and often found it appropriate to enforce parties' agreement.[99]

Later, a judgment rendered based on not only submission but also a jurisdiction agreement was capable of recognition.[100] The court also differentiated submission from party autonomy noting that the former arose after proceedings had been commenced for preventing any abuse of the court's procedure.[101] Furthermore, recognition of a jurisdiction agreement was encouraged by an anti-suit injunction to restrain any foreign proceedings in breach of this agreement and an anti-enforcement injunction upon a judgment rendered by foreign proceedings.[102] These rules have transformed into modern laws on protective measures in support of the parties' choices. Along with the shift from the justification regarding the territorial sovereignty to the fairness for the parties, forum non conveniens counterbalanced the expansion in favour of the objective connections.[103]

By globalisation and increase in international trade and cross-border commerce, philosophical thoughts in Continental Europe and Anglo-American Law contributed to further advancement of the composition of autonomy. From the nineteenth-century national laws in Europe adopted the principle. As stated in Article 1134 of the Napoleonic French Civil Code of 1804, "*Les conventions légalement formées tiennent lieu de loi à ceuxqui les ont faites*" – agreements lawfully entered by the parties define the law applicable to them.[104] Regarding this position, it was alleged that the idea of

[95] *Law v Garrett* [1878] LR 8 Ch D 26 (CA); *Austrian Lloyd Steamship Company v Gresham Life Assurance Society Limited* [1903] 1 KB 249; Mills (n 1) 35-36.
[96] Common Law Procedure Act 1854, s 11.
[97] *Law v Garrett* [1878] LR 8 Ch D 26 (CA).
[98] "Although, therefore, this Court is invested with jurisdiction, I order that the proceedings in the action be stayed, in order that the parties may litigate in Germany, as they have agreed to do." per Sir Samuel Evans P. in The *Cap Blanco* [1913], [130], [136].
[99] *The Fehmarn* [1957] 2 Lloyd's Rep 551.
[100] *Rousillon v Rousillon* (1880) 14 Ch D 351, 371.
[101] *The British Wagon Company v Gray* [1896] 1 QB 35 (CA).
[102] *The Angelic Grace* [1995] 1 Lloyd's Rep 87; *Ellerman Lines Ltd v Read* [1928] 2 KB 144; Mills (n 1) 140-141.
[103] Mills (n 1) 39.
[104] French Civil Code 1864, Article 1134 (currently French Civil Code 2016, Article 1103).

contract as 'private legislation' enables parties to establish 'their brand of law.'[105] However, by choosing the law, parties subject their contract or dispute to the existing laws than legislating new laws. The French Civil Code further gave jurisdiction to the court in the place of the defendant's nationality.[106] The Italian Civil Code in 1865 adopted the principle. Mancini, who had previously highlighted nationality as a connecting factor in private international law, supported both the principle and legislation to that effect.[107]

The political and economic theory of Karl Marx and Friedrich Engel condemned capitalism due to inequality and class antagonisms between business owners (bourgeoisie) and labour (proletariat) who did not possess any freedom or right to the means of production or their finished products or any other profits.[108] These ideas were postulated in support of communism and further enhanced socialism. While seeking to remove social classes and bring equality and freedom, communism and socialism failed to ensure autonomy or freedom disabled private trade or commerce.[109]

During the last 50 years of the nineteenth century, party autonomy as an express choice was brought into the coverage of the European and international documents and domestic legislation. During the Second World War and post-War, the freedom and autonomy of the parties were restricted.[110] However, considering the need to remove economic weaknesses resulting from the Second World War, the judiciary reduced state intervention and balanced the interests. Liberal views of political freedom and a free-market economy were adjusted by promoting parties to express their wills.[111] Yet, academic theories and liberal concepts contrasted with judicial practice, which interpreted party autonomy as a political notion framed by the

[105] Horatia Muir Watt, "Party Autonomy" in International Contracts: From the Makings of a Myth to the Requirements of Global Governance" [2010] 6 European Review of Contract Law 250, 257.
[106] French Civil Code 2016, Article 15.
[107] Nygh (n 54) 8-9; Giuliano/Lagarde Report [1980] O.J. C282/1 [16]; Yntema (n 63); Mills (n 1) 63.
[108] Karl Marx, *Das Kapital* (first published 1867). Relevantly, Richard Posner described private banking system as an unstable component of capitalism, whose failure would bring economic fall. He pointed out that capitalism could not consist of free markets or freedom of the parties. See: Richard A. Posner, *The Crisis of Capitalist Democracy* (Harvard University Press, 2010) 2.
[109] Communism aimed at the communal goal for everybody and working class to own everything while there was not any class, rich or poor people. By equally distributing the goods among people communism brought low production, poverty and demotivation. Similarly, socialism intended to achieve equality while providing wages, however still the goods were not owned by citizens but the government. Therefore, the latter also resulted in no incentive to work, particularly absence of autonomy or freedom disabled private trade or commerce.
[110] Yntema (n 63) 358. See also Nygh (n 54) 28-30.
[111] For more see Atiyah (n 79).

sovereign power as "the source of the rules of private international law."[112] The state was looked at as a sovereign authority, denying "legislative power" exercised by parties.[113] Party autonomy was at risk of getting undermined by policy and the economy.[114]

Yet, in the early twentieth century, the principle was not fully-justified in an international context; instead, its use was pretty contentious on both sides of the Atlantic.[115] Based on the post-colonial experience in Latin America, a state was the only determinant of law, and in this context, for example, Bustamante Code 1928 did not recognise party autonomy.[116] Likely, US law prioritised state sovereignty and public authority; therefore, the US Supreme Court evaluated forum selection clauses as an attempt against the state power.[117] Regardless of the adoption of the Federal Arbitration Act 1925, foreign choice of court agreements were not adequate to oust the jurisdiction of a US court.[118] Lack of autonomy of the parties to determine the applicable law and dispute resolution tool would leave them with "judicial chauvinistic manipulation," as stated, which would bring much more uncertainty.[119] It was only 1972 when the court

[112] Yntema (n 643 356-357.
[113] Ibid, 343; There are still some conditions over autonomy set by the law and courts similar to the ones existing then, however they are not to the point of narrowing the scope of the principle, See Nygh (n 54) 8.
[114] Ibid, cf Nygh, 8-13.
[115] Brooke Adele Marshall and Marta Pertegás "Party Autonomy and its Limits: Convergence through the New Hague Principles on Choice of Law in International Commercial Contracts" (2014) 39(3) Brooklyn journal of international law 975, 976. Party autonomy by an express choice of the parties was upheld and territoriality was rejected by Mancini and Rabel, whereas Batiffol and Niboyet disfavoured it. The latter supported the view that parties are allowed to exercise their autonomy only to the extent that is permissible by the 'sovereign' source of PIL rules being the national state or a supranational regime. For more on the autonomy conceptions of those scholars see: Yntema (n 63) 343-345, citing Niboyet's description of "le paroxysme de la volonté des parties"; Janeen Carruthers, "Party Autonomy in the Legal Regulation of Adult Relationships: What Place for Party Choice in Private International Law?" [2012] 61 International and Comparative Law Quarterly 881, 885.
[116] Mills (n 1) 64; Ernest G. Lorenzen, "Pan-American Code of Private International Law" (1930) 4 Tulane Law Review 499. Similarly, the drafter of the first Restatement of Conflict of Laws in the United States, Joseph Beale denied the principle on the basis of his territorialist views. He believed that giving parties freedom would be equal to a license to legislate and by doing so, parties were making rules for themselves opposing to the state power. See: Joseph Beale, *A Treatise on the Conflict of Laws* (Baker Voorhis and Co., 1935), 1105-1174. Meanwhile, the shift from the state-sovereigntist views to the private-party centred approaches also followed in the United States. Beale's views were proved to be wrong, and the Second Restatement of Conflict of Laws formally sanctioned the principle by providing that validity of a contract and the rights created by it were determined by the parties' chosen law. See: Restatement (Second) of the Conflict of Laws, adopted by the American Law Institute on 23 May 1969, s 187, comment (e).
[117] *Home Insurance Company v Morse* [1874] 87 US 445; *Scott v. Avery* [1856] 10 ER 1121.
[118] *Wood Selick v Compagnie Generale Trans*, 43 F.2d 941, 942.
[119] Nygh (n 54) 3.

confirmed the validity of the choice of court agreements under US federal law.[120] The principle gained much more significance with the later growth of international relations and commerce in the twentieth century. It was eventually adopted by national laws and globally recognised at an international level.[121] As a global expansion of the movement, international organizations began to draft frameworks for the provision of the principle. The Brussels Convention 1968 could be crucial evidence of the recognition of choice of court agreements in Europe, whereas Rome Convention 1980 ascertained choice of law clauses.

Similarly, the HCCH established special instruments[122], and the NYC ensured the parties' autonomy in arbitration.[123] Since the most notable documents for the provision of the principle were adopted during the last 50 years of the century it was called the "triumphant period" for party autonomy.[124] At the same time, English authorities began to give broader explanations of the principle and recognize the parties' legal and bona fide intentions provided there was no reason for avoiding their choice due to public policy.[125] The year 2015 is considered a victory phase for party autonomy. The BIR was replaced by the BRR, which enhanced the effectiveness of party autonomy by its new rules on choice of court agreements. Furthermore, the HCCCA finally entered into force.[126]

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[120] *The Bremen v Zapata Off-Shore Co*. (1972) 407 US 1. The trend was followed by the French courts and it was admitted that, rights of access to courts were waivable. See also Mills (n 1) 43.

[121] The principle was endorsed by the "intellectual father of American conflicts of law" Joseph Story, legislative measures and judicial practice. Some US authorities held that it was up to the parties to determine either the law of the place of contract or performance for governing their relations. In *Pritchard v Norton* [1882] 106 US 124, at 136, the court confirmed that the law applicable to the nature, interpretation and validity was the one which was expressly or impliedly provided by their contract. See *Andrews v Pond* [1839] 38 US 65, 78; *Miller v Tiffany* [1863] 68 US 298; *Arnold v Potter* [1867] 22 Iowa 194; *Cromwell v Country of Sac* [1877] 96 US 51; For more discussions see Mills (n 1) 57-58; Zhang (n 61) 529ff. On the other hand, territoriality still remained applicable where there was an *ordre public* matter. See also Joseph Beale, "What Law Governs the Validity of a Contract", (1909) 23 Harvard Law Review; Ernest G. Lorenzen, "Validity and effect of contracts in the Conflict of Laws" (1921) 30 Yale Law Journal, 655, 658.

[122] See thesis, Chapter 3.

[123] In this sense, Alex Mills argues that "it was rather the acceptance of arbitration that prompted recognition that the parties might alternatively choose a foreign state court". See Mills (n 1) 44. Indeed, global respect given to arbitration agreements was an influential factor for the recognition and enforcement of jurisdiction agreements at an international level.

[124] Symeonides (n 2), 114.

[125] *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] UKPC 7.

[126] The HCCCA and 2015 Hague Principles on Choice of Law intended to play the same role as the European counterparts, but in a global context. At the same time, there existed notable international instruments regulating choice of law and jurisdiction for specific matters. For example: Berne Convention for the Protection of Literary and Artistic Works 1886; New York Arbitration Convention 1958; Convention on the Contract for the International Carriage of Passengers and Luggage by Road 1973; Convention on the Contract for the International Carriage of Goods by Road 1978; Convention

As seen, party autonomy is both an old and modern phenomenon.[127] In particular, the jurisdictional rules moved forward from the priority of state sovereignty to fairness and justice to defendants.[128] Regarding the choice of law, development took through from the objective rule of connection, i.e., the place of contracting or performance to the express determination by the parties.[129] Some claim that historically these two processes evolved independently from each other.[130] Nonetheless, there are connecting links between the choice of law and choice of court, which are also demonstrated by the modern Hague developments at an international level and EU instruments at a regional level. The instruments also evidence the shift of the justifications given to the provision of the principle from the state-sovereigntist approaches to the party-oriented views.

Furthermore, these evolutionary patterns reflected themselves also in the development of the approaches towards arbitration agreements. As discussed above, acceptance of arbitration agreements paved the way for privatisation of jurisdictional matters and recognition of choice of court agreements. Courts interpreted the provisions of the statutory instruments that gave extensive force to arbitration acts to include jurisdiction agreements. This feature of the progress is also displayed in the achievement of the NYC long before the HCCCA.

Courts are the agents of the public authority, and jurisdictional issues are directly subject to state sovereignty. Litigation is conducted publicly at a court, while the arbitration process is private. Litigation has mandatory character, with strict rules determined by the government, whereas arbitration is consensual with the procedural freedom and rules specified by the parties. One would say, choice of court agreements are also consensual as the arbitration clauses; however, following parties' choice, mandatory jurisdictional provisions regulate court proceedings. Arbitration is always civil in nature, whereas litigation may cover both civil and criminal cases. While courts are competent of the trial of any matter related to the case, an arbitral tribunal is nominated only for the particularly specified disputes limited by the parties. Arbitration has a decisive body, an arbitrator or arbitrator with a non-governmental

concerning International Carriage by Rail 1980; Vienna Convention on contracts for the international sale of goods 1980 etc.

[127] Mills (n 1) 65.

[128] Ibid.

[129] Ibid.

[130] Ibid.

identity, selected by the parties. In contrast, litigation is held by the judges whom the government appoints.[131]

Furthermore, each state has its distinctive judiciary system, judicial culture and traditions. Also, judicial ethics and prerequisites of judicial integrity, independence, and competence distinguish in each jurisdiction. There is not a trust element at the international level. Reaching a convention on choice of court agreements and providing free circulation of judgments demanded sophistication and extra care for achieving a fair balance, stability and consistency between the national laws. In contrast, navigation of arbitral awards is more straightforward since an arbitrator-practitioner who the parties appoint usually has specialised knowledge and recognition and enforcement of an award is less challenging since there is no intervention into the sovereign judicial system of a state and an award does not establish any precedence being intrinsic to a particular case and specific parties. Since arbitration is wholly based on the commercially aware parties' free wills and shaped based on the needs of international trade, the NYC became a success. This peculiarity is also why the states with the largest economies and global traders have ratified the NYC but not the HCCCA. The NYC was established as a mechanism to perceive parties' autonomy as a valid source of private international law and international form of procedure which removed the sense of frontier and sovereignty both economically and politically.[132]

It is claimed that arbitration is not an expansion of the available forums; indeed, the global acceptance of arbitration encouraged the recognition of the parties' options to choose a foreign state court.[133] Having influenced by the NYC and upon the lengthy negotiations, the HCCH established the HCCCA limited to exclusive jurisdiction agreements on a specific range of the commercial and civil matters and subject to the Contracting States' opt-outs (declarations). In this sense, the need for ensuring stability, certainty and smooth international trade enabled reaching a balance between the national authorities and achieving an instrument applying to choice of court agreements.

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[131] For more discussions see: Gary Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International, 2020).

[132] Report and Preliminary Draft Convention adopted by the Committee on International Commercial Arbitration at its meeting of 13 March 1953, at A. <https://library.iccwbo.org/content/dr/COMMISSION_REPORTS/CR_0011.htm?l1=Commission+Reports> accessed 25 November 2021.

[133] Mills (n 1) 44.

2.4 Party autonomy and related concepts

2.4.1 The legal interpretation of the principle

Party autonomy is "the one principle in conflict of laws that is followed by almost all jurisdictions"[134] or a "rule of customary law"[135]. In a legal context, it is understood as a fundamental principle of the common law of contract entitling parties to determine, reject or modify their obligations.[136] It is a 'joint product' of the parties or 'combination of joint individual autonomy' to have mechanisms or locations where and under which law their disputes will be resolved.[137] This understanding links to the individualistic approaches to autonomy with its social aspects.

Private international law differentiates forum selection or choice of forum and law within the legal definition of the party autonomy principle. Therefore, parties build confidence in their relationship by choosing applicable substantive or procedural law and determining the mechanism for resolving their existing or potential disputes. Choice of law is the substantive facet of the principle. In contrast, the choice of forum is its procedural side, contributing to the same sense of enhancement of legal certainty and economic efficiency.[138]

Party autonomy is viewed as a "bedrock principle of the international law of contractual obligations," nevertheless, its theoretical background, as discussed earlier, remains obscure, and similarly, normative foundations have not been a theme to many discussions.[139] Gray expresses the ambiguity related to the notion and its interpretation in his statement that "on no subject of international law has there been

[134] Matthias Lehmann, "Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws" (2008) 41 Vanderbilt Journal of Transnational Law 381, 385. For more discussions see Mills (n 9).

[135] Andreas F Lowenfeld, "International Litigation and the Quest for Reasonableness" (1994) 245 Recueil des Cours 1, 256. See also Nygh (n 54) 45; Mills (n 9).

[136] For more see *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL), 848; *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd & Anor* [2013] EWHC 1328.

[137] Xandra Kramer and Erlis Themeli, "The party autonomy paradigm: European and global developments on choice of forum", in Vesna Lazić & Steven Stuij (eds.), *Brussels Ibis Regulation. Changes and Challenges of the Renewed Procedural Scheme* (The Hague/Heidelberg, Asser Press/Springer 2017), 3.

[138] For more see Rühl Giesela, "Choice of Law and Choice of Forum in the European Union: Recent Developments" in Christopher Hodges, Stefan Vogenauer, (eds.), *Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contracts Law* (Hart Publishing, 2010).

[139] Jürgen Basedow, "The Law of Open Societies – Private Ordering and Public Regulation of International Relations" (2013) 360 Recueil des Cours, 9, 164; Mills (n 1) 67.

so much loose writing and nebulous speculation as on autonomy."[140] Briggs argues that choice of law or choice of forum agreements should be given effect since they are private legal acts in the form of unique contracts and render the parties subjects of a particular jurisdiction and legal system which otherwise would not apply to them and common law recognises the effectiveness of the contracts.[141] Those contracts bring individuals inside or let outside of the institutions or legal system which assess them or define the status of the relationship.[142] Enforcement of those contracts serves the parties and broadly public interests and supports the efficiency of economic relations.[143] Still, it is up to the states and their legislation whether to give effect to such contracts.[144]

Another reason for those agreements' unique nature is the difference between private international law party autonomy and contractual autonomy.[145] The separability of such agreements is also a justification for their peculiarity.[146]

It has long been a contested and controversial notion before its current understanding as a modern development of the twentieth century as "perhaps the most universally accepted aspect of private international law."[147] As stated, "…astonishingly little attention has been paid to the function with which it is henceforth invested…."[148] It has been called as "perhaps the most widely accepted private international rule of our time"[149] or "unifying principle of modern private international law,"[150] "a fundamental right"[151] or "an irresistible principle"[152] belonging to "the common core of the legal system".[153] Furthermore, there are many ongoing debates broadening party autonomy to "the one principle in conflict of laws that is followed by almost all jurisdictions"[154] or

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[140] John Gray, *The Nature and Sources of the Law* (Columbia University Press, 1909). See also Hurst Hannum and Richard Lillich, "The Concept of Autonomy in International Law" (1980) 74(4) American Journal of International Law, 858 and 886.
[141] Adrian Briggs, *Agreements On Jurisdiction and Choice of Law* (Oxford University Press, 2008); Hessel E. Yntema, "Contract and Conflict of Laws: "Autonomy" in Choice of Law in the United States" (1955) 1 New York Law Forum 46, 47; Mills (n 1) 66.
[142] Northwestern National Insurance Co. v Donovan, [1990] 916 F.2d 372, 7th Cir.
[143] Mills (n 1) 66.
[144] National laws might have different positions.
[145] Mills (n 1) 67.
[146] For the discussions related to separability see thesis, 4.2.3; 5.4.3 and 6.4.3.
[147] Mills (n 1) 30.
[148] Watt (n 102) 253.
[149] Symeonides (n 2) 114.
[150] Ibid.
[151] Ibid.
[152] Ibid.
[153] Ibid.
[154] Lehmann (n 132) 385.

calling it “a rule of customary law.”[155] Becoming a significant cornerstone of intersection between international commerce and private international law, the principle has been understood as a means for the growth of international trade regulated by unified provisions. In this vein, the influence of the principle has become much more striking, especially while highly regarded international organizations actively seek tractable unification of private international law. And vice versa, private international law itself has evolved while the use of the principle became wider. The principle has not been confined only to the borders of conflict of laws or private international law but also has been applied in contract law as freedom of contract. Party autonomy has been assessed as “internalisation of freedom of contract”[156] or “mirror image” of the latter in the domestic sphere.”[157] Similar to ‘legislating’ the terms of the contract, their freedom to determine the applicable legal regime expanded within liberal economies and gave the parties “a form of sovereignty.”[158] The blurring differences between contractual autonomy or freedom of contract and private international law autonomy and conflation have been crucial for developing the principle. Internationalisation of the parties’ autonomy in its relocation at a global level is evidenced in the Hague frameworks, particularly in the HCCCA.

Therefore, the “ubiquitous and incontestable” and still “incongruous and exceptional” principle is worth studying as it has extremely necessary “even dramatic effects” entitling private parties to identify jurisdiction and applicable law.[159] By exercising their autonomy, parties privatise global governance's allocative and regulatory (institutional and substantive) functions.[160] Furthermore, double privatisation is viewed particularly by choosing a non-state forum (arbitration) or non-state law.[161] The increasing impact of the principle is also witnessed because some jurisdictions have extended its application to non-contractual obligations.[162]

While the principle is getting more importance and international consensus, the definition adjusts to the nature of the legal systems and specific legal fields. As a result, individual freedom or rights of a person experience legitimate and moral constraints in

[155] Lowenfeld (n 133) 256; Nygh (n 54) 45; Mills (n 1) 2.
[156] Mills (n 1) 63.
[157] Watt (n 102) 257.
[158] Ibid.
[159] Mills (n 1) 3-4.
[160] Ibid.
[161] Ibid.
[162] Mills (n 1) Chapter 8.

line with what is legally allowed or conversely prohibited. Limitations on choice become essential for satisfying the state's interests and parties' expectations. Further, parties' wills could be restricted upon consideration of third parties and public policy grounds. Similar to the indefiniteness of the principle in legal theory, it is not so definitive or promissory in practice.

2.4.2 Justifications for the principle

Justifications given to party autonomy are viewed either from the public-state or from a private-party-centred perspective. Traditionally, theorists who favoured reconciling rules of private international law with public international law denied party autonomy as it would establish an individual's power over a sovereign's and regulatory authority.[163] Nevertheless, by exercising their independence, parties express their preference for resolving their dispute and applicable law to the extent that states agree to enforce their priorities.[164] Therefore, the principle gets legitimacy based on the recognition by the state.[165] This justification, in turn, relates the principle to liberalism and paternalism ideas.

From a more radical party-sovereigntist perspective, private parties have an inherent power of freedom or autonomy to choose a forum or law, and states recognise this underlying reality.[166] Private parties and their free agreement in determining their rights, obligations, and choices are the focus of this perspective. Individuals are the source of normative authority rather than the sole supremacy of the state.[167] In this sense, the justification links to the postulates of individualism. In support of the party-sovereigntist perspective, it has been observed that the principle is justified while ignoring the classic theory of state relations, accepting the parties as to the centre of the conflicts and allowing them to choose the applicable law to their dispute.[168] As posited by Van Loon, the nation-state is no longer the sole anchor space of private international law; indeed, the latter has adapted new methodologies and exceeded its

[163] Ibid, 5.
[164] Ibid.
[165] Ibid, 6.
[166] Ibid, 8.
[167] ibid, 10. See also Alex Mills, "Rethinking Jurisdiction in International Law" (2014) 84 British Yearbook of International Law 187.
[168] Lehmann (n 132) 415.

traditional boundaries towards the global community while preserving integrity.[169]

In scholarship, private-unilateral justification is evaluated as enforcing contractual bargains as a matter of contract law.[170] Contrasting approaches highlight the dominance of the state-sovereigntist perspective and the weakness of the Westphalian model[171] by the subordination of party autonomy to state authority. On the one hand, the effectiveness of party autonomy is contingent on public power. On the other hand, parties are the determinant of the fate of their relations.

In *Belhaj & Anor v Straw & Ors*, the Court of Appeal of England and Wales was inclined towards preserving party-sovereigntist perspective by stating that: "… a fundamental change has occurred within public international law… The traditional view of public international law as a system of law merely regulating the conduct of states among themselves on the international plane has long been discarded… In its place has emerged a system which includes the regulation of human rights by international law, a system of which individuals are rightly considered to be subjects…"[172] It has been contended that international law is no longer the law between states, but it is the global law of humanity.[173] While these points could be affirmed to a certain extent, there is no way to completely agree with this idea since the states still perform their decisive power internationally and nationally. With this in mind, international law primarily consists of international agreements, one of which is the HCCCA; its founders are global, intergovernmental, or transnational organisations whose members are national states. On the other hand, states are sovereigns having the power to legislate in their territories and implement international law, whereas those laws limit individuals' sovereignty. Parties' agreements have to be consistent with both national and international law, as well as they should align with the commonly accepted principles and international practices.[174]

The principle should be promoted as it meets the expectations of private parties, and one of the aims of personal international law is to facilitate efficiency. It is claimed that

[169] Hans van Loon, "The 2005 Hague Convention on Choice of Court Agreements - An Introduction" (2016) 18 *Annals* of the *Faculty* of Law of the University of *Zenica*, 45.
[170] Mills (n 1) 68
[171] The Westphalian model of state sovereignty is an international law principle defining exclusive sovereignty of each state over its own territory.
[172] *Belhaj & Anor v Straw & Ors*, [2014] EWCA Civ 1394, 115.
[173] Mills (n 1) 11.
[174] In contrast to hard law which is legally binding and sanctioned by enforcement mechanisms, soft law containing the commonly accepted principles and best practices of international law is not binding and does not bring any sanction, unless they are 'hardened'.

although both choices of forum and choice of law agreements are binding on the parties, they do not bind courts, who determine whether to give or not to give effect to the parties' choices.[175] Nevertheless, national or international law is binding on courts, and party autonomy should be given effect based on the relevant provisions. Moreover, the justification oriented with private parties aligns with the recognition of freedom of contract principle; on this basis, party autonomy presents itself as the continuance or 'natural consequence'[176] of the former in the broader context.

Acceptance of party autonomy as a legal principle counterbalances public and private interests. Parties express their free wills and choices by concluding an agreement, whereas that agreement is legal and legitimate as long as it confines the normative framework existing within a particular state or at regional or international levels. Modern private international law is established on balance between the interests of the state and private parties. In the same context of liberalism, the state should protect and ensure parties' freedom and autonomy, whereas parties' choices are recognised only if they reconcile public order and interests.

2.4.3 Preconditions for party autonomy

It is also submitted that for any justification to be persuasive, parties' choices should meet several requirements: authenticity, foreseeability, public interests or values, justifiability, and cross-border elements.[177]

The choice should be genuine for the joint exercise of the parties' inherent freedom to be authentic.[178] Authenticity concerning the parties' free decision relates to the acknowledgement of bargaining powers and inequalities between them.[179] The theme discussed below justifies limitations over the exercise of autonomy where there is a weaker party. The choice could be authentic if it meets both substantive or material and formal validity requirements and valid consent.

Foreseeability necessitates the parties to be informed while making their choice for private and public benefits.[180] An uninformed choice is believed not to be genuine and,

[175] Mills (n 1) 70.
[176] Ibid, 68.
[177] Ibid, 85-90.
[178] Erin A. O'Hara and Larry E. Ribstein, "From Politics to Efficiency in Choice of Law" (2000) 67 University of Chicago Law Review, 1151. See also: Mills (n 1) 85-86.
[179] Ibid, cf Mills.
[180] Ibid, 86-87.

therefore, not reflect parties' free wills.[181] Foreseeability is one of the reasons for the non-application of party autonomy to non-contractual disputes.[182] Nevertheless, some national laws and the Rome Regulation on the law applicable to non-contractual obligations evidence that it is not always the case. As authenticity, foreseeability is linked to validity and capacity since only capable parties can make informed choices.

Public interests and values should also be considered while giving effect to party autonomy and justifying limitations over it. The European Parliament has shown its intention to prevent any risk to its mandatory rules. In this regard, it has fostered setting an interparliamentary forum on the work of the HCCH to ensure that the provision of party autonomy does not give any chance for a breach of those rules or forum shopping.[183] While such policy is reasonable, it would bring primary rationale of public interests and values for the limitations over parties' autonomy in the light of overriding mandatory rules.

Justifiability and appropriateness of the parties' choice seek an expected beneficial outcome before enforcement.[184] Foreseeability also envisages private and public benefits similar to justifiability. It is alleged that justifiability is one of the solid reasons for the restriction in choosing the law or forum that is not connected to the parties or their relationship.[185] Although this reasoning might be applicable in some states and other international instruments[186], it contrasts with the neutrality objectives of international cross-border litigation.

A cross-border element is another condition for the principle to be justified.[187] Accordingly, it is claimed that the best way to ensure efficiency and legitimacy is only if a dispute or relationship has an international character. The parties should be allowed to determine the law or forum. In contrast, if the case is domestic, there would not be any uncertainty for the parties to eliminate by their choices. The international nature of the case is one of the multiple elements to be satisfied for applying the HCCCA. Indeed, a cross-border element should be observed as a requirement for

[181] Ibid.
[182] Ibid.
[183] European Parliament resolution of 23 November 2010 on civil law, commercial law, family law and private international law aspects of the Action Plan Implementing the Stockholm Programme (2010/2080(INI)), para 10 and 38.
[184] Mills (n 1) 89-90.
[185] Ibid.
[186] HCCCA also have some tension towards this premise by declaration options given to the states. For more discussions see thesis, Chapter 4.
[187] Mills (n 1) 90.

using those international frameworks but not a justification for party autonomy. Party autonomy is ensured by both national and international law. As discussed earlier, domestically, the principle is materialised as freedom of contract.

While not all of these conditions prove themselves correct as grounds for applying the principle, authenticity, foreseeability, and justifiability enhance the provision of party autonomy.

2.4.4 Freedom of contract versus party autonomy

Parties exercise their wills also by freedom of contract principle or as called 'contractual autonomy'[188] and enhancement of the latter has given credence to autonomy.[189] Possibly, long before the period of internationalisation, freedom of contract was sanctioned domestically and entitled parties to enjoy their autonomy in that jurisdiction. By enlarging the relations to a global level and growing cross-border commerce and trade, international agreements necessitated facilitation and certainty, which could be achieved by enforcing parties' autonomy.

While party autonomy and freedom of contract share a common outlining element – parties' free will, they are distinctive based on their nature, grounds of application, and legal outcomes. The two distinct and yet connected principles function in a complementary manner. Nonetheless, the subject is contentious enough, and opposing views on the nature of their relation bring challenges for reaching a consensus. Sometimes the principles have been combined, and it has been argued that autonomy to choose the governing law is part of the parties' contractual freedom.[190] Party autonomy is called the "external" side of the domestic law doctrine of freedom of contract, allowing parties to a multistate contract to agree which state's the law will apply to their agreement.[191] Nonetheless, this view equalises the two different principles and undermines their distinctive features. The criticism of the argument is also about the deficiency of the definition since the principle covers the choice of law and forum.

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[188] Mills (n 1) 21-23.
[189] Ibid, at 28.
[190] Peter Nygh, "The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and in Tort" (1995) 1 Recueil des Cours 251, 297. See also Nygh (n 54) 8.
[191] Symeonides (n 2) 110.

Moreover, others have claimed that party autonomy should be justified since parties' contractual freedom should be upheld, and their agreements should be given effect.[192] Although not entirely comprehensive, this justification is reasonable since it diminishes party autonomy as a discrete concept and embraces only a contract law perspective.[193] Freedom of contract is commonly accepted as a principle applying domestically and enabling parties to decide whether to contract, with whom to contract, and how to negotiate terms and conditions of their contract.[194]

Besides enabling the parties to determine the terms and conditions of their contract, it adds some protection from economic power for the ones in need.[195] Still, autonomy or freedom cannot be limitless, and likewise, proponents of freedom theories assert a need for state intervention in a sense.[196] Similar to the limitations that apply to the exercise of party autonomy, freedom of contract is also restricted by particular mandatory rules or public policy grounds. Constraints over freedom of contract are determined by national public policy or overriding mandatory rules. The relevant private international law rules that also refer to public policy or mandatory rules – conflict of laws rules might interfere with party autonomy.

On the one hand, this view is accurate since freedom of contract is germane to contract law. At the same time, party autonomy applies to the choice of law and choice of forum agreements which are in the scope of private international law and associated with the global nature of the relation. In this regard, it is argued that both choices of law and choice of court agreements are contracts; therefore, they should be bound by the rules

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[192] For more see Briggs (n 138) 12.

[193] For more discussions see ibid cf Briggs, 12.

[194] In this relevance, the Principles of European Contract Law 2002 which are still subject to national mandatory rules, sanctioned freedom of contract principle. See Principles of European Contract Law 2002, Articles 1:102 and 1:103.

[195] For more discussions see Briggs (n 138). The main idea behind this principle is that the law should define a framework for parties to freely agree to their exchanges which they think make them better off. It is similar to the understanding of "pareto optimal" known in social sciences and often used for evaluating the interrelation between economics and law. Linked to the Italian sociologist Vilfredo Pareto, Pareto optimalism or Pareto efficiency seeks a state which promises equal and mutual advantages for all of the individuals, in other words, a condition that makes one worse off cannot make the others better off. It is also relevant to sanctity of contract which is a legal ideal to preserve autonomous choices or decisions of the parties and block any unreasonable shift by them. See John Adams and Roger Brownsword, *Key Issues in Contract* (Butterworth, 1995) 51.

[196] Minimalism or new formalism approaches emphasise the importance of parties' choices and indeed maximizes freedom of contract while rejecting interventionist position of a state and recognizing law as a tool contributing to the effectiveness and efficiency. For more see John Stewart Hobhouse, "International conventions and commercial law: The pursuit of uniformity", 106 *Law Quarterly Review* 530; Jonathan Morgan, *Contract law minimalism: a formalist restatement of commercial contract law* (Cambridge University Press, 2013).

of contract law.[197] The uniqueness of those contracts justifies their regulation by a complex set of private international law. On the other hand, private international law is also a set of domestic rules. Based on private international law autonomy, parties may choose a domestic court and law that would apply the contract law of that jurisdiction. If an English and a French party agree on the English choice of law and jurisdiction clauses, English contract law would still be paramount in determining their rights and obligations, further validity, and capacity issues. Party autonomy and freedom of contract exist jointly and accompany each other. By choosing applicable law and a forum, parties displace dispositive rules of the legal system that otherwise would govern their relation and employ freedom of contract, contributing to certainty and efficiency.[198] While party autonomy functions between the legal orders, contractual autonomy or freedom of contract performs within a legal order.[199] Apparently, for the national legal order to be applicable private international law party autonomy should be employed.

2.4.5 Submission to a forum versus party autonomy

Similar to the exercise of party autonomy, submission to a forum brings a basis for jurisdiction.[200] Unlike freedom of contract, the latter links to only one side of party autonomy: choice of court. Also, submission to a forum is not a principle but a rule established by law that protects the parties' autonomous wills and decisions. Observations of submission would differ depending on whether a designated court or parties have not agreed on jurisdiction. It has been claimed that while parties choose a forum in advance based on their autonomy, submission to a forum enables them to admit a particular court's jurisdiction after the commencement of the proceedings.[201] This statement might be valid only if a dispute has not arisen yet and parties agree on jurisdiction. There is nothing to prevent parties from exercising their autonomy and negotiating a court agreement choice at any stage of the proceedings. In other words,

[197] Mills (n 1) 21. Nevertheless, they are often special types of contracts being separate from the host contract, which is subject to general contract law.
[198] Ibid, 1-3.
[199] Ibid, 22.
[200] The HCCCA does not provide any rules on submission.
[201] Mills (n 1) 17.

party autonomy can be employed while a dispute has already arisen and proceedings have commenced assuming there are no mandatory rules or public policy grounds.
On the other hand, the court designated by the parties would be able to take the proceedings over, assuming the defendant does not contest its jurisdiction. It leads to the point that a defendant shall submit to the designated forum for a choice of court agreement to get enforced. The understanding is that parties' choice of court agreement based on their autonomy becomes effective when there is an implied or tacit agreement to submit to that form. Where the parties have not designated any court, and a defendant is sued in the English court, proceedings will continue where the defendant enters an appearance and does not contest the jurisdiction of the English court. Relevant to this case, submission to a forum is viewed as a quasi-contractual process where a claimant 'offers' for the dispute resolution by commencing the proceedings in a particular court, and a defendant 'accepts' that 'offer' by entering an appearance.[202]

2.5 Double layer of party autonomy: Choice of law and choice of forum

2.5.1 Overal review of the parties' choices

Private international law governs relations between the States, between legislators and judges, and between private individuals. The nature of the provision of party autonomy is distinctive at each level. The relations between States involve the comity element and sovereignty, which would, in many cases, restrict autonomy. When it comes to the relations between judges and legislators, judges might be directed or, in their sense, would be keen on giving effect to parties' agreement. However, they can act as instructed by legislators, which proposes that private international law rules are of public orientation or dependant on public law.[203]
In the global market, business enterprises become parties to contracts with foreign companies (and states), potentially bringing enormous losses. The steady growth in international trade and investment[204] has led to a substantial increase in cross-border

[202] Mills (n 1) 18.
[203] Briggs (n 138) 538-539, para 13.26.
[204] Garnett Richard, "The Hague Choice of Court Convention: Magnum Opus or Much Ado About Nothing?" [2009] 5(1) Journal of Private International Law, 161.

commercial disputes.[205] The same disagreement can end with various outcomes depending upon the law applicable to the relations and instruments which the parties use for resolution. Hence, the exercise of party autonomy by choice of law and forum selection clauses[206] is crucial enough for dispute resolution and its final consequences, particularly allowing the risk of parallel proceedings and inconsistent decisions.[207]

Bargaining parties negotiate provisions in support of the mutual advantage. In contrast, economic analyses reveal that they conclude an agreement indicating the most favourable mechanism, which is an efficient solution for their current or potential disputes with greater social benefits[208] and social surplus[209], considering different points, in the context of a particular transaction or specific type of transactions and counter-party.[210]

Relations between commercial parties are characterized by the promise of enforceability and assure that agreements are made to be kept.[211] Agreements that are based on consent are the most concrete and elaborate exercise of individual autonomy.[212] It is claimed that the law on jurisdiction and choice of law agreements needs to be simple; yet, it is still complicated and complex.[213] Interpretation by case law and academic writings have contributed to the simplification and comprehension

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[205] A survey showed that cross-border disputes account for almost a third of multinational corporations' legal spend. As stated by Hogan Lovells partner Megan Dixon: 'I expect to see either constant or even higher number of cross-border disputes due simply to the shrinking global market phenomenon', See: John Hyde, "Cross-border disputes on the rise, say corporations", 14 February 2014, <https://www.lawgazette.co.uk/practice/cross-border-disputes-on-the-rise-say-corporations/5039838.article> accessed 30 November 2021.

[206] On this note, many authors (such as Born (n 129), however, he then comes back saying "the decisive factor is not the label, but the reality of who the decision maker is" at page 257) consider forum selection clauses to be the same as the choice of court agreements, whereas in my opinion, as a wider notion, forum selection clauses enshrine not only the choice or court, but also other alternative dispute resolution tools including arbitration clauses. Moreover, I would tend them to be identical with the "dispute resolution clauses".

[207] As an illustration, if a decision given by a French court against a defendant domiciled in Singapore, then the judgment has no force, which means that a claimant is likely to bring a new action in the court of Singapore. Therefore, a risk of parallel proceedings and inconsistency of the resulting judgments become inevitable.

[208] Keith N. Hylton, "Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis" [2000], 8 Supreme Court Economic Review 209.

[209] Theodore Eisenberg and Miller Geofrey, "The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in Publicly-Held Companies' Contracts" (2006) New York University Law and Economics Working Papers, Paper 70, 1,2.

[210] Gary B. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (6th edn, Kluwer Law International 2021).

[211] ibid.

[212] ibid.

[213] Briggs (n 138), para 8.

of law to strengthen party autonomy. As a contractual term, the choice of forum or law clause is a product of a negotiation between the parties who should be held for it. They are usually given effect to ensure efficiency and fairness for the parties. Furthermore, they provide certainty and avoid common risks resulting from the non-determination of any law or forum.

Some authors defend the position that contracts containing a choice of law provisions form part of the forum selection clauses.[214] Regardless of their strong links, the existence of either does not necessarily ensure the other, and a contract does not always provide for both. Parties in their sale of goods contract may agree on applying the English law without determining any forum for resolving their dispute. Vice versa, they can choose the English court while not any governing law is selected.

Since 17 December 2009, the Rome I Regulation has been applied to determine the law governing contractual obligations, while the Rome II Regulation defines similar issues regarding the non-contractual obligations. After the Brexit transition period, the Regulations as part of the EU law ceased to apply in/to the United Kingdom.[215] The Hague Conference adopted the Hague Principles on Choice of Law in International Contracts in 2015 for defining the legal rules applicable to the transaction.[216] Like the Rome I Regulation, the Principles do not address the law governing forum selection clauses. Furthermore, they do not consider those clauses equivalent to their choice of law on their own. Moreover, distinguishing choice of court and choice of law agreements, it is asserted that jurisdiction clauses may be considered one of the

[214] Briggs (n 138) 381, para 10.01.

[215] In this regard, there have been some claims encouraging to preserve those Regulations as part of the domestic law of the United Kingdom for enhancing legal certainty. See: Paul Torremans, Uglješa Grušić, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Zheng Sophia Tang, Katarina Trimmings, and Lara Walker, James J Fawcett (eds.), *Cheshire, North and Fawcett: Private International Law* (15th edn, Oxford University Press 2008), 683; Financial Markets Law Committee, Issues of Legal Uncertainty Arising in the Context of the Withdrawal of the U.K. from the EU—The Application of English Law, the Jurisdiction of English Courts And the Enforcement of English Judgments, December 2016, <http://fmlc.org/wp-content/uploads/2018/03/brexit_-_english_law_and_jurisdiction_paper.pdf> accessed 26 November 2021. House of Commons Justice Committee, Implications of Brexit for the justice system, 22 March 2017, <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/750/75002.htm> accessed 26 November 2021. Further, the UK has legislated to keep the same rules in place. See: The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019.

[216] By these non-binding Principles (Similar to the UNIDROIT Principles and the PECL), the Conference intends to promote the principle of party autonomy and promulgate the states to incorporate them into their domestic law for further development of their legislation on choice of law. Asserting the main aim of ensuring party autonomy, the document differentiates choice of law agreements from the forum selection agreements including jurisdiction and arbitration clauses. See: Hague Principles on Choice of Law in International Contracts 2015, paras I.7-I.9 and I.13.

factors assisting in determining parties' intention to choose the governing law.[217] Similarly, the Rome I Regulation contains a particular rule enabling the applicable law to be determined based on the circumstances of the case and close connection where forum selection clauses get relevant.[218]

Despite the differences between those clauses and their exclusion from the scope of the documents mentioned above[219], English courts have generally considered the existence of either choice of law or forum selection clauses while deciding the question of governing law or jurisdiction. In other words, parties' express wills might be counted for the determination of their implied choices.[220] In *Egon Oldendorff v Libera Corp*, where German and Japanese parties expressly provided for the London arbitration but did not select any governing law, it was decided that English law was a conscious choice referring to Article 3 of the Rome Convention at that time in force.[221]

Whereas the choice of law clauses may differ depending upon whether there is a contractual or non-contractual relation, forum selection clauses could devise either court, arbitration, or other forms of ADR (mediation or expert determination) for resolving the disputes. The world will still go round if parties fail to make agreements or keep to them, as private international law rules might fill the gap; likewise, the world would be a much more unsatisfactory place if commercial contracts were undermined and disregarded at all.[222] Irrespective of whether parties have agreed on the

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[217] Commentary to the Hague Principles, para 4.11.

[218] Rome I Regulation, Article 4(3).

[219] Rome I Regulation, Article 1(2)(e); Hague Principles, Article 1.3(b).

[220] Before the Rome Convention was adopted, the House of Lords stated that while determining parties' intention on the governing law all the relevant factors should be put on the scale and forum selection clauses are one of those persuasive factors, though not always decisive. See *Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA* [1971] 1 A.C. 572, [1970] 3 All E.R. 71 (1970). This view was also held by the court post-Convention. In the case where German and Japanese parties expressly provided for the London arbitration in their international contract but did not select any governing law, it was decided that English law was an intended choice referring to Article 3 of the Convention on the Law Applicable to Contractual Obligations 1980 at that time in force. See *Egon Oldendorff v Libera Corp (No.2)* [1996] 1 Lloyd's Rep. 380; Similarly, in *Samcrete Egypt Engineers and Contractors SAE v. Land Rover Exports Ltd.* [2001] EWCA Civ 2019 and *Kent v Paterson-Brown* [2018] EWHC 2008 (Ch) jurisdiction clauses counted for a sufficient linkage to hold choice of governing law; For more see Dicey, Morris and Collins on the Conflict of Laws (15th edn, Sweet&Maxwell 2012), Chapter 32. This conclusion is also compatible with Article 3 of the Rome I Regulation, therefore English courts still consider strong links between choice of court and choice of law clauses while determining parties' intentions and their autonomy.

[221] ibid, cf *Egon Oldendorff v Libera Corp,* 380; Rome Convention on the Law Applicable to Contractual Obligations 1980. Similarly, in *Samcrete Egypt Engineers and Contractors SAE v. Land Rover Exports Ltd.* [2001] EWCA Civ 2019 and *Kent v Paterson-Brown* [2018] EWHC 2008 (Ch) jurisdiction clauses counted for a sufficient linkage to hold choice of governing law; For more see Dicey, Morris and Collins (n 218) Chapter 32.

[222] Briggs (n 138) 538-539, para 13.26.

jurisdiction, arbitration, or the governing law, it is still a self-contained, self-sufficient and self-justifying agreement that the court and parties should comply with.[223] Such agreements intend to safeguard the *pacta sunt servanda* principle and fidelity and persuasiveness of rights and obligations established by them, which are not easily trumped.[224] In common law, "No one needs to teach the common law the importance of enforcing agreements: whether one looks to Scrutton JL[225] or Lord Bingham[226] or Lord Hobhouse[227], the sentiment is all the same: contracts are made to be performed…."[228] Still, their effectiveness varies in terms of approaches that have been developed in different legal systems, whether it is an international or European framework, common law, or other national rules.

2.5.2 General outline of choice of court agreements

Choice of court agreements manifest parties' autonomy to submit their arisen or potential disputes to a particular court or courts of a specific state or states. They may also agree on hybrid clauses which allow them to resolve their disputes either by litigation or arbitration depending upon their preference and circumstances. Such an agreement may be formulated separately or provided in the host contract.

It is claimed that party autonomy is an exceptional basis of jurisdiction as it is not grounded on the objective factual connection between the parties, their dispute, and territorial legal orders.[229] While choosing between possible dispute resolution tools, one might concentrate on the benefits of arbitration together with the recognition and enforceability of the arbitration agreements and awards, which were not characteristics supplied for litigation previously. However, the HCCCA secures relevant safeguards

[223] ibid, 541, para 13.29.
[224] ibid, paras 23 and 25.
[225] *Metropolitan Tunnel and Public Works Ltd v London Electric Railway Co* [1926] Ch 371 (CA), [389]: 'a guiding principle…and a very natural and proper one is that parties who have made a contract should keep it'.
[226] *Golden Strait Corp v Nippon Yusen Kubishika Kaisha* [2007] UKHL 12, [2007] 2 AC 353, at [22]: 'contracts are made to be performed, not broken. It may prove disadvantageous to break a contract instead of performing it'.
[227] *Shogun Finance Ltd v Hudson* [2003] UKHL 62, AT [49]: 'The bargain is the document; the certainty of the contract depends on it…The rule is one of the great strengths of English commercial law and is one of the main reasons for the international success of English law in preference to laxer systems which do not provide for the same certainty'.
[228] Briggs (n 138) 540, para 13.26.
[229] Mills (n 1) 31.

for choice of court agreements and judgments; and parties would contemplate all the decisive points and make a well-thought choice to resolve their dispute.

As a matter 'of great tactical significance[230], choice of court agreements are specified as a "boilerplate"[231] in contractual negotiations. Besides recognition and enforcement of agreements and resulting judgments, the degree of functionality and efficacy of agreements can be evidenced by reviewing numerous elements such as classification of exclusive and non-exclusive jurisdiction clauses, recognition of dual: positive and negative effects involving prorogation (conferral), and derogation (ouster), the presumption about the exclusivity of the choices, etc. In addition, considerations of their procedural or substantive nature, possible outcomes of a breach, possibility of granting remedies, anti-suit injunctions, stays or damages, interpretation and assessment of validity, relation to third parties would also help to evaluate the sanctuary of the parties' choices. Furthermore, identifying the legal nature of the choice of court agreements would mostly necessitate 'a parallel enquiry'[232] into the nature of the choice of law agreements. In this sense, the role of choice of law agreements can be revealed not only by the clause itself but by looking beyond.[233]

At a transnational level, choice of court clauses are regulated by the regional BRR. Multiple international frameworks have been formulated to handle jurisdictional issues, including choice of court agreements. In this respect, the HCCCA, a leading global instrument, aims at similar guarantees to jurisdiction agreements and resulting judgments as the NYC gives to arbitration agreements and arbitral awards. As believed by Peter D. Treboof, the HCCCA will become a litigation analogue for the New York Convention 1958, as it seeks to ensure "an equal and viable alternative to arbitration."[234] Likewise, V. Nanda describes the HCCCA as "a viable alternative" to the NYC and reveals that they should not be seen as competing instruments.[235] Many commentators have supported this view, who believe that the Convention may ensure 'a viable alternative to arbitration' once ratified by enough countries.[236]

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[230] Yvonne Baatz (ed.), Maritime Law (5th edn, 2017, Informa Law from Routledge), 2.
[231] Mills (n 1) 91.
[232] Briggs (n 138) para 10.
[233] Briggs (n 138) para 11.
[234] Louise Ellen Teitz, "The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration" (2005) 53(3) *The American Journal of Comparative Law* (2005) 543, 548; Peter D. Trooboff, "Foreign Judgments" (2004) 28 National Law Journal 13.
[235] *Ved P Nanda*, "The *Landmark 2005 Convention* on *Choice* of *Court Agreements"* (2007) 42 *Texas International Law Journal,* 773, 787-788.
[236] Eisenberg and Geoffrey (n 206) 10.

Specific legal systems which have conventionally shown rigidity by rejecting parties' choices nowadays give effect to them.[237] Apart from the national and transnational recognition and enforcement perspectives, considerable empirical evidence also indicates an increasing emphasis on jurisdiction clauses.[238]

These observations witness the importance of examining a wide variety of factors that affect parties' preference to choose either a court or arbitration for resolving their disputes and reasons lying behind the states' policies to enforce or not to enforce such agreements. These would also bring the significance of the HCCCA and its contributions to both the legal landscape and international trade and commerce.

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[237] Brazilian Code of Civil Procedure 2016, Articles 22 and 25 of the recognise agreements in which parties tacitly or expressly agree to subject themselves to the Brazilian or foreign jurisdiction, subject to the exclusive jurisdiction of the Brazilian courts provided in Article 23. Uruguay has also adopted the similar approach although arbitration clauses are used much more often as adherence to the NYC 1958 and Inter American Convention 1979. However, still Uruguayan conflict of laws principles do not enforce parties' free choice of law agreements. Uruguayan conflict of law rules, most of which are found in the Civil Code permit the parties to choose the governing law only to the extent the law defined as applicable pursuant to those conflict of law rules, enables such a choice (section 2403 of the Civil Code). For example, if according to Uruguayan laws, Brazilian law applies to an agreement and such Brazilian law allows the parties to freely choose, for example, English law, then the choice of English law by the parties would be a valid choice. Where there is not any choice, the applicable law to the parties' agreement shall be the one of the places where the main obligations derived from the agreement are to be performed (section 2399 of our Civil Code). To these effects, Uruguayan law also provides certain mandatory rules. China shows quite unique approach towards enforcement of jurisdictions agreements while applying many restrictive provisions and giving the parties a list of several courts from which they can choose for addressing their disputes. Article 34 of the Civil Procedure Law of the People's Republic of China enforces jurisdiction of the chosen people's court subject to the exceptions set out in Article 33 and other several conditions which will be discussed further. Besides, Chapters VIII and XXVI give effect to mediation and arbitration agreements. Yet, some jurisdictions represent unfavourable manner to enforcing parties' choices. According to Section 28 of the Indian Contract Act 1872, parties' agreement denying jurisdictional powers of the ordinary tribunals is void. Although this provision still allows parties' rights to get enforced by the legal proceedings in the courts that normally possess jurisdiction, it clearly undermines the party autonomy principle. As understood, an exclusive choice of court agreement will be effective only if parties have chosen the Indian court which would have jurisdiction in the absence of such an agreement and there are objective factors linking that court to the parties or their dispute. See: *ABC Laminart v. AP Agencies, Salem* (1989) 2 SCC 163; *Rajasthan SEB v Universal Petrol Chemicals Ltd* (2009) 3 SCC 107, stated by Mills (n 1) 148-149.

[238] A survey conducted at the University of Oxford showed that a large number of respondents would consider choice of court 'very important': 61 percent of those viewed choice of court to be 'very important', whereas 48 percent of them 'often' opted for a foreign court. See: Business Survey on "Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law" (University of Oxford, 2013) <https://www.fondation-droitcontinental.org/fr/wp-content/uploads/2013/12/oxford_civil_justice_survey_-_summary_of_results_final.pdf> accessed 26 November 2021.

Another survey which was held by the Queen Mary University of London and PWC, demonstrated that choice of forum was employed by the respondents very often (court and arbitration equally with 47 percent each). See: Survey on "Corporate Choices in International Arbitration: Industry Perspectives")School of International Arbitration of Queen Mary University of London, 2013) <http://www.arbitration.qmul.ac.uk/research/2013/index.html> accessed 26 November 2021.

2.6 Conclusion

As observed, party autonomy is a product of numerous theoretical assumptions and historical circumstances. The principle has appeared in multiple formations, including but not restricted to ideological, sociological, and legal developments. While it has rooted from the most straightforward moral understanding of a person's self-governing character, it then transformed into a more sophisticated form of the legal principle characteristic to modern conflicts of law and private international law. On the one hand, the combination of individualism, liberalism, and paternalism has shaped the principle in its contemporary form; on the other hand, elements of those theories can still be found in the modern legal instruments framing party autonomy. In this context, basic rules of the HCCCA ensuring jurisdiction of the court first seized and stay of any other court, as well as recognising and enforcing resulting judgments evidence both moral values of parties' free wills and liberalism ideas depicted by the state and state authority's – court's role in giving effect to the principle.

Furthermore, while the HCCCA does not provide any rules on submission, party autonomy aspects of the provisions might be looked at as internalization of freedom of contract. The Convention further displays those justifications given to party autonomy as a legal principle in private international law. The rules on the validity of the choice of court agreements and recognition and enforcement of the judgments coupled with the refusal grounds manifest that only authentic and foreseeable agreements would be valid; moreover, same as the jurisdiction agreements, judgments should adhere to public interests. Declarations that the Contracting States might opt for are also grounded on these justifications. Especially sovereignty of the states over their territory justifies limitations that might apply to the provision of the principle. Non-recognition of judgments might get legitimacy, in particular, due to the states' public policy.

Regarding understanding party autonomy in the legal context, choice of court and choice of law aspects of the principle have developed together. The fundamental Hague instruments – HCCCA and the Hague Principles on the Choice of law have evidenced that the two facets of party autonomy have existed side by side and evolved

simultaneously. The latter is often manifested by the choices made by commercial parties, i.e., English law and English forum.[239]

[239] Such combinations might be prevalent in the maritime sector.

Chapter 3 THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 2005 – A MAJOR INTERNATIONAL BREAKTHROUGH?

3.1 Introduction

The following chapter reveals the origins of the HCCCA and traces the negotiation process at the Permanent Bureau. The discussions present the background leading to the need for a global instrument giving effect to commercial parties' choices. The HCCH had taken several normative steps towards the harmonisation of private international law. Notwithstanding the failure of the earlier Hague conventions, their analysis facilitates identifying the reasons behind the disappointments that might play an essential role in the promotion of the Convention and provision of its objectives. This chapter outlines the Hague Convention of 25 November 1965 on the Choice of Court, Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, and Hague Judgments Convention 2019 ['HJC']. It shows that the Hague perspective of party autonomy has been a continuing development encompassing more attempts than the HCCCA. Against the historical background, contributions of the HCCCA to judicial certainty and effective litigation are determined, and the fundamental rules ensuring party autonomy are detected. These discussions establish a link with the analysis of the elements of party autonomy in the following chapter.

3.2 An overview of the Hague Conference on private international law and contributions to the field

There is continual work taken by many international organisations to harmonise legal rules for the effective resolution of international commercial disputes.[240] HCCH is the oldest international organization in the Hague, which had its first session in 1893, convened by Tobias Asser. Since then, it has evolved from an "occasional diplomatic

[240] David P Stewart, "Private International Law: A Dynamic and Developing Field" (2009) 30 *University* of *Pennsylvania Journal* of *International* Law, 1121, 1124.

assembly"[241] into a permanent intergovernmental organisation operating on its own for cross-border cooperation in civil and commercial matters.

The global reputation of the Conference has been sharply increasing since 1955 owing to the manifold nature of its operation, multifaceted documents that it has developed, and enhanced cooperation with other international organisations.[242] The HCCH aims at progressive unification of the rules of private international law.[243] It builds bridges between states based on private international law rules but not affecting national substantive rules.[244]

In an economically developing world, where commercial relations involve cross-border elements, arising disputes cannot be fully resolved at either national or regional levels. The HCCH intends to "…allow individuals as well as companies to enjoy a high degree of legal security," notwithstanding considerable varieties between legal systems.[245] The legislative mission of the organization brings its unique nature to facilitating cross-border commercial and private relationships of the citizens rather than those of the States.[246]

Three main fields in the normative work of the Conference – the Hague acquis[247] can be differentiated as follows:

- Civil procedure and international litigation;
- International protection of children;
- International Commercial and Finance Law.

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[241] Hague Conference on Private International Law Permanent Bureau, Annual Report, 2016, Foreword.

[242] The Conference has built cooperation with the UNIDROIT, UN, Council of Europe, OHADA, MERCOSUR, AALCO. In 2018, the Conference celebrated its 125 years anniversary. 2018 has also been notable for 50 years and 60 years' anniversary of Brussels and New York Arbitration Conventions respectively. As shown in a chart updated on 12 August 2021, the Conference has 89 Members (88 States and 1 Regional Economic Integration Organisation) and 66 Non-Member Connected Parties which have signed, ratified or acceded at least one of its conventions or are in the process of becoming a Member see HCCH Conventions, status <https://assets.hcch.net/docs/ccf77ba4-af95-4e9c-84a3-e94dc8a3c4ec.pdf> accessed 26 November 2021.

[243] Statute of the Hague Conference on Private International Law 1955, Article 1.

[244] That is the main point of difference between the Conference and its counterparts acting for harmonisation and coordination of private or international trade law. See Statute of the UNIDROIT 1993, Article 1. See also General Assembly resolution 2205 (XXI) of 17 December 1966 Establishing - United Nations Commission on International Trade Law - United Nations Commission on International Trade Law.

[245] Ibid; Hans Van Loon, "The Hague Conference on Private International Law" (2007) 2 Hague Justice Journal, 3.

[246] ibid.

[247] For the list of the instruments see < https://www.hcch.net/en/instruments/conventions> accessed 26 November 2021.

Along with all other areas, international dispute resolution plays a substantial part in the interdisciplinary work of the HCCH and its legal instruments. Relevant to this field, it has built principal mechanisms on civil procedure[248], the jurisdiction of the selected forum in the case of international sales of goods[249], recognition, and enforcement of decisions relating to maintenance obligations towards children[250], jurisdiction, applicable law, and recognition of decrees relating to adoptions[251], service abroad of judicial and extrajudicial documents in civil or commercial matters[252], choice of court[253], recognition, and enforcement of foreign judgments in civil and commercial matters[254], taking of evidence abroad in civil or commercial matters[255], international access to justice[256], jurisdiction, applicable law, recognition, enforcement, and cooperation in respect of parental responsibility and measures for the protection of children[257], choice of court agreements.[258]

3.3 Party autonomy from the "Hague perspective": Older treaties

As the fundamental principle of private international law, party autonomy is of paramount importance in the work of the HCCH, and the two facets of the principle are reflected in the HCCCA and Hague Principles on Choice of Law in International Commercial Contracts.[259] Before the current millennium, party autonomy has long been a topic for ongoing discussions at the various sessions of the Conference.

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[248] Convention of 1 March 1954 on civil procedure.
[249] Convention of 15 April 1958 on the jurisdiction of the selected forum in the case of international sales of goods.
[250] Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children.
[251] Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions.
[252] Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.
[253] Convention of 25 November 1965 on the Choice of Court.
[254] Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and its Supplementary Protocol.
[255] Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.
[256] Convention of 25 October 1980 on International Access to Justice.
[257] Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.
[258] Convention of 30 June 2005 on Choice of Court Agreements.
[259] The principles are characterised as an instrument relevant to international commercial and finance law rather than civil procedure and international litigation. See Conference "Cross-Border Recognition and Enforcement of Judgments", St Petersburg, Russian Federation (17 June 2014), Opening speech by Christophe Bernasconi, Secretary General of the HCCH.

However, the way forward to the genuine and express provision of party autonomy has not been smooth enough, as characterised by several milestones and mirrored in the following documents:

- Hague Convention of 25 November 1965 on the Choice of Court;
- Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters;
- HCCCA;
- HJC.

The links between its normative tools can identify the exclusiveness of the Hague perspective. The actual provision of choice of court by the HCCH was a product of the negotiations on the recognition and enforcement of judgments. The collapse of the "ugly caterpillar"[260] brought the "beautiful butterfly" – the HCCCA.[261] Indeed, the HJC was drafted as a complementary document to the HCCCA and safeguards judgments rendered by non-exclusively chosen courts.

3.3.1 Hague Convention of 25 November 1965 on the Choice of Court: The quest for uniformity

The Convention contained 22 articles and was signed by only Israel; therefore, it never entered into force. While canvassing the text of the Convention, it is not hard to see the very limited scope with many complexities and contrasts, which might be the reasons for the lack of success. Article 1, stating a general provision on a designation made by the parties, determines several pre-conditions based on the internal legal systems of the Contracting States. As a result, international recognition of the parties' choice depends on the boundaries set out by national jurisdictions. The Convention was not operable as a "real" choice of court instrument since it undermined party autonomy, brought a risk of parallel proceedings and inconsistent judgments.

Article 4 determines the validity rule applicable to the designation, but it does not cover substantive validity. The same article states the void or voidable choice of court agreements not defining their essence or effects. Moreover, while Article 5 determines

[260] Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

[261] Paul Beaumont, "Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status" (2009), 5(1) Journal of Private International Law" 125.

the presumption of exclusivity, there is no definition of exclusive choice of court agreements as seen in the HCCCA. Similarly, Article 6 allows any other court than the chosen one to take jurisdiction where that choice is not exclusive. On the other hand, Article 7 adds a contrasting effect by permitting ongoing proceedings and resulting judgments where there is a non-exclusive choice of court agreement. However, the Convention does not ensure any mechanism of the application of *lis pendens*. Let's suppose, A and B have agreed on the jurisdiction of the English court without excluding the jurisdiction of any other court. Party B can go to the Mexican court and get a judgment capable of recognition in the US, where he pleads a defence. That would make the English court give way for lis pendens, whereas the Convention does not determine how the ongoing proceedings would be tackled. Besides, considering the application of the Convention only to the Contracting States, Article 7 would apply to this scenario only if the United Kingdom, Mexico, and the US had ratified the Convention.[262]

Another prejudice against party autonomy is that Articles 12-15 give broad discretions to the States to make multiple reservations not to apply the Convention and recognise the choice of court agreements or resulting judgments. It brings a potential risk for unfair actions of the States; Article 8 determines the law applicable to the recognition and enforcement of decisions rendered based on a choice of court agreement. The law of the state of the court to which recognition or enforcement is addressed shall apply to this matter, which means a decision capable of recognition or enforcement in one State will not get recognised or enforced in another state due to the existing differences between domestic rules. Applying to the scenario described above, Party B could get the Mexican judgment recognized and enforced under American law. In contrast, the same decision might not be capable of recognition and enforcement under Italian law. According to Article 16, the Convention is open to be ratified only by the States represented at the Tenth Session of the Hague Conference on Private International Law. In contrast, all other States may accede to it after it has entered into force, and there is no objection from a State, which has ratified the Convention. That provision limited the widespread ratification and application of this instrument.

[262] Otherwise, national laws apply.

3.3.2 Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters: The ongoing failure

The initial phase in the progression of the current Choice of Court Convention could be when the Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters was negotiated. The Convention was ratified by only Cyprus, Portugal (afterwards denunciated), the Netherlands, Kuwait, and Albania.[263] Being a convention *simples*[264]*,* it ruled only on the recognition and enforcement of judgments on the defined jurisdictional grounds.[265] Nevertheless, the court had the discretion to give effect to it based on an assumption, even if that resulted from the jurisdiction not acknowledged by the Convention.[266] Doubtlessly, the absence of direct jurisdictional grounds, one of which is a choice of court agreement counting for the provision of party autonomy, drove into the failure of the mechanism. Besides, the Contracting States had to reach bilateral agreements with each other, which brought more complexity.[267] It was also affected by the already existing double Brussels and Lugano regimes, which were widely adopted and applied across the region.[268] However, the Brussels regime could not ensure international guarantee with its application to only the EU.

[263] As provided in Article 28, this Convention shall enter into force on the sixtieth day after the deposit of the second instrument of ratification. Indeed, it entered into force on 20 August 1979 which is still in force. In accordance with Article 59 of Vienna Convention on the Law of Treaties 23 May 1969, it will potentially be considered as terminated once the Hague Judgments Convention as a later treaty on the same subject-matter will get concluded by the Hague Conference.

[264] "A simple convention" was understood to define jurisdictional rules and provisions on the effects of resulting judgments, while "a double convention" contained both direct bases of jurisdiction and the recognition and enforcement of judgments. A narrow convention double provides a white list of jurisdictional bases that are exclusive, whereas in its broader form there are also black and grey lists of those grounds, which relevantly prohibit or give discretion to assume jurisdiction much wider than those of a white list.

[265] Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Article 10.

[266] For more discussions see Eric B. Fastiff "The Proposed Hague Convention on the recognition and enforcement of civil and commercial judgments: A Solution to Butch Reynolds's jurisdiction and enforcement Problems", (1995) 28 Cornell International Law Journal 469.

[267] Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Article 21.

[268] All states becoming members to the European Union also had to ratify the Convention. Lugano Convention was built for the same purposes and reminded a duplicate of the Brussels Convention but for EFTA States. See Preliminary Document No 17 of May 1992, "Some Reflections of the Permanent Bureau on a General Convention on Enforcement of Judgments" in Proceedings of the Seventeenth Session (SDU Publishers, 1995) 237.

3.3.3 The Hague Convention on Choice of Court Agreements 2005: From turmoil to triumph

3.3.3.1 Origins of the Convention and history of the negotiations

As noted, "it appears an anomaly that there is still, a century after the First Session of the HCCH in 1893, no multilateral instrument available on a worldwide scale for the recognition and enforcement of judicial decisions".[269] It left international commerce and trade with legal uncertainty, delays and increasing costs.[270] Achievement of such an instrument was full of promises that "as a result, the cost is reduced for parties and courts, business planning is facilitated, and overburdened court systems are relieved."[271] Against the lack of trust in the quality of justice in different jurisdictions which would be observed by, i.e., frequency of anti-suit injunctions, a multilateral convention on the recognition and enforcement accessible by any state was in need, especially considering globalisation and the increasing rate of the disputes arising out of international relations.[272]

Meantime, the 1971 Judgments Convention did not experience success in terms of ratifications. Therefore, an attempt to adopt a mixed instrument covering both jurisdiction and recognition and enforcement rules of the European double

[269] The Convention of Brussels of September 27, 1968 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters which was the tool of the European Economic Community to ensure uniformity in the rules of jurisdiction and judgments in the region, by "…simplification of formalities…" and "…facilitating recognition and introducing procedure for securing the enforcement..." was not a tool for global harmonisation being applicable to the EC and Member countries. Successors of the Convention – Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and Regulation (EU) No 1215/2012 of the European Parliament and of Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) were also adopted as the internal instruments of the European Union. Neither the Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters (superceded by the Lugano Convention of 30 October 2007 on jurisdiction and the enforcement of judgments in civil and commercial matters (Lugano II). The Lugano Convention used to be called the Parallel Convention) which played an equivalent role as the Brussels Convention, but for the European Free Trade Association (EFTA) could be a model for global adjustment, due to its limited territorial scope and possibility for the third states to access only upon a request and unanimous consent given by the Contracting States. See Article 62.1(b); Lugano Contracting States are Iceland, Liechtenstein, Norway and Switzerland and EC Member States.

[270] Preliminary document No 1 of May 1994 of The Hague Conference, Annotated checklist of issues to be discussed at the meeting of the Special Commission of June 1994, 4.

[271] Ibid.

[272] Yet, a lack of trust in the quality of justice and impartiality could be another reason for absence of such an international treaty. In England, this assumption is evidenced by frequency in granting anti-suit injunctions.

Conventions was inadequate at that particular point.[273] The United States was highly interested in a tool ensuring a legal structure to "support the growth of global markets and promote international cooperation."[274] It lacked any federal or state law to recognise and enforce American judgments abroad but gave effect to foreign reviews based on the comity doctrine. Furthermore, being isolated from the global judiciary framework with no bilateral or multilateral agreements on recognising and enforcing foreign judgments, re-litigation might become mandatory to enforce American decisions abroad.[275] These reasons caused uncertainty, delays, and costs, contrary to the principal aims of justice, and drafting a relevant instrument became inevitable.

3.3.3.2 The early phase of the negotiations: Rollback of the initial ideas

In May 1992, Edwin Williamson[276] suggested to the Secretary-General of the Hague Conference on Private International Law to negotiate a multilateral convention on recognising and enforcing judgments worldwide[277], which brought up the United States' initiative.[278] The proposal came in the form of a "single convention."[279] It later

[273] In South and Central America, the Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards has been in force. The Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards 1979 (The Montevideo Convention) was ratified by Argentina, Bolivia, Brazil, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela.

[274] Letter from Jeffrey D. Kovar to Hans van Loon, Hague Conference on Private International Law 2, 22 February 2000 <http://www.cptech.org/ecom/hague/kovar2loon22022000.pdf> accessed 26 November 2021.

[275] Similarly, efforts to achieve a bilateral agreement with the United Kingdom for the mutual recognition of the judgments in the 1970s ended up with no success. See Nanda (n 233) 775. See also: Peter North, "The Draft U.K/U.S. Judgments Convention: A British Viewpoint" (1979) 1 Northwestern Journal of International Law & Business, 219; See also Martine Stuckelberg, "Lis Pendens and Forum Non Conveniens at the Hague Conference: The Preliminary Draft Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters" (2001) 26 Brooklyn Journal of International Law 949, 953. See also Andrea Schulz, "The Hague Convention of 30 June 2005 on Choice of Court Agreements" (2006) 2 Journal of Private International Law, 243, 244-246; Fastiff (n 264) 476.

[276] He was the Legal Adviser at the United States Department of State.

[277] Letter from Edwin D. Williamson to Georges Droz, The Hague Conference on Private International Law, 5 May 5, 1992 <https://2009-2017.state.gov/documents/organization/65973.pdf> accessed 26 November 2021. See also Ronald A. Brand and Paul M. Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (Cambridge University Press, 2008), 6.

[278] Schulz (n 273) 244-246.

[279] Discussions were based on enforcement of the judgments. See Preliminary Document No. 17 of May 1992, "Some Reflections of the Permanent Bureau on a General Convention on Enforcement of Judgments" in Acts & Proceedings of the Seventeenth Session, I, Hague Conference on Private International Law (SDU Publishers, 1995) 231; 'Some Reflections of the Permanent Bureau on a General Convention on Enforcement of Judgments', Preliminary Document No 19 of November 1992, in Proceedings of the Seventeenth Session, Vol I (SDU Publishers, 1995) 263; Preliminary document (n 269).

transferred into a mixed convention form, taking into account the defeat of the previous convention due to the lack of ratifications.[280] Once the Working Group "unanimously recognised the desirability of attempting to negotiate multilaterally through the Hague Conference a convention on recognition and enforcement of judgments" in October 1992[281], it expressed "preference for a convention which would offer some of the advantages of a double convention, while at the same time having a greater degree of flexibility than that available with a convention of the Brussels/Lugano type."[282] Therefore, the Seventeenth Session of the HCCH decided to include the theme of recognition and enforcement of foreign judgments in civil and commercial matters in the Agenda and agreed to go into that issue more deeply by a Special Commission.[283] The Commission concluded that it could be "advantageous to draw up a convention on the jurisdiction, recognition, and enforcement of foreign judgments in civil and commercial matters."[284]

The Permanent Bureau took an approach to establish a "flexible mixed convention" that would indirectly adapt exorbitant jurisdictional rules.[285] It was anticipated that in this case, the EC and EFTA states would be under less pressure, and those grounds of jurisdiction would get global respect.[286] The conclusion of a mixed convention was also supported and submitted by the US delegation, represented by the Legal Adviser Peter Pfund, Arthur von Mehren, and Peter Trooboff.[287] The Working Group

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[280] Beaumont (n 259) 127.
[281] Brand and Herrup (n 275) 6.

[282] The Group recognised that "a simple convention" would be insufficient, whereas "a full double convention" would be too ambitious. "A simple convention" was understood the one with indirect jurisdictional rules and provisions on the effects of the resulting judgments, and "a double convention" rules both on direct jurisdiction and judgments. As regards to flexibility, the common law countries have exercise considerable flexibility of the rules of international jurisdiction, owing to the mechanism of forum non conveniens, whereas civil law countries experience rigidity. See Preliminary Document No 7 of April 1997 for the attention of the Special Commission of June 1997 on the question of jurisdiction, and recognition and enforcement of foreign judgments in civil and commercial matters, 18, 69.

[283] Preliminary Document (n 281) 20.
[284] ibid, 18, 22; Nonetheless, Brand and Herrup do not include "jurisdiction" point into the Session's desire to conclude such a convention. See Brand and Herrup (n 275) 6. See also Beaumont (n 259) 129.
[285] "…jurisdiction is exorbitant when the court seised does not possess a sufficient connection with the parties to the case, the circumstances of the case, the cause or subject of the action, or fails to take account of the principle of the proper administration of justice…" See Preliminary Document (n 281) 138-139.

[286] ibid; Indeed, the Brussels regime avoids application of the *forum non conveniens* doctrine which is related to the exorbitant grounds of jurisdiction to provide proper administration of justice.
[287] Preliminary Document (n 281) 257; Brand and Herrup (n 275) 7.

approached a mixed type of convention based on both jurisdiction and recognition and enforcement. As detailed, “as far as jurisdiction is concerned:

- like a double convention, contain a list of grounds upon which the court of origin would, at least in principle be required to assume jurisdiction, the 'white list,'
- like a double convention, contain a list of grounds on which States are required not to assume jurisdiction (exorbitant grounds of jurisdiction), the 'black list,'
- unlike the complete double convention, but like a single convention, allow the court of origin to assume jurisdiction on grounds neither approved by the convention in the 'white list' nor disapproved in the 'black list' (the 'grey area');

As far as recognition and enforcement are concerned, the court addressed would be allowed to review the grounds upon which the court of origin had based or could have based its jurisdiction and would:

- be required to enforce a judgment when the jurisdiction of the original court was based on one or more jurisdictional grounds from the ‘white list,’
- be required to refuse recognition and enforcement if the court addressed determined that a judgment presented was exclusively based on a jurisdictional ground from the ‘black list,’
- be free to enforce, or not to enforce, as the case may be, a judgment based on a jurisdictional ground within the ‘grey area.’[288]

The Working Group also emphasised the advantages of a double convention over a single one. The former ensures more information and predictability for both parties and prevents any confusion arising from the indirect grounds of jurisdiction; furthermore, it eases recognition and enforcement by lessening time and costs.[289] The Group supported the provision of “choice of the court” in the new convention, which was not characteristic of the Hague Judgments Convention 1971.[290]

Preliminary Document No 7 of April 1997 specified a choice of court as one of the grounds of jurisdiction. It further explained the formal and substantive validity of the contractual clause on the choice of court, tacit choice of court, choice of court in matters not on contracts, and relation of those clauses with *forum non conveniens* or *lis pendens* doctrines. Once the Eighteenth Session agreed to include the point into

[288] Preliminary document (n 269) 6, 8.
[289] "Conclusions of the Working Group meeting on enforcement of judgments", Proceedings of the Seventeenth Session, referred by the Preliminary Document (n 281).
[290] Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Article 10(5).

the Agenda of the Nineteenth Session, formal negotiations on the new convention began in June 1997. Preliminary Document, No 8 of November 1997, noted that the Convention would be a global one. Taking all legal and judicial systems into account would lead to a consensus among all of those systems.[291] It particularly underlined matters related to material and formal validity and also lawfulness of choice of court agreements.

The father of the HCCCA[292], Allan Philip of Denmark, suggested a document opposing the classical mixed convention ideas. He advised "a step-by-step approach … tackling the outlawing of exorbitant jurisdiction", which was accepted by the Conference long after.[293] Following the next session of the Special Commission, the draft document was issued by the Drafting Committee in March 1998[294] , which the Preliminary Draft Convention pursued in October 1999. As Brand and Herrup record, the Special Commission eventually adopted the classical mixed convention model in 1999, but the words and concepts were still similar to a double convention.[295] The text resembled the EU and EFTA instruments then in force, which made it complicated to achieve a convention applying on a global basis.[296] The Draft was then replaced by a new Interim text which the Diplomatic Conference generated in June 2001. Despite the achievement of the Preliminary Draft Convention and Interim Text, difficulties in attaining a universal legal framework remained. Mainly, the similarity of those documents to the EU instruments and the US federal jurisdictional system's difference to the civil-law-based Brussels regime made it much harder.[297] Renegotiations of the Brussels and Lugano Conventions and the desire of the Europeans to export them into global use, moreover, transfer of the private international law competences of the Member states to the European Community[298] established much more uncertainty.[299]

[291] Preliminary Document No 8 of November 1997 for the attention of the Special Commission of March 1998 on the question of jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters, 4(e).
[292] Beaumount (n 259) 130.
[293] ibid.
[294] Brand and Herrup (n 275) 8.
[295] ibid, 9.
[296] ibid.
[297] Ibid. Besides, some states used jurisdiction rules stated in the Brussels and Lugano Conventions for all cases rather than those where the defendant was domiciled in a Member State, not desiring different rules to apply to the same matter. See also Beaumount (n 259) 133.
[298] Treaty of Amsterdam 1997 (entered into force in 1999).
[299] Beaumount (n 259) 132.

3.3.3.3 Towards achievement of a choice of court convention: From judgments to jurisdiction

According to the Decision of the Commission I of the Nineteenth Session on General Affairs and Policy of the Conference of 24 April 2002, the Permanent Bureau established an informal group to produce a convention for the attention of the Special Commission to be held in mid-2003. It had to be on the jurisdiction, recognition, and enforcement of foreign judgments in civil and commercial matters.[300] Subsequently, the desirability of getting a single text for referral to the Special Commission was also discussed.[301]

The Permanent Bureau submitted by its document dated February 2002 that issues getting a lack of consensus made obstacles for developing the negotiation process and conclusion of the convention.[302] Nonetheless, "provisions on scope, defendant's forum, choice of court in the business to business context, *lis pendens* and exceptional circumstances for declining jurisdiction along with most of the chapter on recognition and enforcement" achieved unanimity in February 2002.[303]

The Permanent Bureau supported the ideas of the US lawyer, Avril Haines, on building a solid basis for the choice of court agreements in business to business context: "reaching agreement on the forum of choice in the global context constitutes, as such, an important step and would be a valuable tool for businesses engaging in cross-border transactions."[304] It was principally noted that notwithstanding the broad or restricted scope of the expected Convention, the nucleus of the work would be the choice of forum in business to business.[305] However, the existence of various lobby groups with conflicting views made the position of the United States on jurisdiction

[300] The aim was to get a balanced line between the earlier two texts of 1999 and 2001. See: Preliminary Document No 20 of November 2002, Report on the first meeting of the Informal Working Group on the Judgments Project of October 2002, 4.
[301] Ibid.
[302] These were in particular internet and e-commerce, activity-based jurisdiction, consumer and employment contracts, patents, trademarks, copyrights and other intellectual property rights, relationship with other related instruments, especially with the Brussels and Lugano Conventions, also bilateralisation. See ibid, 5. See also Beaumount (n 259) 133.
[303] Preliminary Document No 16 of February 2002, Some reflections on the present state of negotiations on the judgments project in the context of the future work programme of the Conference, 7.
[304] Beaumount (n 259) 133.
[305] Preliminary Document (n 298) 9.

rules unclear even at the time of consensus on the adoption of a classical mixed convention was achieved.[306]

After three meetings in October 2002, January, and March 2003, the group eventually summarised a draft convention on choice of court in March 2003. The document was considered as the litigation counterpart of the NYC.[307] While the first meeting had concentrated on the exclusive choice of court clauses in business to business matters[308], the second meeting at the very start examined the definition of "exclusivity," continuing with non-exclusive choice of court clauses. It studied some areas which the first meeting had left open, particularly interim reliefs.[309] The group assessed whether an international element was needed for a case to fall into the convention's scope.[310] It also examined whether an objective link was a prerequisite, general escape clause, and substantive validity.[311] Furthermore, exclusion of intellectual property rights and other grounds of jurisdiction such as submission, counter-claims, and defendant's forum was also studied.[312] The group also looked at potential overlap areas related to disconnection with other general instruments on the jurisdiction, recognition, and enforcement, particularly the EU instruments and Lugano Convention.[313]

Remarkably, during its first meeting, the group canvassed types of choice of court clauses which were pointed out as follows:

- Pure exclusive clauses choosing only one court (or the courts of one State),
- Multiple exclusive clauses excluding all other courts than several courts[314],
- Non-exclusive choice of court clauses identifying a specific court without preventing parties from seizing a different one,
- Asymmetrical clauses where a choice is exclusive for only one party and the other party is entitled to seize a different court,

[306] Beaumount (n 259) 133.
[307] Ronald A. Brand, "A Global Convention on Choice of Court Agreements" (2004) 10 ILSA Journal of International and Comparative Law, 345-346.
[308] "B2B", as stated in the preliminary documents.
[309] The informal working group considered jurisdiction rules on "choice of court agreement, defendant's forum, counterclaims, branches, submission, trusts and physical injury torts" at the Nineteenth Session. See: Beaumount (n 259) 134.
[310] Preliminary Document (n 298) 3.
[311] ibid, 1-4.
[312] ibid, 5-6.
[313] ibid, 9-10; see also Annex II.
[314] The group noted that such clauses are widely known in some industries and countries like banking sector in Japan, but considered void by some national laws such as Chinese law.

- Symmetrical clauses where each party has to seize in their home forum.[315]

The first meeting of the informal group discussed only pure exclusive jurisdiction clauses, considering the imbalance raised by the risk of parallel proceedings based on the other grounds of jurisdiction.[316] The ICC survey[317] disclosed that jurisdictional uncertainty dissuades many companies from going further with international contracts. Businesses expected that "the Convention will respect the choice of national court and enforceability of judgments."[318] In addition, the discretion of the chosen court to dismiss the proceedings should be restricted for the predictability of judgments.[319]

The Preamble of the text was discussed for the first time at the third meeting of the group.[320] The word 'business' was replaced by 'commercial' due to the narrower scope of the former. Commercial transactions of the government should fall into the convention's scope, where it was not business but acting as a commercial party, and there was no issue concerning privileges and immunities.[321] The group further identified the aims of the HCCCA and drafted provisions on each of those policy goals:

- The chosen court should hear the case,
- Any other court should decline jurisdiction,
- Judgments of the validly chosen court should be recognised and enforced.[322]

Upon further discussions, the preliminary draft convention provided only one of the jurisdictional grounds out of the 'white' list. It focused on the exclusive choice of court agreements in favour of the Contracting States.[323] Moreover, there was no 'black' list before, whereas a 'grey' list still existed regarding the exclusive choice of court agreements concerning consumer and employment contracts, which were excluded

[315] A reference was made to an Arbitration Agreement between the American Arbitration Association and the Japanese Commercial Arbitration Association 16 September 1952, where the forum is chosen based on various factors.
[316] The Permanent Bureau advised to tie up the matter with the International Chamber of Commerce for outside comments and some empirical research on practical use of such clauses, where the bar of Washington D.C. was also about to assist. See Preliminary Document No 21 of January 2003 - Report on the Second Meeting of the Informal Working Group on the Judgments Project of January 2003, 6.
[317] Presented to the Informal Working Group by Michael Hancock who was Co-chairman of the International Court of Arbitration Task Force on Jurisdiction and Applicable Law and partner at Salans Hertzfeld & Heilbronn in France <https://iccwbo.org/media-wall/news-speeches/jurisdictional-certainty-is-essential-in-international-contracts/> accessed 26 November 2021.
[318] Ibid.
[319] Ibid.
[320] Preliminary Document No 22 of June 2003 - Report on the work of the Informal Working Group on the Judgments Project, in particular on the preliminary text achieved at its third meeting of March 2003.
[321] ibid.
[322] ibid.
[323] Therefore, the forum should not be located in any non-Contracting State.

from the scope. In this case, it was up to the Contracting States whether to exercise or not to exercise jurisdiction and recognize or not to recognise the resulting judgments.[324] As stated by the Explanatory Report, the draft convention provided only for exclusive choice of court agreements, specifying one court or courts of the Contracting or non-Contracting States; and both types had an equal treatment by the HCCCA.[325] Moreover, the text did not cover one-sided asymmetrical choice of court agreements[326], which would bring a risk of parallel proceedings and irreconcilable judgments.

Articles 1(2) and 1(3) of the draft text listed the excluded matters and proceedings.[327] It also contained the rules on formal validity, separability, reciprocity regarding recognition and enforcement, limitations on the jurisdiction, and damages.

In its third meeting, the informal group only had time to debate on jurisdictional grounds that the Commission on General Affairs considered in April 2002. It did not discuss matters related to trusts, branches, and physical torts. The text did not include provisions on the forum of the defendant, counterclaims, and submission. Otherwise, multiple courts could lawfully be seised, creating a need for a rule on parallel proceedings. In many cases, counterclaims would already be enclosed by a choice of court clause, not requiring any further ruling. On the other hand, it was contested that the situation giving rise to a counterclaim would have had its own choice of court clause, which should be respected. Therefore, having a rule on counterclaims, such as the possibility for consolidating proceedings, would not be that practical.[328]

During the first meeting, the group defined some principles regarding interim reliefs where there was an exclusive choice of court clause.[329] The aim was to resist other courts from issuing an anti-suit injunction to the detriment of the proceedings at the

[324] Preliminary Document No 25 of March 2004 - Explanatory Report on the Preliminary Draft Convention on Choice of Court Agreements, drawn up by Trevor C. Hartley and Masato Dogauchi, 7.
[325] ibid, 47, 52; It was stated that where the clause was read as “courts of France”, it was up to the French law to identify the entitled forum, whereas the clause showing multiple courts of France was not covered by the Convention.
[326] ibid, at 49.
[327] Consumer and employment contracts, the status and legal capacity of natural persons, maintenance obligations, matrimonial property regimes and other rights and obligations arising out of marriage or similar relationships, wills and successions, insolvency, composition and related matters, admiralty or maritime matters, including contracts for the carriage of goods by sea, anti-trust or competition matters, nuclear liability, right in rem in immovable property, validity, nullity, or dissolution of a legal person and decisions related thereto, validity of patents, trademarks and other intellectual property rights, arbitration proceedings and so on.
[328] Preliminary Document No 21 of January 2003, at 14; Preliminary Document No 22 of June 2003, at 4-5.
[329] Preliminary Document No 20 of November 2002, 14.

exclusively chosen court.[330] It was advised that rulings concerning anti-suit injunctions should not be included in the Convention excluding non-exclusive clauses because cases would be rare, causing more confusion.[331] Afterward, the group clarified that not only the court chosen but also any other court would be entitled to grant such measures provided there is not any prohibition under its national law.[332] Still, an interim measure would not be recognised or enforced under the Convention, as it would not be a judgment on merits.[333] Additionally, due to the universal admissibility, the group altered the English wording "provisional and protective measures" to "on an interim basis."[334]

Oddly, the wording' exclusive' was deleted upon the group's suggestion to draft a separate chapter on recognising and enforcing the judgments resulting from non-exclusive clauses.[335] Article 7 was drafted to cover recognition and enforcement provisions regarding both exclusive and non-exclusive choice of court clauses and resulting judgments. Nevertheless, the final text did not follow that approach yet kept an option for the Contracting States to make a declaration in this regard.[336]

Article 5 on 'Priority of the chosen court,' which the final text does not reflect, put an obligation on any other court to defer the case to the chosen court regardless of whether the latter was in a Contracting or non-Contracting State. It was also different from the rules of the EU instruments relating to the choice of the Member State courts.[337] The final text reversed that ruling and defined any other court's obligation to dismiss the proceedings in favour of the court of the Contracting State exclusively chosen by the parties.[338]

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[330] Preliminary Document No 21 of January 2003, 6.
[331] Ibid.
[332] Preliminary Document (n 314) 23.
[333] Ibid; This position of the group was not convincing enough to justify elimination of interim measures from the Convention.
[334] Ibid.
[335] Ibid, 7.
[336] HCCCA, Article 22. The HJC provides the rules on the recognition and enforcement of the judgments rendered by non-exclusively chosen courts.
[337] The Convention of Brussels of September 27, 1968 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Article 17; Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters, Article 17; Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Article 23; Lugano Convention of 30 October 2007 on jurisdiction and the enforcement of judgments in civil and commercial matters (Lugano II), Article 23; Regulation (EU) No 1215/2012 of the European Parliament and of Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), Article 25.
[338] HCCCA, Article 6.

Following three meetings[339], the informal working group suggested that the objective should be put on a convention on exclusive choice of court agreements in business-to-business cases. Article 5(2) of the draft Convention produced by the meeting of April 2004 precluded *forum non conveniens* and *lis pendens,* which would bring the chosen court's discretion to decline exercising jurisdiction "on the ground that the dispute should be decided in a court of another State. The text excluded the matters related to rights *in rem* in immovable property, legal persons, public registers, and validity of certain intellectual property rights.[340] Article 11 prohibited the recognition of judgments given by the courts of the Non-Contracting States where there was a binding exclusive jurisdiction agreement between the parties.[341] That was deemed to create an incentive for more states to accede to the treaty.

Nonetheless, there could be another treaty of the Contracting States to recognise such judgments under their national laws. In this regard, Article 23(3) was proposed to prioritise the "older treaty obligations" of the Contracting States.[342] These proposals did not appear in the final text.

The Drafting Committee held a meeting on 18-20 April 2005 to prepare the Twentieth Session of June 2005.[343] The final Twentieth Diplomatic Session was held in June 2005, and the Convention was adopted as a classic mixed Convention[344] in English and French, both texts being equally authentic.[345] The final text narrowed the context of the original judgments project positively to exclusive choice of court agreements

[339] The meeting in December 2003 discussed the draft text prepared by the informal working group and produced the Working Document No 49. The draft Explanatory Report on Working Document No 49 was contained in Preliminary Document (n 323). The next meeting was held in April 2004, which reconsidered the document and dealt with the issues that remained open.

[340] For more discussions see Draft on exclusive jurisdiction agreements, Working Document No 110, April 2004; Preliminary Document No 26 of December 2004 – Hartley/Dogauchi Report, para 32; Article 12 of the preliminary draft Convention 1999 also contained rules on these matters.

[341] For more discussions see Draft on exclusive jurisdiction agreements, Working Document No 110, April 2004; Preliminary Document No 28 of April 2005 - Report on the meeting of the Drafting Committee of 18-20 April 2005 in preparation of the Twentieth Session of June 2005, 31.

[342] Ibid, 65.

[343] The draft convention was circulated among the Contracting States and their comments were added. A paper on the American PIL instruments and relation to the future Hague Convention was issued. See: Preliminary Document No 29 of May 2005 - Comments on the preliminary draft Convention on exclusive choice of court agreements. See also: Preliminary Document No 31 of June 2005 - The American instruments on PIL - a paper on their relation to a future Hague Convention on exclusive choice of court agreements.

[344] The Convention has one positive rule of jurisdiction, the court of a Contracting State exclusively chosen by the parties, on which recognition and enforcement is based, and one rule prohibiting jurisdiction when it unlawfully conflicts with an exclusive choice of court agreement. For more see: Beaumount (n 259) 134.h

[345] HCCCA, Article 34.

and recognition and enforcement of the resulting decisions.[346] The HCCCA became open for signature and ratification, and the official Explanatory Report ('Hartley/Dogauchi Report') was issued.[347]

3.3.4 Fundamental rules of the Convention: Three dimensions of the provision of party autonomy

The HCCCA attempts to garner its ideals for build a solid basis for judicial certainty and party autonomy by three fundamental rules:

- The court exclusively chosen shall have jurisdiction to decide a dispute to which the agreement applies[348],
- Any other court than the chosen one shall suspend or dismiss the proceedings[349],
- Finally, a judgment given by the chosen court shall be recognised and enforced in any other Contracting State.[350]

3.3.4.1 Rule 1: Mandatory jurisdiction of the chosen court

As stated, "the court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies…".[351] The chosen court cannot derogate from this fundamental rule, except where that agreement is null and void.[352]

More than that, this principal rule also prevents the chosen court from declining to exercise jurisdiction if there would be another forum that should hear the case.[353] In other words, the court chosen has to take jurisdiction irrespective of a court of another

[346] *HCCCA, Article 22* reminds rulings of a single convention on the effects of the judgments given by the courts designated in a non-exclusive choice of court agreements, without provisions on jurisdictional grounds in that regard.
[347] Interestingly, later drafting of the Model law including all the useful points arising out of the discussions on the project was proposed, nevertheless, it was never achieved. See: Preliminary Document (n 328) 5.

[348] *HCCCA,* Article 5(1).
[349] *HCCCA,* Article 6.
[350] *HCCCA,* Article 8(1).
[351] *HCCCA,* Article 5(1); NYC, Article II and BRR, Article 25 also provide similar obligation on the chosen forum in promotion of party autonomy.
[352] *HCCCA,* Article 5(1).
[353] *HCCCA,* Article 5.2.

State would have jurisdiction in the application of *forum non conveniens* and *lis pendens* doctrines. The HCCCA reinforces the obligation of the designated court and applies with respect to a court of another State.[354] This provision is reasonable when considering that the parties can select a court or courts of a Contracting State and the specific rule on the internal allocation of jurisdiction among the courts of a Contracting State that is not affected by the HCCCA. However, it would be proper to the target of the HCCCA and specific rule if Article 5(2) would have stated that:

"*A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in another court*."

Concerning the courts of the same State as the chosen court, the HCCCA, subject to some limitations, permits application of the national rules that would deter the chosen court from exercising jurisdiction. Accordingly, national laws on subject matter jurisdiction and internal allocation of the jurisdiction of domestic courts are not affected by the HCCCA, and parties cannot override them by their choice.[355] Albeit, those mandatory rules affect the jurisdictional competence of the courts.[356] Those rules specify the court's ability to hear and decide a dispute based on its subject matter rather than authority over the defendant as in personal jurisdiction.[357] In other words, subject matter jurisdiction is related to what kind of court within a State would hear the case based on the subject matter of the dispute, rather than defining which State's courts would be entitled to take jurisdiction.[358] In English law, a court has subject matter jurisdiction over the disputes concerning the title to or the right to possession of the immovable property.[359] If partners of a firm had negotiated the French exclusive jurisdiction clause over the disputes on the possession of the office located in Southampton, that agreement would not be recognised under the HCCCA, and the English court would have had exclusive jurisdiction.

[354] Hartley/Dogauchi Report, para 127.
[355] HCCCA, Art 5(3);
[356] Mary Keyes, *Jurisdiction in International* Litigation (Federation Press, 2005), 77
[357] Mary Keyes differentiates subject matter jurisdiction under legislation (related to the act of State doctrine and the cases involving foreign government's interests) and under common law. Ibid, 69-77.
[358] Hartley/Dogauchi Report, para 135.
[359] Civil Jurisdiction and Judgments Act 1982, Section 30.

3.3.4.2 Rule 2: Mandatory stay by the seised court

The second key provision established in Article 6 of the HCCCA serves as a flip side of the first rule. Any other court chosen court shall suspend or dismiss the proceedings to which the exclusive jurisdiction agreement applies.[360] As the first rule, this principle also prevents the application of *forum non conveniens* or *lis pendens* under the national laws. Similar to other provisions, it also applies where the case falls within the scope of the HCCCA. Moreover, like the other rules, it is also addressed to the courts of the Contracting States. If a court of Non-Contracting State is seised regardless of a choice of court agreement, there is nothing to prevent it from continuing the proceedings. That brings a real risk of litigation tactics, parallel proceedings, and inconsistent judgments. Suppose the English court seises upon a jurisdiction agreement designating the court of Singapore. In that case, the HCCCA obliges the former to stay the proceedings in favour of the chosen court. In another scenario, if the Singaporean court is chosen under the HCCCA and subsequently there are ongoing proceedings in the district court of New York, the latter is not obliged to stay. Furthermore, there could be exceptions such as subject matter and internal allocation of jurisdiction to which the HCCCA does not affect.[361]

3.3.4.2.1 Exceptions to Rule 2: Refusal to stay the proceedings

International litigation requires reconciling a spectrum of conflicting interests, those of the states, individuals, and other states[362] that could often contradict each other and necessitate staying of the proceedings or dismissal of the jurisdiction. It is asserted that mere presence and 'weaker' statutory bases of jurisdiction are insufficient for founding jurisdiction.[363] On the one hand, choice of court agreements and party autonomy should be held not weaker, but globally-accepted stronger reasons to establish the jurisdiction of the designated court; such arguments would prove true if there is any ground of staying proceedings as provided in Article 6. Accordingly, the

[360] *HCCCA,* Article 6.
[361] *HCCCA*, Article 5 (3).
[362] Keyes (n 354) 221.
[363] Keyes (n 354) 122.

court not chosen must either suspend or dismiss the proceedings unless there is at least one of the following exceptions that allows this court to take the jurisdiction over:
a) an agreement is null and void under the national law of the chosen forum;
b) a party lacked the capacity to conclude an agreement under the law of the State of the court seised;
c) enforcing that agreement would bring into a manifest injustice or would be manifestly contrary to the public policy of the State where the court is seised;
d) not depending upon the parties, the agreement cannot be reasonably performed; or
e) there is a decision of the chosen court not to hear the case in question.[364]

The position of the HCCCA towards the validity of the choice of court agreements is relevant to Article 6(a). Furthermore, with the fact that the court not chosen but seised will also determine if the agreement is null or void in application of Article 6(a) of the HCCCA, the existing or potential differences and conflicts between the national laws would lead to the manifest injustice or contrast to public policy. As noted above, there could be more possibilities for dismissing a choice of court agreement on public policy, which would also bring more abuses by the courts seised.

Determination of capacity is another point that draws on more imbalances and conflicting outcomes. According to Article 6(b), capacity is determined by the law of the court seised; the lack of capacity would make the agreement null and void under Article 6(a), and the latter is determined by the law of the State of the chosen court.[365] It seems drafters considered it too ambitious to formulate a uniform choice of law rule defining capacity, applicable in all Contracting States.[366]

The further exception is the incapability of the chosen court to hear the case. It occurs where there are exceptional reasons which are not in the control of the parties.[367] The duration of this unavailability does not matter; in other words, notwithstanding the length of this time, they cannot bring proceedings before the chosen court. It could be the case where there is a war that involves the State of the chosen court. Or another reason could be, for instance, the closure of the chosen court.[368] This exception could

[364] *HCCCA,* Article 6(e).
[365] Hartley/Dogauchi Report, para 150.
[366] ibid.
[367] ibid, para 154.
[368] As there was an unreasonably long summer vacation in the Indian courts in 2016 and therefore, even pending cases were not heard for the due time. See: Vinita Deshmukh "No record of why courts are closed for the summer and other long holidays", 18 February 2016

be regarded as a ground of the doctrine of frustration under which a contract is discharged due to an unanticipated and fundamental change of circumstances after the conclusion of an agreement.[369]

The convention's following exclusion is where the court chosen decides not to hear the case. On such an occasion, the court seised will not be obliged to dismiss the proceedings. The drafters intended to provide access to justice and predictability, moreover, prevent denial of trial.[370] In some instances, Article 6(e) may trigger the application of Article 5(3) on the transfer of the case already discussed.[371] For example, the choice of court agreement designates “the courts of Sweden,” and Party A brings proceedings before the Stockholm district court. Following this, the Stockholm court transfers this case to the Göteborg district court according to Article 5(3). As both are Swedish courts, this case falls under Article 5(3) instead of Article 6(e). Following this transfer, if Party B brings proceedings before the English court, the latter would be obliged to dismiss the proceedings. In another example, the parties have nominated “the Stockholm district court,” and upon commencement of the proceedings there, it decides not to hear the case and transfers it to the Göteborg district court. This case does not count for a transfer. Instead, it establishes a ground shown in Article 6(e). Therefore, like the example above, if Party B brings proceedings before the English court, the latter would not be obliged to dismiss the proceedings based on Article 6(e).

3.3.4.2.2 Public policy as an exception to the primary rules

A particular emphasis should be given to the third exception allowing the court seised to take jurisdiction regardless of the choice of court agreement. It has “two limbs”, as provided by the Hartley/Dogauchi Report, manifest injustice and public policy. Although those notions are closely linked to each other or might be defined the same, likely varieties in different legal systems might be why the drafters included both words in the text. The law applicable to these notions is the law of the court seised[372],

<https://www.moneylife.in/article/no-record-of-why-courts-are-closed-for-the-summer-and-other-long-holidays/45524.html> accessed 26 November 2021.

[369] Hartley/Dogauchi Report, para 154.

[370] ibid, para 155.

[371] Ibid, para 156-158.

[372] *HCCCA,* Articles 6(b) and 6(c).

consisting of its national law and conflict of laws rules.[373] Such a position of the HCCCA brings many inconsistencies arising from the understanding and application of public policy.[374]

Manifest injustice could occur in exceptional cases where a party would not get a fair trial in the foreign State. There could be apparent bias or corruption or any other similar reasons that the party would hesitate to bring the proceedings at a particular forum.[375] The Hartley/Dogauchi Report also defines fraud as one of the grounds of manifest injustice. It states that if the agreement was concluded due to fraud, this might relate to manifest injustice.[376] Nevertheless, it would be grounds for the exception about nullity and voidance in Article 6(a) rather than Article 6(c) of the HCCCA. For the facts to be regarded as manifest injustice, a high threshold should be satisfied. The second limb of the exception is related to public policy (*ordre public*)[377] grounds. Although public policy is still an ambiguous term having no precise definition, it mainly refers to basic norms or principles of the State of the court seised. A high standard should be established for the case to fall under Article 6(c). Therefore, mere facts that the chosen court could violate a mandatory rule of the State of the court seised in a technical way or the fact that the jurisdiction agreement would not be binding under that law would not satisfy this standard.[378]

Unlike private interests of the parties that are relevant to the law of jurisdiction, state interests are too contentious.[379] Parties can usually regulate their relationships by private agreements without state interference due to the dominance of party autonomy.[380] On the other hand, based on different functions of law, mandatory and default rules are differentiated, which also identify limits to the parties' autonomy.[381] Mandatory rules apply notwithstanding the parties' intentions, and the courts do not give any attempt to dispense those rules effect in the relevant forum.[382] In contrast, default rules conform with liberalism and are non-intervention by the state in the

[373] Brand and Herrup (n 275) 13.
[374] See thesis, 3.3.4.2.2.
[375] Hartley/Dogauchi Report, para 152.
[376] ibid.
[377] As called in civil law states.
[378] Hartley/Dogauchi Report, para 153.
[379] Keyes (n 354) 11.
[380] Ibid, 11-12.
[381] Ibid, 29.
[382] Ibid, 30.

freedom of the individuals.[383] Based on these specific rules and horizontal distribution of authority between the states[384], one could draw a clear picture of the principles for establishing or declining the jurisdiction.[385]

Still, some arguments show vulnerability and limited effectiveness of mandatory rules since they might not be enforced in foreign courts and vice versa. On the other hand, the imprecise nature of those rules allows the parliaments to give mandatory effect to any statutory provisions and courts to interpret them as such.[386] This fact might bring potential abuses and end up with vulnerability and non-enforcement of the parties' choices. Relevant to the latter, parties could avoid the forum's mandatory rules by using another form of dispute resolution, removing their assets from that forum, "exiting" the jurisdiction or agreeing not to litigate there.[387] The latter is relevant to the current discussion. Nevertheless, it could be applicable only if the parties have not designated the chosen court. Put differently, the argument here is all about mandatory rules (specifically public policy) of, for instance, the German law upon an agreement designating the German court. This suggestion is not practical.

As suggested, generally, public policy doctrine has not been expressly applied to jurisdictional matters.[388] It has been used in the context of choice of law and the recognition and enforcement of foreign judgments.[389] Similarly, it was submitted that overriding state interests that are indeed mandatory rules founding public policy are rare in international jurisdiction, while party autonomy is much more important.[390] Those authors imply the relevance of international law standards or principles globally rather than national mandatory rules. Nevertheless, it is also noted that parties' autonomy is not always pre-eminent in international jurisdiction.[391] Where the HCCCA refers public policy to the national law, the court seised, or court to which the recognition or enforcement have been addressed might include any point of the

[383] Ibid, 32.
[384] Ibid, 225
[385] Ibid, 32.
[386] Discussion of mandatory rules and public policy in Articles 8 and 9 relates much more to procedural law rather than the substance. However still there could be some overlaps between substance and procedure, similar to the chosen law and law of the forum. For more on this relation see: Mary Keyes "Statutes, choice of law and the role of forum choice" (2008) 4(1) Journal of Private International Law 7.
[387] Ibid, 8.
[388] Keyes (n 354) 90.
[389] Peter Carter, "The role of Public Policy in English Private International Law" (1993) 42 ICQL 1.
[390] Keyes (n 354) 30
[391] ibid, 32.

domestic law into the notion as a reason not to give effect to the jurisdiction agreement or resulting judgment. Therefore, overlaps between national and international law are still substantial grounds of limitations over international jurisdiction.

When it comes to the possible impacts of the exception, Nygh and Davies, and Collier discuss the adverse effects of public policy shown in the acts of courts by not applying or recognising what would otherwise be applicable or recognised.[392] In contrast, Lee believes that this notion has positive effects by justifying the application of forum law.[393] Putting all together, public policy exception in the HCCCA brings both negative or exclusionary (regarding not giving effect to jurisdiction agreement and refusing recognition or enforcement of a judgment) and positive effects (by vesting jurisdiction to the national court other than the chosen one).

Different legal systems have particular approaches towards public policy in respect to the choice of forum agreements. In the US, agreements “in advance of controversy whose object is to oust the jurisdiction of the courts” were considered contrary to public policy and, therefore, not enforceable.[394] The rationale of this position was argued to be that "(1) the parties cannot by agreement in the contract alter the jurisdiction of the courts, and (2) such contractual stipulations are violative of public policy".[395] Nonetheless, "the real issue **...** is not whether the parties can by agreement 'confer' or 'oust' jurisdiction, but whether the selected or ousted court will exercise its jurisdiction in such a way as to give effect to the intention of the parties".[396] A strong showing could be made for setting aside forum selection clauses "for such reasons as fraud or overreaching" or if the enforcement would be "unreasonable and unjust" or contrary to "a strong public policy of the forum."[397]

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[392] John Collier*, Conflict of Laws* (3rd edn, Cambridge University Press, 2001) 361; See also: Pippa Rogerson and John Collier, *Collier's Conflict of Laws* (4th edn, Cambridge University Press, 2013); Peter E Nygh and Martin Davies, *Conflict of Laws in Australia* (7th edn, Butterworths, 2002) at 345. See also: Martin Davies, Andrew Bell and Paul Brereton, Nygh's Conflict of Laws in Australia (10th edn, LexisNexis Australia, 2019).

[393] Stephen Lee, “Restitution, Public Policy and the Conflicts of Laws” (1998) 20 University of Queensland Law Journal, 2.

[394] *The Monrosa v. Carbon Black Export*, *Inc*., (1959) 359 U.S. 180.

[395] Ronald A. Brand, “Arbitration or Litigation - Choice of Forum after the 2005 Hague Convention Choice of Court Agreements”, (2009) Annals of the Faculty of Law in Belgrade International Edition, 23, 29.

[396] ibid. Significantly, in relation to admiralty jurisdiction, which was enlarged to the forthcoming cases, the court held that forum selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances". See: *MIS Bremen and Unterweser Reederei, GmbH v. Zapata Off-Shore Co*., 407 U.S. 1 (1972), 10.

[397] *ibid,* 15.

Besides all the above, due to the modern trends of the contemporary world and globalisation, public policy transfers into a private international law matter in a "global village." In contrast, it has long been a concern for public law.[398] The main topic for this interrelation is human rights, which constitutes the substantive aspect of public policy. Courts have long held judgments based on procedural public policy[399], while the substantive element of public policy as of human rights has been in focus not that frequently.[400] It has been submitted that by globalisation, the shape of private international law will further change, and substantive public policy clauses will get much more significant.[401] The courts should consider the doctrine of indirect horizontal effect and proportionality principle regarding applying substantive public policy clauses.[402] The HCCCA does not differentiate substantive and procedural public policy notions. As long as the case is within the scope of the HCCCA, the exception set out in Article 6(c) encapsulates both facets of this concept. Accordingly, the applicable national laws determine the matter.

3.3.4.3 Rule 3: Recognition and enforcement of judgments[403]

The third rule guarantees the recognition or enforcement of the judgment concluded by the designated court. Recognition and enforcement of judgments experience challenges in certain jurisdictions where these ends are subject to bilateral or regional treaties or reciprocity. This fact has proved the necessity of a global convention regulating those matters.[404] Nevertheless, it is recently argued to become "a toothless principle" that does not represent substantial hurdles.[405] The HCCCA aims to ensure

[398] For more discussions see: Jan Oster, "Public policy and human rights" (2015) 11(3) Journal of Private International Law, 542; Alex Mills, *The Confluence of Public Policy and Private International Law* (Cambridge University Press, 2009); Alex Mills, "The Dimensions of Public Policy in Private International Law" (2008) 4(2) Journal of Private International Law, 201.
[399] *Dieter Krombach v André Bamberski* (2000) EUECJ C-7/98.
[400] *Kuwait Airways Corp v Iraqi Airways Co* ('*Kuwait Airways*') (2002) UKHL 19; For more see: Oster (n 397) 543.
[401] Oster (n 396) 567
[402] Ibid, 567
[403] For more discussions on the recognition and enforcement of judgments under the HCCCA see thesis 3.3.4.3 and 4.2.7.
[404] Preliminary Document No 5 of March 2012, Ongoing Work on International Litigation and Possible Continuation of The Judgments Project, prepared by the Permanent Bureau, 9-10.
[405] Elbalti shows that even if reciprocity is not abolished in its entirety, it does not have a substantial role in the field of the recognition and enforcement and therefore does not bring any problem for giving effect to foreign judgments except in the States where outdated practice of *revision au fond* is still applicable. See Béligh Elbalti, "Reciprocity and the recognition and enforcement of foreign judgments: a lot of bark but not much bite" (2017) 13(1) Journal of Private International Law, 184.

reliability by recognising and enforcement of judgments rendered by the exclusively chosen courts.[406]

In addition to the mentioned rules, it is claimed that the HCCCA establishes an "optional fourth basic rule" on declaring to recognise or enforce judgments given by the courts of the other Contracting States designated in a non-exclusive choice of court agreement.[407] However, in my view, the three fundamental rules brought by the HCCCA apply generally, and the basic principles cannot have an 'optional' nature.[408]

3.3.5 Hague Judgments Convention 2019: Relationship with the sister instrument

The HCCH adopted the HJC 27 years after the initial proposal of a mixed instrument covering both jurisdiction and recognition and enforcement rules.[409] The proceedings "to reconsider the feasibility of a global instrument on matters relating to jurisdiction and the recognition and enforcement of judgments in civil and commercial matters" began in 2012.[410] On 2 July 2019, the 22nd Diplomatic Session on 18 June 2019

[406] For more discussions see thesis 3.3.4.3 and 4.2.7.

[407] HCCCA, Article 22; See also: Mukarrum Ahmed and Paul Beaumont, "Exclusive choice of court agreements: some issues on the Hague Convention on choice of court agreements and its relationship with the Brussels I recast especially anti-suit injunctions, concurrent proceedings and the implications of Brexit" (2017), 13(2) Journal of Private International Law, 386, 393.

[408] Besides, the HCCCA gives several options to the Contracting States to make declarations in regard to limiting jurisdiction, recognition and enforcement, specific matters and the treaty governing jurisdiction or the recognition or enforcement on a specific matter. These would bring more than four rules of the Convention. See: HCCCA, Articles 19-22 and 26(5).

[409] A convention harmonising rules laid down in the Brussels and Lugano Conventions would be of general use in Europe and beyond. See: Letter (n 275). See also: Brand and Herrup (n 275) 6.

[410] Upon several meetings of the Working Group from 2012 to 2015, a Proposed Draft Text of the Project was finalised and the Special Commission for preparation of the Draft Convention was organised in 2016. Upon the first meeting of the Commission between 1-9 June 2016, the preliminary Draft Convention was prepared. This text was short enough containing only 16 Articles and nothing about convergence with exclusive jurisdiction agreements or the HCCCA 2005. The second meeting of the Special Commission between 16-24 February 2017 resulted in the Draft Convention which was evaluated very positively by the Council and stimulated arrangements for the next meeting of the Commission between 13-17 November 2017. That meeting produced another Draft Convention containing 34 Articles and very notably including a provision which set the dividing line between the texts of the future Hague Judgments Project and HCCCA. See: Working Document No 2 of April 2012 for the attention of the Council on General Affairs and Policy of the Conference. See also: The Garcimartín-Saumier Report, paras 3-6; Working Document No 76 REV of June 2016, "2016 preliminary draft Convention" (Special Commission on the Recognition and Enforcement of Foreign Judgments; Working Document No 170 REV of February 2017, "February 2017 draft Convention" (Special Commission on the Recognition and Enforcement of Foreign Judgments; Working Document No 236 REV of November 2017, "November 2017 draft Convention" (Special Commission on the Recognition and Enforcement of Foreign Judgments.

adopted the long-awaited HJC[411]. Uruguay[412], Ukraine[413], Israel[414], Costa Rica[415] and Russian Federation[416] have signed it. Furthermore, the EU is committed to joining the HJC following the launch of its initiative and positive feedback received by the public consultation.[417] The EU was actively involved in the negotiations, which reflected its political interests. Thus, the EU's accession to the HJC would be in line with the objectives of the Commission set out in the Political Guidelines (2019-2024), especially regarding "An economy that works for people."[418] Besides, "the EU's long-standing approach is that the appropriate framework for cooperation with third countries in the field of civil judicial cooperation is provided by the multilateral Hague Conventions such as the HCCCA and HJC".[419] Indeed, the EU's opposition to the UK's application to ratify the Lugano Convention will most likely impede the ratification of the HJC by both for the provision of the continuing civil judicial cooperation.[420]

According to the HJC, a judgment given by the court of a Contracting State (state of origin) shall be recognised and enforced in another Contracting State (requested state).[421] The HJC determines a minimum standard for mutual recognition and enforcement and "defines the perimeter of "eligible judgments" that circulate under the Convention."[422] It presents a liberal approach and facilitates the circulation of judgments by permitting recognition and enforcement under national law or other treaties unless there is a conflict with an exclusive basis.[423] Yet, a judgment given effect under the national law does not become "a Convention judgment," the

[411] The fourth meeting of the Special Commission between 24-29 May 2018 put forth the Draft Convention including 32 Articles which was adopted as the Convention. See: Working Document No 262 REV of May 2018, "2018 draft Convention" (Special Commission on the Recognition and Enforcement of Foreign Judgments.
[412] Signed on 2 July 2019.
[413] Signed on 4 March 2020.
[414] Signed on 3 March 2021.
[415] Signed on 16 September 2021.
[416] Signed on 17 November 2021.
[417] See: EU Commission's Initiative, International enforcement of court rulings (Judgments Convention) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12166-International-enforcement-of-court-rulings-Judgments-Convention-_en> accessed 26 November 2021.
[418] See: Communication from The Commission To The European Parliament and The Council, Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention COM(2021) 222 final <https://ec.europa.eu/info/sites/default/files/1_en_act_en.pdf>.
[419] ibid.
[420] For the related discussions see thesis, Chapter 7.
[421] HJC, Articles 1(2) and 4; Garcimartin/Samuer Report, para 21. It determines certain indirect grounds for recognition or enforcement[421] as well as refusal[421], further stating that there shall be no review of merits by the requested court.[421] See also HJC, Articles: 4(2) and 5-7.
[422] Garcimartin & Samuer Report, paras 134 and 326.
[423] HJC, Articles 6, 15 and 23.

Contracting States have no obligation to acknowledge the effect of such a judgment unless there is a basis determined by Article 4.

As an instrument complementary to the HCCCA, the HJC shares the same goals to ensure commercial certainty and access to justice, serves legal certainty and uniformity by providing free circulation of judgments and parties' autonomy, also, advances multilateral trade investment and mobility. The Conventions add to global justice and mutually promote their effectiveness and implementation. Both instruments accommodate mutual recognition of judgments with several restraints for keeping the internal rule of law and respecting national diversities deriving from territorial sovereignty.[424] The Conventions aim at judicial cooperation and recognition and enforcement of judgments given by the court that parties designate. While recognition and enforcement policy of the HCCCA covers judgments which the exclusively chosen court gives, the HJC applies to judgments rendered by a court specified in an agreement concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference, other than an exclusive choice of court agreement.[425] The HJC determines convergence and divergence by mentioning the definition of an "exclusive choice of court agreement" as the HCCCA.[426] By applying to non-exclusive designations, it enhances party autonomy and access to justice.

On the other hand, confusion might arise due to the exclusivity presumption of the HCCCA. According to the HCCCA, a choice of court agreement shall be deemed exclusive unless the parties have expressly provided otherwise. Therefore, if the parties have designated the court or courts of a Contracting State, which has also ratified the HJC and haven't explicitly mentioned exclusivity, and there is no claim by the parties, the HCCCA might apply. However, the abusing party might insist on non-exclusivity to delay the proceedings unless there is no inconsistency between the instruments. At the same time, courts would interpret the conventions compatibly, giving regard to their objectives, international character, and complementary nature to each other, and would aim to promote uniformity in their application.[427]

[424] According to the UN Charter Article 2(1), the states have equal sovereignty.
[425] HJC, Convention, Article 5.1(m).
[426] HJC, Convention, Article 5.1(m); HCCCA Article 3(a). See also: Garcimartin/Samuer Report, para 215.
[427] HCCCA, Articles 23 and 26(1); HJC, Articles 20 and 23.

In principle, the HJC seeks to avoid gaps between the two instruments.[428] Nevertheless, further uncertainties might arise regarding the interpretation of asymmetrical clauses. Such designations are not considered exclusive under the HCCCA and would theoretically fall within the scope of the HJC.[429] However, as discussed above, the English courts have reached exclusivity of asymmetrical jurisdiction agreements, which might bring a similar interpretation under the HCCCA, resulting in the non-application of the HJC. Therefore, uncertainties might exist as long as a uniform interpretation is provided by an international Hague Court (if established).
Although both of the treaties apply in cross-border cases in civil and commercial matters, the HJC might be much broader in its scope. Most of the excluded issues are likely not in the scope of the HJC. However, the latter applies to employment and consumer contracts, physical injuries, damage to tangible property, rights *in rem* and leases of immovable property, antitrust (competition) matters, emergency towage and emergency salvage, maritime matters, such as marine insurance, shipbuilding, or ship mortgages and liens.[430] While the HCCCA applies to the validity of the copyright and related rights and their infringement[431], the HJC excludes all intellectual property matters.[432] In this regard, the HJC has taken a retrograde step in comparison with the HCCCA.
Contrary to the HCCCA, it applies to judgments on consumer and employment contracts and avoids any possible clashes between the instruments exclude any such judgments given by the designated court.[433] While the HCCCA applies to insurance and reinsurance matters regarding which the Contracting States have often made declarations under Article 19, the HJC does not mention such contracts at all. Considering it applies to marine insurance[434], possibly neither insurance nor reinsurance issues are excluded. On the other hand, like the option provided by the HCCCA, States might declare not to apply the HJC to such matters.[435]
Similar to the HCCCA, under the HJC, the court may refuse to recognise or enforce the judgment if it is inconsistent with a judgment given in the requested State in a

[428] Garcimartin/Samuer Report, para 216.
[429] Garcimartin/Samuer Report, para 217; Hartley/Dogauchi Report, paras 32, 106 and 249.
[430] HJC, Article 2; Garcimartin/Samuer Report paras 44 and 55.
[431] HCCCA, Article 2.2; HJC Article 2.1(m).
[432] HJC, Article 2.1(m).
[433] HJC, Article 5.2.
[434] Garcimartin/Samuer Report, para 55.
[435] HJC, Article 18.

dispute between the same parties, or an earlier judgment given in another State between the same parties on the same cause of action, provided the earlier judgment fulfils the conditions necessary for its recognition in the requested State.[436] Unlike the HCCCA, the HJC contains a provision related to *lis pendens* which allows a court to postpone or refuse recognition or enforcement if proceedings between the same parties on the same subject matter are pending before a court of the requested State, and the court of the requested State was seised before the court of origin, further, there is a close connection between the dispute and the requested State.[437] While this provision should be appreciated, the mere existence of parallel proceedings cannot be a ground for refusal. Still, it should be combined with the close connection for the court to consider its discretion whether to refuse recognition or enforcement. Apart from the language of the HJC, which gives discretion to the court, the exercise of this discretion depends on the application of *forum non conveniens* elements, which might bring additional uncertainties arising from diverse interpretations.

Unlike the HCCCA, the HJC determines a bilateralisation regime. It enters into force only if the Contracting States have not notified the depository about the intention not to establish any relations between them.[438] Yet, the latter's effect is not contingent merely upon the existence of such bilateral agreements and, therefore, is unlikely to bring failure as its predecessor. In the absence of such a notification, the HJC still has an effect between two Contracting States from the first day of the month following the expiration of the period during which notifications may be made.[439] Unlike its sister instrument, the HCCCA does not include such a requirement which would have been inconsistent with the party autonomy objectives.[440] The following examples illustrate possible interactions between the HCCCA and HJC:

- Let’s assume both the State of origin and requested state are Contracting States of the HCCCA and HJC. The state of origin where the chosen court is located is the person's habitual residence against whom recognition or

[436] HCCCA, Article 9(g); HJC, Articles 7.1(e) and 7.1(f),
[437] HJC, Article 7(2).
[438] Such a regime is characteristic to other HCCH instruments which necessitates a high level of mutual trust and cooperation. Under the 1971 Judgments Convention judgments were not recognised or enforced in another Contracting State in the absence of a Supplementary Agreement to this effect. See: HJC, Article 29. See also: Michael Wilderspin and Lenka Vysoka “The 2019 Hague Judgments Convention through European lenses” (2020) Nederlands Internationaal Privaatrecht, 47-48.
[439] HJC, Article 29
[440] Garcimartin/Samuer Report, para 407.

enforcement is sought. The judgment can be recognised and enforced under either or both of the instruments. If there is a ground of refusal under either instrument, the judgment can still get recognised and enforced under the other, which does not determine such a ground. The Garcimartin/Samuer Report states that since the grounds for refusal are not mandatory but permitted, the judgment must be given effect under either instrument, preventing recognition or enforcement.

- Nevertheless, there is nothing to prevent a national court from refusing to recognise or enforce that judgment; indeed, the court's discretion parallels its obligation under both instruments. Therefore, if the national court considers that the judgment should not be enforced, it won't give effect to it. The court should consider membership of the State to both Conventions and interpret them compatibly while deciding on the case. This factor would be determinative for avoiding any inconsistencies. On the other hand, if a judgment is given on rights *in rem* over immovable property, the HCCCA would not be applicable. It would be recognised and enforced under the HJC only if the property is situated in the State of origin.[441]

- In another example, State A, the defendant's state of origin and habitual residence, and State B, the requested state, are both Contracting States of the HJC. State B and State C (whose courts have been designated by the parties) are the HCCCA Contracting States. Accordingly, the courts of State B may refuse to recognise or enforce the judgment given by State A since it is contrary to the exclusive choice of court agreement in favour of the courts of State C.[442] According to the Garcimartin/Samuer Report, there is no inconsistency between the two instruments.[443] The HCCCA allows a court to refuse to recognise or enforce a judgment if it is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary

[441] HJC, Article 6.
[442] HJC, Article 7.1(d).
[443] Garcimartin/Samuer Report, para 377.

for its recognition in the requested State.[444] Inconsistencies may arise if there are two different judgments given by the courts of States A and C. Following the refusal of recognition and enforcement by the court of State B based on HJC 7(1)(d), the claimant goes to State D, which is also a Contracting State to the HCCCA (but not the HJC), and the court decides to apply Article 9(g) of the treaty. According to the Explanatory Report, both Conventions aim to promote mutual recognition and enforcement; therefore, the requested state should give effect the judgment.[445] However, the Conventions by the wording "may refuse" determine a discretion of a court rather than an obligation; in such a scenario, there might be multiple judgments given effect in different states. If State D has ratified both Conventions, its courts will aim for consistent interpretation in the best case. Yet, there might be a mechanism for monitoring whether another state court renders any judgment or any jurisdiction agreement exists between the parties before the case goes to the state's courts or a decision is given. Therefore, consistent application of the treaties and provision of certainty would depend on the national law and the parties making declarations in this regard.

3.4 Conclusion

The Chapter has disclosed different phases of the negotiation processes towards adopting the final text of the HCCCA. While the initial proposal targeted an instrument that would have been wider in scope covering grounds of jurisdiction, complexities, and traditions of different legal systems led to narrowing the ambits of the treaty to only exclusive choice of court agreements. It brought global prominence to the treaty for securing the party autonomy principle and designation of jurisdiction. The HCCCA sets three fundamental rules as the safeguards of the principle by the mandatory obligation of the exclusively designated court to decide the case, the duty of any other court to stay or dismiss the proceedings in favour of the chosen court, and recognition and enforcement of a judgment rendered by the chosen court. In this regard, public policy as an exception to the fundamental rules is particularly touched upon, and

[444] HCCCA, Article 9(g).
[445] Garcimartin & Samuer Report, para 378.

diverse interpretations of the notion in national laws are considered a hurdle on the uniform application of the HCCCA.

The chapter further discusses the relationship between the HCCCA and the HJC and scrutinises their complementary nature. It is emphasised that the sister instruments together level the playing field; they promote the effectiveness of international litigation as a counterpart to international arbitration and enhance access to justice and ensure parties' exclusive and non-exclusive choices. Therefore, it is exposed that states that aim to provide parties' autonomy and commercial certainty and the growing international reputation of their judiciary might be interested in ratifying both instruments. Although this couple would not give complete protection to non-exclusive designations[446], parties would be able to get their final judgments recognised and enforced.

The chapter reveals that, against the HCCH's goals, much remained to be achieved by the HCCCA. In this sense, it bridges the discussions to the next chapter, which details the party autonomy aspects of the HCCCA. The discussions later bring forward contextual comparisons with the similar perspectives shared by the BRR and NYC.

[446] The HJC does not expressly rule on jurisdictional grounds rather provides recognition and enforcement of judgments resulted from non-exclusive jurisdiction agreements.

Chapter 4 PARTY AUTONOMY ANGLES OF THE HCCCA 2005: A PIECEMEAL SOLUTION?

4.1 Introduction

This chapter details the party autonomy angles of the HCCCA. Before the Convention was adopted, there had been only regional and bilateral agreements, leaving international trade and commerce absent of universal safeguards. Several attempts to achieve such a worldwide framework had also failed. Besides, the traditional advantage of arbitration over litigation was perceived due to almost the most successful international NYC, which was a role model for the Permanent Bureau. The HCCCA is the first international treaty recognising and enforcing parties' autonomous choice of court agreements and resulting judgments. According to Louis Allan, with its objectives, the HCCCA stands as a 'lasting monument' to Arthur von Mehren's vision of "law and justice in a multi-state world."[447]

While examining the elements of the comparative study within the ambit of the HCCCA, the chapter shows a broader approach. It explores the various classification of choice of court agreements and determination of exclusivity. Regardless of the exclusion of non-exclusive jurisdiction agreements from the scope, upon a relevant declaration, the HCCCA could encompass judgments that would be resulted from such designations. The latter justifies the examination of distinguishing non-exclusive variations, as well as consequences of a breach.

The chapter is the centrepiece of the thesis since it manifests the main characteristics of the provision of party autonomy by the HCCCA and analyses shortcomings and factors affecting effectiveness. It puts a particular emphasis on the objective of the HCCCA to establish uniform rules to promote international trade and investment through enhanced judicial cooperation. Based on these assessments, suggestions are made for reforming the text of the HCCCA to strengthen party autonomy, legal and commercial certainty.

[447] Teitz (n 232) 558.

Assessment of the common elements in this chapter bridges the discussions to the following chapters for further comparisons with the similar perspectives shared by the BRR and NYC.

4.2 Party autonomy aspects of the HCCCA

4.2.1 Choice of court agreements: Effects

4.2.1.1 Characterisation of choice of court agreements

Jurisdiction clauses are usually construed by their context, and while classifying them, high importance is given to the construction of the agreement and intention of the rational commercial parties.[448] Relevantly, the positive or negative effects of such agreements have long been asserted as the central point for their characterisation as exclusive or non-exclusive. Exclusive jurisdiction agreements hold dual effects. Prorogation by conferring jurisdiction on the specifically nominated court or courts expresses the positive effects. Derogation, in other words, excluding or ousting the jurisdiction of all other courts presents negative effects.[449] Conversely, non-exclusive choice of court agreements have only positive effects. These distinguishing effects of jurisdiction agreements are regarded to be constructive. In contrast, choice of law clauses[450] together with all other surrounding circumstances are helpful to determine the true intentions of the parties.[451]

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[448] Mary Keyes and Brooke Adele Marshall, "Jurisdiction agreements: exclusive, optional and asymmetrical" (2015) 11(3) Journal of Private International Law 345, 352; *BNP Paribas SA v Anchorage Capital Europe LLP* [2013] EWHC 3073 (Comm), para 91.

[449] ibid, cf Keyes and Marshall. For examination of implementation of those effects in different jurisdictions see Mills (n 1) 113.

[450] Under English common law, choice of law clauses have been regarded as to be promissory in effect. See Briggs (n 138) 431-464, paras [11.16]-[11.78]. Unlikely, In *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724, Brereton J stated that "…the express choice of law is declaratory of the parties' intention, not promissory..." (at paras 47, 51) But still Briggs justified the judgment by commenting that it is very professional and the court did whatever had to be done. "The area of disagreement is simply one of how to construe the plain vanilla, or not so well drafted, choice of law". Case note, Perry Herzfeld, "Choice of law clauses are not promissory", 4 August 2009, <http://conflictoflaws.net/2009/choice-of-law-clauses-are-not-promissory/> accessed 30 November 2021. Moreover, in the mentioned decision, the Australian Supreme Court held that the absence of wording "exclusive" weighs against exclusivity of a choice of forum clause, although it is not determinative in nature.

[451] James Fawcett, "Non-exclusive jurisdiction agreements in private international law" [2001] 28 Lloyd's Maritime and Commercial Law Quarterly 234, 238-239; For the relation of choice of law agreements to an implied choice of jurisdiction see: Maria Hook, "The choice of law agreement as a reason for exercising jurisdiction" [2014] 63 International and Comparative Law Quarterly, 963-975.

Some authors posit that exclusive jurisdiction agreements are those which impose an obligation on one or more parties.[452] Indeed, this approach includes non-exclusive jurisdiction agreements into the scope of the exclusive variations. From my point of view, exclusive jurisdiction agreements determine a single jurisdiction imposing an obligation on both of the parties. Exclusivity of jurisdiction agreements is confirmed by the designation of a single forum, where the parties shall bring the proceedings, and all other courts shall dismiss or stay any actions. In contrast, non-exclusive choice of court agreements identify the jurisdiction of the courts without putting any obligation on the parties.[453] By drafting such agreements, parties agree that either party could bring the proceedings to any other foreign forum.[454]

According to Briggs, the "binary distinction" of choice of court agreements is not helpful.[455] An agreement might have a hybrid nature and become exclusive after either party brings the proceedings, making the other party rely on the jurisdiction of only that court.[456] Some argue that the determination of the type of agreement is a matter of the contract's governing law.[457] Others argue that this is a matter of construction rather than characterisation; The wills of the parties and all other circumstances are of high importance in this determination.[458] On the one hand, characterisation of the agreements based on their positive and negative effects is different than legal effects given to them by the governing law.

On the other hand, an agreement that is exclusive or non-exclusive in a specific legal system might not be regarded so under another system. Notably, different positions established in each national law towards jurisdiction agreements and their substantive or procedural nature also affect this determination. Relevant to this discussion, jurisdiction clauses have long been viewed as procedural contracts, which constrain them to prorogation or derogation of the jurisdiction of courts. Fentiman defends procedural contract doctrine while discussing the anatomy of dispute resolution clauses; he gives their definition simply as the mechanism for resolving any disputes and the venue or venues for the process; moreover, he considers those clauses as a

[452] Keyes and Marshall (n 446).
[453] Fawcett (n 449) 235.
[454] Ibid.
[455] Adrian Briggs, "The Subtle Variety of Jurisdiction Agreements" [2012] 3 Lloyd's Maritime and Commercial Law Quarterly 364, 376.
[456] Ibid.
[457] For more discussions see Briggs (n 138).
[458] Louise Merrett, "The future enforcement of asymmetric jurisdiction agreements" [2018] 67(1) International and Comparative Law Quarterly, 37, 39.

mechanism of reinforcement of the primary agreement by enforcement of a judgment and indemnity against the breach.[459] Briggs views the substantive nature of jurisdiction clauses by asserting that their construction and interpretation are matters for the governing law of substantive contracts of which they are part; he also adds that it is not always so, as there could be free-standing dispute resolution clauses which would have own governing law clauses.[460] LC Ho and CH Tham claim that there is no independent right to contractual remedies for breach of this contract unless the terms of forum selection clauses bring ancillary obligations.[461] I think a jurisdiction clause is a mixed hybrid agreement.[462] It has both the elements of substance and procedure. Substantive and formal validity issues count for substantive qualities governed by applicable laws, whereas commencement, the continuation of the proceedings and recognition and enforcement of judgments are procedural in nature. Separability or severability of a forum selection clause also underpins this position. These factors should be considered not in isolation, but there should be an in-depth and comprehensive evaluation of the drafting techniques and constructive issues, parties' intention and all other circumstances relevant to the matter; besides, the law governing the procedure[463] should also be considered.

The distinction between exclusive and non-exclusive choice of court agreements coupled with the relevant factors is decisive for determining the applicable mechanism. It indicates whether the civil or commercial case comes into the scope of the HCCCA or BRR, which includes non-exclusive jurisdiction agreements, unlike the Hague regime.[464] This classification is also helpful for defining whether there is a breach of the contractual obligation and if remedies will be consumed.[465]

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[459] Fentiman (n 3) 43.

[460] Briggs (n 138) 365; *A v B* [2006] EWHC 2006 (Comm).

[461] LC Ho, "Anti-suit injunctions in Cross Border Insolvency: A Restatement" [2003] 52(3) International and Comparative Law Quarterly, 697; CH Tham "Damages for Breach of English Jurisdiction Clauses: More than Meets the Eye" [2004] Lloyd's Maritime and Commercial Law Quarterly, 46.

[462] Some academics also support the idea of a hybrid agreement. See Mukarrum Ahmed, *The Nature and Enforcement of Choice of Court Agreements: A Comparative Study* (Hart Publishing, 2017) 54-57, 242.

[463] The procedural law could be chosen by the parties and in the absence of such a choice, *lex fori* as the law of the seat would apply.

[464] It has been defined to have "central importance" for the operation of the Hague Convention or Recast Regulation, and also significance for the enforcement of a clause and any remedies for the breach of the clause. For more see: David Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (2nd edn, Sweet & Maxwell, 2010) para 4.03; Keyes and Marshall (n 446) 349. Besides, this will specify if reversed or general *lis pendens* rulings of the Recast Regulation will be employed. See: Chapter 5.

[465] Moreover, such a distinction determines which kind of remedies would be applicable, since anti-suit injunctions would not be granted between Member State courts regardless of the domicile of the parties, whereas they could be used in regard to the jurisdiction agreements designating Non-Member State

The HCCCA leaves the matters such as interpretation and scope of an agreement for the national laws.[466] Merely bilateral and equally enforceable agreements by both parties are considered to have a quality of becoming subject to the HCCCA. Nonetheless, it removes a great majority of the agreements (non-exclusive jurisdiction agreements) which are characteristic of international commercial, particularly financial relations.[467]

4.2.1.2 Exclusive jurisdiction agreements

The HCCCA limits its application only to exclusive jurisdiction agreements and recognition and enforcement of the judgments resulting from such designations.[468] This type of agreement gives jurisdiction only to a particular court or courts of a Contracting State and restrains any other court from taking the jurisdiction.[469] Parties can consent that Party A shall sue Party B and Party B shall sue Party A in the courts of France. Or they can agree to bring proceedings in London Commercial Court. Both of these designations are exclusive. Nevertheless, designation of the High Court of England in London or courts of France would be non-exclusive and excluded from the scope.[470] According to Hartley and Dogauchi, if parties determine two different courts of the same State regarding each party, that agreement would be exclusive; however, if they specify courts of other States, such an agreement would not be regarded as such.[471] Suppose the agreement states that Party A shall sue Party B in Bromley County court and Party B shall sue Party A in Wandsworth county court (both of these county courts are located in London). It is an exclusive jurisdiction agreement. In contrast, a designation providing that Party A shall sue Party B in the Commercial Court of Paris and Party B shall sue Party A in the English High Court is a non-exclusive choice of court agreement.[472]

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courts and vice versa. In contrast, there is nothing in the HCCCA to prevent the parties from using anti-suit injunctions which could be paired with damages and stay of proceedings. These remedies could be used only if exclusive jurisdiction agreements are breached, as any kind of non-exclusive jurisdiction agreements is out of the scope of the HCCCA.

[466] Fentiman (n 3) 64.

[467] Ibid.

[468] HCCCA, Article 1.

[469] HCCCA, Article 3(a).

[470] For more on exclusive and non-exclusive designations see: Brand & Herrup (n 275) 43-44.

[471] Hartley/Dogauchi Report, para 104.

[472] Relevant to this discussion, once the HCCCA is ratified and applied by the United States both federally and by the states, a choice of court agreement could nominate i.e.: the federal courts of the

Parties who prefer certainty to flexibility[473] often choose a neutral court to resolve their potential or existing disputes to avoid any risk of bias or partiality. Moreover, they intend to prevent uncertainties for their relationship that would arise upon no choice and potential application of the national laws of the habitual residence of a defendant, which would also cause parallel proceedings, inconsistent judgments, undesirable costs, and waste of time. In this respect, Louise states that the HCCCA is a tool to validate the autonomy of the commercial parties and increase certainty for them by the exclusive choice of court agreements rather than being a 'litigation tool.'[474]

The negative effects of an exclusive jurisdiction agreement are reviewed alongside its positive effects. In this regard, it is noted that more than ensuring parties' autonomy and compelling them to litigate in the nominated forum, an exclusive choice of court agreement rigidly limits parties' options only to the chosen court and prevents them from litigating in any other forum.[475] The HCCCA admits the prerogative nature of an exclusive jurisdiction agreement by the mandatory rule requiring the chosen court to take jurisdiction[476] and not decline it based on any ground.[477] Derogative effects of an exclusive jurisdiction agreement are apparent from the rule, which puts an obligation on a court not chosen to suspend or dismiss the proceedings.[478]

Different national laws approach the matter from different perspectives.[479] For instance, under common law, exclusive jurisdiction agreements are ordinarily given effect to either by staying proceedings in breach of an agreement, an anti-suit injunction restraining a party from bringing or continuing proceedings (unless the proceedings fall into the scope of the BRR[480]), or granting damages. In other words,

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United States, or the Federal District Court of Colorado, or state courts of Colorado. See: Nanda (n 233) 778.

[473] Keyes and Marshall (n 446) 351

[474] Teitz (n 232) 547.

[475] Keyes and Marshall (n 447) 353-355.

[476] HCCCA, Article 5(1).

[477] HCCCA, Article 5(2).

[478] HCCCA, Article 6.

[479] For example, the practice in China is based on 'actual connection' of the chosen court with the dispute according to the Civil Procedure Law of the People's Republic of China, Article 34. For more discussions of the related discussions see thesis, Chapter 7.

[480] In *West Tankers* at first instance, Colman J referred to "*Angelic Grace*" and *Donohue v Armco* and granted an injunction against Italian judicial proceedings in breach of London arbitration clause. Subsequently, the BIR was interpreted as meaning that an English court can no longer grant such a remedy against the proceedings in a foreign court within the Brussels/Lugano regime. This was irrelevant in the Ust-Kamenogorsk case, where the Supreme Court upheld that English courts do have jurisdiction to grant a final injunction in order to restrain foreign proceedings brought in breach of an arbitration agreement. Neither anti-suit injunctions against foreign proceedings in Non-EU Member States are forbidden and those cases fall in the scope of Article 6 of BRR. See: *The Angelic Grace*

the English courts will enforce an exclusive jurisdiction agreement unless there is a strong reason not to, which is known as the 'Brandon test'.[481] Although this can go against the party autonomy principle and parties' free wills, the requirement to be 'strong' and putting the burden on the claimant – the party who sues at the forum, which is not designated aims at reaching a balance. It is claimed that common law does not recognise the derogative nature of an exclusive jurisdiction agreement per se; it gives effect to that agreement only if there is no reason to the contrary; also, public policy might override an exclusive choice made by the parties.[482] From my point of view, the primary emphasis should be put on the fact that the English courts would give effect to an exclusive jurisdiction agreement, as long as a party does not claim any ground for refusing to do so. In *AMT Futures*, the court held that an exclusive jurisdiction agreement designating the English courts precluded parties from the beginning or continuing proceedings in any other forum than the chosen one; otherwise, it would result in a continuing breach.[483] Additionally, the case law, which held strong convenience grounds over the choice of forum, is specific to when the HCCCA was not in force in the UK.[484] The case would have come into scope if the BRR were in force due to the English jurisdiction clause.[485] On the other hand, if a similar case was addressed to the court and the HCCCA was applicable in the UK

[1995] 1 Lloyd's Rep 87; *Donohue v Armco Inc* [2002] 1 All ER 749; *West Tankers Inc v Ras Riunione Adriatica Di Sicurta Spa & Anor* [2005] EWHC 454 (Comm), paras 13, 59 and 72; *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, para 27.

[481] The common law courts may decline to exercise jurisdiction based on a jurisdiction agreement, if the party suing at the non-contractual forum (claimant) can show strong reasons not to enforce that agreement. Such a strong reason might be a foreign court other than the chosen one which has already seised and has jurisdiction over all the parties and matters in dispute. This is the 'Brandon test' which was firstly established by Brandon J. in *The Owners of Cargo Lately Laden on Board the Ship or Vessel 'Eleftheria' v 'The Eleftheria' (Owners), "The Eleftheria"* [1969] 1 Lloyd ' s Rep 237 (Brandon J). In *Donohue v Armco Inc* [2002] 1 All ER 749, Armco brought the proceedings in New York in spite of they had concluded the exclusive jurisdiction agreement in favour of the English courts. When Donohue applied for an anti-suit injunction restraining New York proceedings, the House of Lords refused to issue such a remedy taking into account the ongoing proceedings in New York and *forum non conveniens* reasons. In this respect, "the interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in issue". See: *Donohue v Armco Inc* [2002] 1 All ER 749, para 34. See also: *Bouygues Offshore SA v Caspian Shipping Co* [1998] 2 Lloyd's Rep 461. Recently, having regard to the 'Brandon test' the Nigerian Court of Appeal declined to enforce an exclusive English jurisdiction agreement and a stay was not granted. See: Chukwuma Okoli, "The Nigerian Court of Appeal declines to enforce an Exclusive English Choice of Court Agreement", 27 November 2021, < https://conflictoflaws.net/2021/the-nigerian-court-of-appeal-declines-to-enforce-an-exclusive-english-choice-of-court-agreement/> accessed 30 November 2021.

[482] Keyes and Marshall (n 447) 354.

[483] *AMT Futures Ltd v Boural and others* [2018] EWHC 750 (Comm).

[484] *Donohue v Armco Inc* [2002] 1 All ER 749

[485] BRR, Article 25(1).

either under its EU membership or on its rights, nothing would prevent the enforcement of the exclusive jurisdiction agreement. Assuming accession of the US to the HCCCA, the American court would have had to stay or dismiss the proceedings in favour of the English court. Moreover, an anti-suit injunction against the New York proceedings might have been granted.[486]

4.2.1.3 Presumption of exclusivity

The HCCCA presumes exclusivity of choice of court agreements unless parties have expressly provided otherwise.[487] Such a presumption demonstrates intrinsic respect towards exclusive jurisdiction agreements. A jurisdiction agreement will be considered exclusive unless parties have explicitly stated that it is not or has expressly stated other courts' jurisdiction. For the agreement to fall into the scope of the HCCCA, there is no need to exclude the jurisdiction of another court particularly.[488]

The presumptive rule of the HCCCA widens its scope by the inclusion of a potentially non-exclusive choice of court agreements. Parties might have selected a court or courts of a specific state but not intended to have an exclusive designation. Likewise, the clause itself does not refrain any other court from taking jurisdiction or staying ongoing proceedings. Per contra, this rule might bring forum shopping manoeuvres by litigants. Suppose in an agreement for the distribution of the manufactured goods, an English distributor and Dutch manufacturer or supplier have chosen the English court for resolving their disputes arising out of their relationship. They have orally agreed on the possibility of bringing the proceedings before any other court by either party without an actual written clause. Such a designation would be defined exclusive based on the presumption rule. Nevertheless, if the Dutch manufacturer goes to the German court while the English distributor insists on the exclusivity of the English jurisdiction or vice versa, this kind of disagreement would lead to disputes.[489] Moreover, it would also bring a high possibility of litigation tactics by the party who would want to delay the

[486] Neither the BRR nor HCCCA would have prevented the English court from granting an anti-suit injunction against the New York court.
[487] HCCCA, Article 3(b); It might seem that based on the rule on presumption of exclusivity the HCCCA has implications for non-exclusive jurisdiction agreements.
[488] It brings relevance of the principle of *expressio unius est exclusio alterius*, which means that express specification of one thing implies exclusion of a contrary argument.
[489] If the court seised is not a Contracting State there will be more uncertainties as Articles 5-6, 9 of the HCCCA will not be applicable to prevention of the parallel proceedings and inconsistent judgments.

resolution. The presumption rule does not entitle the parties to claim a breach as there is no obligation or constraint on any to litigate in a specific court.

On the one hand, non-exclusive choice of court agreements do not limit parties' options where to initiate proceedings; Party A could not claim against Party B for litigating at a venue other than the one non-exclusively designated. Likewise, it could be unrealistic to grant a stay, leave, or anti-suit injunction. On the other hand, parties are most often reasonable businessmen agreeing on the venue. Notwithstanding the non-exclusivity of their choice, it forms their rationale intentions and further adds to the appropriateness of the forum. As long as there is no fair justification for applying *forum non conveniens* or public policy grounds or strong reasons that did not exist or were not foreseen while negotiating or parties were reasonably unaware of, they should still be bound by it. If one of the parties persists in non-exclusivity of the designation and forum shops to delay the process, an anti-suit injunction resisting such litigation tactics should and more likely be granted. The presumptive rule would be operable only if none of the parties would sue in or submit to the jurisdiction other than the one shown in the forum selection clause or upon a contrary action if the court holds the agreement exclusive and the case comes within the scope of the HCCCA.

The BRR also provides that a choice of court agreement "shall be exclusive unless the parties have agreed otherwise."[490] Therefore, if a jurisdiction agreement falling into the scope of Article 25 of the BRR states that French courts shall have jurisdiction, it is an exclusive designation unless the parties have expressly provided otherwise.[491]

Presumption of exclusivity is also the position under English law.[492] Exclusivity of a jurisdiction agreement does not depend on drafting techniques or if parties have added "exclusive" in the text. Still, it will be presumed based on construction and their intention. As Dicey inserts, the wording "exclusive" or "non-exclusive" might be helpful, but it is not always decisive in determining the type of agreement.[493] Similarly, according to Fentiman, an agreement would still be exclusive in the absence of the

[490] BRR, Article 25.

[491] The predecessor of the latter, the Brussels I Regulation also had a similar approach whereas the Brussels Convention required parties to demonstrate their consent clearly and precisely. Presumably a clear indication of non-exclusivity of a jurisdiction agreement was also true under the Brussels Convention. See: Brussels Convention, Article 17; *AIG Europe SA v QBE International Insurance Ltd* [2001] 2 Lloyds Rep 268. For more see: Alan Berg, "Rethinking English Jurisdiction Clauses", *Journal of International Banking & Financial*, 2002, 17(3), at 117.

[492] See also: *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] 1 All E, Bank of New York Mellon v GV Films [2009] EWHC 2339 (Comm).

[493] Dicey, Morris and Collins (n 218) para 12-098.

word “exclusive” unless it clearly states non-exclusivity in its text.[494] Although common law does not presume exclusivity rigidly[495], courts usually assume that the intention of rational businessmen would be to negotiate exclusive jurisdiction agreements.[496]

[494] Fentiman (n 3) para 2.52.

[495] The burden of proof about exclusivity of a clause is for the party who relies on this argument, as a breach of such a clause may count for the remedies, which are not available in the absence of an exclusive designation.

[496] For instance, the Court of Appeal concluded that despite the jurisdiction clause did not use the word “exclusive”, it was an exclusive designation. See: *Hin-Pro International Logistics Limited v Compania Sud Americana De Vapores S.A.* [2015] EWCA Civ 401. In *Continental Bank NA v Aeokos Cia Naviera SA& Ors* [1994] 1 WLR 588, at 249, at A., Rix J stated that “…where there is an agreement to submit disputes to the jurisdiction of a particular country, the parties are taken to have intended the chosen court's jurisdiction to be exclusive unless there are unusual or particular circumstances which indicate otherwise…” In *AMT Futures Ltd v Boural* [2018] EWHC 750 (Comm), at [33], it was held that “…proceedings falling within the scope of the clause should take place only in the English courts, and that such proceedings should not take place elsewhere…” In *BNP Paribas v Anchorage Capital and others [2013] EWHC 3073 (Comm)*, Males J held in favour of the exclusive jurisdiction clause and underlined construction of an exclusive choice of court agreement as a decisive factor. It was held that litigation in New York notwithstanding the jurisdiction clause designating the English court's jurisdiction was a breach of the promise. Unless strong reasons to the contrary were shown, parties should be kept to their contractual bargain. Moreover, following *Donohue v Armco Inc [2001] UKHL 64, [2002] 1 All E.R. 749, [2001] 12 WLUK 383,* Males J noted that where the courts of other Member States are involved and proceedings were brought in a foreign jurisdiction in breach of the contract, the English court would ordinarily use its discretion and restrain the foreign proceedings. Therefore, an anti-suit injunction against the proceedings in New York was granted (at paras 91-94). In *Global Maritime Investments Cyprus Limited v OW Supply & Trading A/S (under konkurs)* [2015] EWHC 2690 (Comm), where the parties agreed “to irrevocably submit to the jurisdiction of the English courts”, the court held that the exclusive jurisdiction agreement prevented parties from commencing proceedings in any other jurisdiction. While making the final decision on exclusivity of the clause and grant of an anti-suit injunction to restrain the parallel proceedings Mr Justice Teare stated that “…I do not consider that the reasonable commercial man who had agreed to … choice of English law and … the jurisdiction clause would regard the clause to commence a suit, action or proceeding in the courts of countries other than that of England…” At para 53, he noted that upon negotiating an exclusive jurisdiction clause and submission to that jurisdiction, bringing the proceedings somewhere else would be a “procedural nightmare”. At para 88, he emphasized the factual context that “…even if the clause is not an exclusive jurisdiction clause” and the other party had accepted and submitted to the English jurisdiction, therefore he could not commence any other proceedings elsewhere. This statement is not very precise, and one could think that without submitting to the English jurisdiction, the clause would not be exclusive, which contrasts with the exclusivity presumption. Indeed, submission is another ground of exclusive jurisdiction rather than an exclusive choice of court agreement. If the HCCCA would be a reference point in this case, the main basis for its application and decisive factor would be the exclusive choice of court agreement (Article 1.1.) which was agreed by the parties at the very outset, rather than submission to the English jurisdiction which is one of the grounds for the recognition and enforcement under the Hague Judgments Convention (Article 5.1(e)). Further, at 47, Teare J referred to Mr J Teare’s previous comment (see: *BNP Paribas v Anchorage Capital and others [2013] EWHC 3073 (Comm))* and considered construction of an exclusive jurisdiction agreement as a decisive factor. Nevertheless, it contrasts with Mr J Teare’s previous comment. In other words, an exclusive jurisdiction clause is built on a promise of the parties not to bring proceedings in any other forum than the particularly specified court while its construction and commencement of the proceedings follow this promissory note. Furthermore, parties’ irrevocable promise should be highlighted as a significant factor identifying their intention and the construction of the exclusive jurisdiction clause. Luke Pearce who appeared for the successful claimant during the proceedings commented that the judgment indicated a general tendency of the courts to presume exclusivity of jurisdiction clauses and this approach should be encouraged. See: Luke Pearce “Jurisdiction clauses in the English courts: is there a presumption of exclusivity?” [2016] 31(1) Journal of International Banking & Financial Law, 38. For more on the related discussions see: Adrian Briggs, *Civil Jurisdiction and Judgments*, (7th edn, Informa Law from Routledge, 2021) paras 4.13-4.17; Dicey, Morris and Collins (n 218) para 12-105-12-108 (“the true question is whether

The usage of exclusive choice of court agreements will likely widen Post-Brexit due to the increasing importance of the HCCCA. Especially English traditional position to strengthen those agreements and presumption of exclusivity[497] would bring much more certainty and respect towards their interpretation and usage. The presumption of exclusivity is based on parties' preference of certainty to flexibility by exclusively designating a sole court. Flexibility would be provided by giving multiple options to the parties via non-exclusive jurisdiction agreements.[498] Furthermore, in the cases falling into the scope of the HCCCA, discretionary power consumed by the courts would be reduced reasonably and bring more certainty over extreme flexibility.

4.2.1.4 Non-exclusive choice of court agreements

Contracting parties often formulate exclusive jurisdiction agreements, and there is a strong tendency in both legal theory and practice towards presuming exclusivity of choice of court agreements.[499] Most legal systems uphold parties' express will for choice of court, and principles applicable in this regard are extensively designed for maintaining a unique forum for the exclusion of any other court.[500] Yet, sophisticated and well-informed parties and their lawyers try to get the most out of the negotiations and designate different forms of complex and multi-faceted dispute resolution agreements other than exclusive jurisdiction clauses.

The Hartley/Dogauchi Report confirmed that "…non-exclusive agreements are quite common…."[501] According to Briggs, regardless of its type, 'non-exclusive' defines solely a jurisdiction agreement that is not 'fully, bilaterally and immediately exclusive.'[502] Parties might agree that Party A could bring proceedings before the English courts, whereas Party B could bring proceedings before the courts of any other State. Or Party A shall bring proceedings in the courts of England or Wales; Party B shall bring proceedings in the courts of France. They could also agree that

on its proper construction the clause obliges the parties to resort to the relevant jurisdiction, irrespective of whether the word 'exclusive' is used").

[497] Except the cases where it would be taken advantage of as discussed above.

[498] For more discussions see: Keyes and Marshall (n 447) 351.

[499] Dicey, Morris and Collins (n 218) para 12-098; Fentiman (n 3) para 2.52; *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] 1 All E, *Bank of New York Mellon v GV Films* [2009] EWHC 2339 (Comm).

[500] Ibid, 345.

[501] Hartley/Dogauchi Report, para 843.

[502] Briggs (n 494) para 4.19.

proceedings under the contract could be brought before the English courts without excluding the jurisdiction of any other courts. Each party could bring proceedings before the courts of the State of their residence. Further, they could simply agree that the French courts shall have non-exclusive jurisdiction under this contract.[503] National laws and practices demonstrate different approaches towards the nature of jurisdiction agreements.[504]

The HCCCA excludes all types of non-exclusive choice of court agreements from its scope[505] unless any Contracting State extends its application towards the recognition and enforcement of judgments resulting from such agreements.[506] Following this option, they are not excluded from the scope; indeed, they could be included by presuming exclusivity or to the extent of the recognition and enforcement. Judgments rendered by non-exclusively designated courts could be given effect only if the Contracting States have opted to make reciprocal declarations.[507] In contrast, when it

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[503] For more see: Hartley/Dogauchi Report, para 109.

[504] The Australian courts showed an inclination towards specifying choice of court clauses exclusive. Courts in the United States and Canada have shown different approaches towards presumption of exclusivity by classifying them as mandatory (exclusive) and discretionary or permissive (non-exclusive) jurisdiction agreements. “mandatory forum selection clauses contain clear language showing that jurisdiction is appropriate only in the designated forum”. On the other hand, permissive clauses entitle jurisdiction in a nominated forum, but do not prevent to commence proceedings elsewhere. See: Nanda (n 233) 779.

Where the clause was read as "…jurisdiction for all and any disputes arising out of or in connection with this agreement is Munich. All and any disputes arising out of or in connection with this agreement are subject to the laws of the Federal Republic of Germany", the court concluded that "is Munich" does not sufficiently imply "is only Munich." Moreover, it was stated that "where venue is specified [in a forum selection clause] with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified [in a forum selection clause], the clause will generally not be enforced unless there is some further language indicating the parties' intent to make the venue exclusive”. See: See: *K&V Scientific Co., Inc. v. BMW*, 314 F.3d, 10th Circuit, 2002, 494-501; Brand and Herrup (n 275) 42; Linda J. Silberman, “The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime” (2004) 26 Houston Journal of International Law 327, 348, 351; Hartley/Dogauchi Report, para 39.

If the United States and Germany had ratified the Convention at the time of the mentioned decision, the court would have come to a different conclusion presuming exclusivity of the jurisdiction of the Munich courts. Likely, in Canada, it was held that “when both parties articulate their commitment to a forum, absent the express intention to render that forum one of exclusive jurisdiction, such a clause will be interpreted as necessarily conferring concurrent [i.e. non-exclusive] jurisdiction”. See: *Old North State Brewing Company Inc v Newland SerticesInc* [1999] 4 *WWR* 573, 36; *BC Rail Partnershiov Standard Car Truck Co,* (2003) BCCA 597; *B.A. Blacktop Lid v Gencor Industries Inc,* (2008) BCSC 231.

[505] FA General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association and Another (1997) 41 NSWLR 117; Mcuid v Office De Commerialisationet D'Exportation [1999] NSWSC 931; Armacel Py Ltd v Smurfit Stone Container Corporation [2008] FCA 592, 88; Rosehana Amin, “International Jurisdiction Agreements and the Recognition and Enforcement of Judgments in Australian Litigation: Is There a Need for the Hague Convention on Choice of Court Agreements?” (2010) 17 Australian International Law Journal 113.

[506] HCCCA, Article 22.

[507] HCCCA, Article 22.

comes to the jurisdiction stage, it seems the drafters did not wish to further complicate the already troublesome case due to the existing disagreements and various approaches; therefore, they excluded non-exclusive designations and focused on the sole ground of jurisdiction.

The widespread use of non-exclusive jurisdiction clauses can often lead to uncertainty arising from parallel proceedings and inconsistent judgments. Indeed, the existence of multiple fora opens doors for litigation tactics and excessive delays bringing reluctance towards enforcement of those clauses. Parties' excessive freedom to agree on non-exclusive designations brings open-ended formulations without preventing proceedings in multiple fora. Parties are flexible to commence proceedings wherever the defendant's assets are and avoid difficulties regarding unavailability to freeze a defendant's assets without initiating substantive proceedings upon drafting an exclusive jurisdiction agreement.[508]

Besides practical uncertainties and applicability, there is not an established academic consensus on these agreements and the position of the HCCCA. In this vein, Merrett claims that what matters is individual promises in an agreement, and as long as parties have agreed on their promises, the nature of a clause should not prevent its enforcement.[509] Likely, there are some remarks that choice of court agreements should be enforced as they are contractual and contracts should be enforced.[510] Regarding the significance of non-exclusive choice of court agreements in commercial practice and commercial contract drafting, the HCCCA is criticised for its rigidity regarding the mandatory enforcement of choice of court agreements, notwithstanding its impact on the third parties.[511] However, excluding such agreements should not be a limitation over party autonomy or hassle for commercial relations. Upon admittance of non-exclusive choices, it would be lawful to bring parallel proceedings with a real risk of inconsistent judgments, waste of time and resources. Therefore, it would have necessitated the inclusion of *lis pendens* provisions[512] and undermined the objectives of exclusive jurisdiction agreements, particularly certainty, predictability, efficiency, simplified dispute resolution, and reducing the risk of multiple proceedings[513] - all of

[508] Fentiman (n 3) 44.
[509] For more on the related discussions see Merrett (n 456) 166.
[510] Briggs (n 138) 531-532.
[511] Ibid, at 531.
[512] Loon (n 166) 18.
[513] Keyes and Marshall (n 446) 377.

which the HCCCA intends to promote. The HCCCA prioritises its objectives and certainty ideals, and Article 22 declarations aim to balance party autonomy and certainty.[514]

4.2.1.5 Asymmetrical jurisdiction agreements

Asymmetrical clauses are frequently used in international commerce and especially financial relations. This designation determines an exclusive choice for only one party. The other party is entitled to seise different courts; a borrower can sue in a particular court while a lender or bank may sue anywhere.[515] Accordingly, a claimant has the flexibility to commence proceedings wherever a defendant's assets are and prevent difficulties regarding freezing the assets without initiating substantive proceedings.[516] Despite the words "non-exclusive" or "asymmetrical" are not always found in a jurisdiction agreement, it is clear from the language and structure of most unilateral agreements that parties intended to specify exclusivity in favour of only one party.[517] An asymmetrical clause is not included in the scope of the HCCCA either.[518] Different national jurisdictions have shown unique approaches towards their interpretation[519]; the English courts have constantly demonstrated their inclination to give effect to the parties' autonomy and intention of the rational businessmen and enforced asymmetrical clauses. In practice, mandatory jurisdiction of the English court was upheld regardless of the non-exclusive nature of the jurisdiction agreement.[520]

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[514] The further perspective for the recognition of those judgments would be Article 5 of the HJC once it is ratified. Taking into account the application of both instruments only in the Contracting States and only in respect to the Contracting States, potential enforceability would be a matter for the national laws. Particularly Post-Brexit conflicts related to the enforcement and validity of those agreements are inevitable due to the existing and potential varieties between the national laws.

[515] For more related discussions see: Hartley/Dogauchi Report, para 249.

[516] Fentiman (n 3) 44.

[517] Ibid, 62.

[518] As comparison, unlike the BRR or its predecessor BIR, the Brussels Convention subsequent to exclusive jurisdiction agreements provided that if the agreement was concluded for the benefit of only one party, that party shall have the right to commence the proceedings at any other forum according to the jurisdictional rules of that Convention. See: Fentiman (n 3) 45.

[519] In *La Société Banque Privée Edmond de Rothschild Europe v Mme X* (11-26-022) 26 September 2012, the French Supreme Court held a unilateral optional agreement to be unenforceable due to the "potestative condition", lack of symmetry, imbalanced and unlimited optional character of the clause. In contrast, in *Apple Sales International v eBizcuss: Cass. 1ere Civ*, 7 October 2015, 14-16.898, the same court decided that as long as asymmetrical jurisdiction clauses comply with the foreseeability requirement, they are valid under French law and each party can identify the competent jurisdictions before commencement of the proceedings. For more on the discussion of these cases see: Keyes (n 355).

[520] *Perform Content Services Ltd v Ness Global Services Ltd* [2021] EWCA Civ 981.

In *Etihad*, the Commercial Court decided that an asymmetrical jurisdiction agreement was exclusive for the purposes of the BRR.[521] It was underlined that the issues should be determined not by applying labels but by identifying the parties' agreement.[522] This judgment affirmed the emphasis that has traditionally been placed on party autonomy, wide liberty, and flexibility that have been upheld in English law and practice. It reasserted a strong presumption of exclusivity and inclination towards the extensive interpretation of exclusive jurisdiction agreements.

The court reiterated its conclusion by emphasising the significance of the academic discussions. As stated by Fentiman, the agreement "is exclusive against a counterparty."[523] Similarly, Merrett argues that asymmetrical agreements should not be considered "as a whole," but each obligation could be considered separately.[524] In similar decisions, the courts highlighted the significance of the contractual bargain between the parties while enforcing asymmetrical jurisdiction agreements.[525]

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[521] Mr Justice Jacob concluded that general *lis pendens* rule was not applicable due to the existing unilateral formulation, therefore, the court first seized had to stay proceedings. The court determined that in spite of the asymmetrical nature of the jurisdiction clause it conferred exclusive jurisdiction to the English courts within the meaning of Article 31(2). See: *Etihad Airways PJSC v Flother* [2019] EWHC 3107 (The Court of Appeal dismissed the appeal in *Etihad Airways PJSC v Flother* [2020] EWCA Civ 1707 and confirmed the first instance decision that asymmetrical jurisdiction agreements are exclusive for the purposes of the BRR). See also: *BNP Paribas S.A. v Trattamento Rifiuti Metropolitan S.p.a.* [2019] EWHC Civ 868 per Hamblen LJ at [68(2)], at *Etihad* at [58], referring to established European and English law the court adopted "…a broad, purposive and commercially minded approach". The general assumption about the intention of the rational businessmen to avoid litigation in different jurisdictions was followed and general principles of the construction of the jurisdiction clauses were applied to the "overall agreement package", see: *Fiona Trust and Holding Corp v Privalov* [2007] UKHL 40 per Lord Hoffmann at [13], at *Etihad* at [60]; *Donohue v Armco* [2001] UKHL 64, *Fiona Trust Holding Corporation v Privalov* [2007] EWCA Civ 20*, Premium Nafta Products v Fili Shipping* [2007] UKHL 40.

[522] The court related this reasoning to the aims of the Recast Regulation. Recital 19 ensures party autonomy and Recital 22 states that there needs to be an exception to the general *lis pendens* rule to enhance effectiveness of exclusive jurisdiction agreements and to avoid abusive tactics. *Etihad*, at [183]; The judge also referred to similar cases where Article 31(2) was applied to asymmetrical jurisdiction agreements*: Codere SA v Perella Weinberg Partners and others*, Spanish Judgment of 10 February 2016; *Perella Weinberg Partners UK LLP & Anor v Codere SA* [2016] EWHC 1182 (Comm); *Commerzbank v Liquimar* [2017] EWHC 161 (Comm).

[523] Richard Fentiman in Ulrich Magnus and Peter Mankowski (eds), European Commentaries on Private International Law, Volume 1 (Sellier, 2015), 751-753.

[524] Merrett (n 456) 37.

[525] See: In *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd. & Sujana industries Ltd.* [2013] EWHC 1328 (Comm), the Commercial Court enforced an asymmetrical jurisdiction clause in a loan agreement which gave exclusive jurisdiction to the English courts on the side of a debtor, whereas not prevented the lender from bringing proceedings in any other courts. In *Commerzbank v Liquimar* [2017] EWHC 161 (Comm), the High Court (Cranston J) also concluded that an asymmetric jurisdiction clause cannot be treated as non-exclusive under Brussels I Recast. It was asserted that where a clause confers exclusive jurisdiction on the court or courts of a Member State when one party sues, the clause will still be an exclusive jurisdiction clause for the purposes of Article 31(2). That reasoning was in line with the related ECJ judgment in *Nikolaus Meeth v. Glacetal Sarl* [1979] CMLR 520, in which the Court asserted that the reciprocal clause was exclusive in effect even though which court had exclusive jurisdiction turned on which party sued. The court also addressed some contrary academic commentaries which were written prior to *Liquimar* and raised tentative views. See: Dicey, Morris and Collins (n 218) Fifth

The case law also highlighted the EU's accession to the HCCCA and building coherence with the BRR.[526] Furthermore, the court referred to the Hartley/Dogauchi Report, which proposed that there should be express wordings for explicit exclusion that 'Such an agreement must be exclusive irrespective of the party bringing the proceedings,' but it was not done.[527] Yet, it was explicitly noted that the HCCCA was not relevant to this scenario by excluding those types of agreements. Although Cranston J in *Commerzbank* alleged the existence of some good arguments showing that asymmetric jurisdiction clauses fall within the definition given to the exclusive jurisdiction clauses under Article 3(a) of the HCCCA, he did not go into more details. He submitted no further comments on this matter, stating the distinction between this issue and characterisation of jurisdiction clauses for the purposes of Article 31(2) of the Recast Regulation.[528]

Similar to Cranston J and Merrett, Jacobs J, in the first instance decision in *Etihad,* discussed divergences and overlaps between the HCCCA and BRR and highlighted that Council Decision[529] referred to the coherence of the instruments. It was stated that there were good arguments showing the application of the HCCCA to asymmetrical clauses. Yet, since the matters concerned applying the BRR rather than the HCCCA, the latter was not assessed further.[530]

On the other hand, LJ Henderson (Court of Appeal), having regard to the Hartley/Dogauchi Report, inferred that the HCCCA might not apply to asymmetrical jurisdiction clauses. Accordingly, 'It was agreed by the Diplomatic Session that, 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 [i.e., asymmetric agreements] are not exclusive choice of court agreements for the Convention'.[531] The absence of the *lis pendens* rules in the HCCCA might also

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Cumulative Supplement at 12R-098 – 12-101 and 12-157 – 12-163; Philip R Wood, *Conflict of Laws and International Finance* (2nd edn, Sweet & Maxwell, 2019) at paras 21-014-21-016; Andrew Dickinson and Eva Lein, *The Brussels I Recast* (Oxford University Press, 2015); Mukarrum Ahmed, *The Legal Regulation and Enforcement of Asymmetric Jurisdiction Agreements in the European Union* (2017), 28(3) European Business Law Review 403.

[526] *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc and another* [2017] EWHC 161 (Comm), [38].

[527] Ibid*,* [39].

[528] Cranston J. in *Commerzbank,* [71]-[74].

[529] EU Council Decision on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements, 4 December 2014, 2014/887/EU.

[530] *Etihad Airways PJSC v Flother* [2020] EWCA Civ 1707, [215]-[217].

[531] ibid, para 85. See also Hartley/Dogauchi Report, para 106.

be a significant point while interpreting its scope and exclusion of non-exclusive jurisdiction agreements.[532] LJ Henderson further noted that the BRR does not refer to the HCCCA. It does not have any express requirement about the consistent interpretation of the instruments but only a desirable general objective.

Considering the statements are obiter, and there has not been any ruling yet on the applicability of the HCCCA to asymmetrical jurisdiction agreements, the English courts might hold an assertive judgment. While deciding, they might refer to the academic commentary interpreting asymmetrical agreements exclusive. Mainly, the applicability of the HCCCA between the United Kingdom and the EU post-Brexit gives a proper sense of analogical interpretation of the treaty by the English courts. Yet, such a finding would not have any global application being solely of domestic importance.

4.2.1.6 Some other variations of jurisdiction agreements

A more complex form of those agreements is multi-tiered hybrid agreements, which may specify multiple options, from alternative dispute-resolution mechanisms (structured negotiation, mediation, expert determination) to arbitration or litigation upon the parties' needs.[533] Those types of dispute resolution clauses are often found in international financial contracts, particularly loan agreements giving parties a certain amount of flexibility and multiple alternatives for getting their disputes resolved. They are under the parties' objectives to avoid litigation; therefore, they typically define arbitration as a last resort for the resolution.[534] More precisely, optional clauses are usually restricted to either arbitration or litigation to avoid possible delays and uncertainties about when to resort to the higher tier.[535]

Despite recognising those clauses and holding no contradiction in giving one of the parties "better" rights than the other, the courts highlighted that parties should be careful in using them.[536] While drafting hybrid clauses, particular caution should be taken, and the parties should exercise greater certainty to prevent wasting time and expenses. Those clauses are entitled to specific enforcement mechanisms,

[532] ibid, para 87.
[533] Fentiman (n 3) 45.
[534] Ibid.
[535] *Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others* [2012] EWCA Civ 638; For *the related discussions see:* Fentiman (n 3) 45-46.
[536] *Law Debenture Trust Corporation plc v. Elektrim Finance BV and Others* [2005] 2 AER 476 para 46, per Mr Justice Mann referring to Mr Justice Morison (*NB Three Shipping,* para 11).

particularly under the common law, NYC, and BRR, unless both involved courts are not those of the European states, which bars anti-suit injunctions.[537] Nevertheless, the HCCCA does not apply to such agreements due to the absence of the exclusive nature, whereas the English courts have enforced them.[538]

Sometimes parties' relationship involves complex agreements. Such agreements may have different dispute resolution clauses being either exclusive or non-exclusive jurisdiction or arbitration agreements. In those cases, assessment of the scope of a jurisdiction clause which would assist in determining if that case falls into the scope of the HCCCA, necessitates contractual interpretation and defining parties' intentions.[539] Lord Collins of Mapesbury reasoned as follows:

> 'Whether a jurisdiction clause applies to a dispute is a question of construction. Where numerous jurisdiction agreements may overlap, the parties must be presumed to act commercially and not intend that similar claims should be the subject of inconsistent jurisdiction clauses… Where the parties have entered into

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[537] Assuming there would have been an exclusive English choice of court clause in the charterparty between West Tankers and Erg Petroli and if that case would have occurred after Brexit, English High Court would have been able to grant an anti-suit injunction against Italian judicial proceedings, taking out irrelevance of mutual trust principle to this scenario. See: *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* [2009] ECR I-00663 Case C-185/07; *Turner v Grovit, Harada Ltd and Changepoint SA* Case C-159/02.

[538] In *NB Three Shipping Ltd v. Harebell Shipping Ltd* [2005] 1 All ER (Comm) 200, Clause 47.02 of the charterparties between the owners and charterers stated that "The Courts of England shall have jurisdiction to settle any disputes which may arise out of or in connection with this Charterparty, but the owner shall have the option of bringing any dispute hereunder to arbitration". When the owner commenced arbitral proceedings and applied for a stay under Section 9(1) of Arbitration Act 1996, Mr Justice Morison at para 12, emphasised the commercial sense of the clause as a whole. He stated that the clause had both the litigation and arbitration streams and the arbitration stream satisfied the requirements of an arbitration agreement, since a one-sided choice of arbitration is sufficient. Furthermore, he noted the fundamental objectives of the 1996 Act, as to ensure the autonomy of the parties over their choice of forum. By refusing a stay in favour of arbitration, the court would indeed refuse their autonomy (There could be many arguments against this conclusion: On the one hand, it gives prevailing position to the banks or borrowers over the other party, which could be bring abuse of process. On the other hand, while drafting the reasonable commercial parties and businessmen should bear in mind this unique feature of such clauses and the potential for parallel proceedings. This discussion is out of the scope of this research).
The hybrid clause in *Law Debenture Trust Corporation plc v. Elektrim Finance BV and Others* [2005] 2 AER 476, mirrored the one in *NB Three Shipping*, giving the parties a right to submit to arbitration with the exclusive benefit of the Trustee and each of the Bondholders to apply to the courts of England, who shall have non-exclusive jurisdiction by Clause 29. Mr Justice Mann confirmed the right of the Trustee to proceed with the litigation and stated that if he had started or participated in arbitral proceedings, earlier then his rights to go to the litigation would have been waived. See also: *Deutsche Bank AG v Tongkah Harbour Public Co Ltd; Deutsche Bank AG v Tungkum Ltd* [2011] EWHC 2251 (QB)**,** *PT Thiess Contractors Indonesia v PT Kaltim Prima Coal and another*[2011] EWHC 1842 (Comm).

[539] *Satyam Computer Services Ltd v Upaid Systems Ltd* [2008] EWCA Civ 487, [2008] 2 All ER (Comm) 465, at [93]; *UBS Securities LLC v HSH Nordbank AG* [2009] EWCA Civ 585 at para 83.

a complex transaction, the jurisdiction clauses in the agreements are at the commercial centre of the transaction'.[540]

There could be some more variations in the form of floating or conflicting clauses that are not exclusive and, therefore, outside the scope of the HCCCA.[541] Unilateral optional agreements are more controversial as they give one party an option to choose a forum. In contrast, non-uniquely exclusive agreements are more unusual, nominating more than one court with exclusive jurisdiction at least for one or both parties.[542] They conclude that theoretical and practical controversies related to those agreements evidence that drafting parties should be cautious enough about their legitimacy, effectiveness, and operation.[543] Indeed, the first type of agreement reminds asymmetrical agreements and might be included in the scope of the HCCCA (by the English courts).[544]

4.2.2 Choice of court agreements: Formal validity

Validity encompasses all issues influencing the binding force of an agreement.[545] For the existence of a legally binding agreement, parties must show that they have reached it by a mutual acceptance and offer. Moreover, consideration must be satisfied, and there must be parties' intention to establish a legal relationship. All of these factors should be in line with the form requirements.[546]

According to the HCCCA, an exclusive choice of court agreement must be concluded or documented in writing or by any other means of communication that renders information accessible so as to be usable for subsequent reference.[547] While the HCCCA does not expressly mention electronic agreements, it covers electronic means

[540] *UBS Securities LLC v HSH Nordbank AG* [2009] EWCA Civ 585, at para 95; Similar decision was concluded in *Sebastian Holdings Inc v Deutsche Bank AG* [2010] EWCA Civ 998.
[541] See: Adrian Briggs, "The Validity of 'Floating' Choice of Law and Jurisdiction Clauses" [1986] 4 Lloyd's Maritime and Commercial Law Quarterly 508; Andrew Beck, "Floating Choice of Law Clauses" [1987] 4 Lloyd's Maritime and Commercial Law Quarterly 523; Fentiman (n 3) at 58.
[542] Keyes and Marshall (n 446) 346.
[543] Keyes and Marshall (n 446) 378.
[544] Analogically as the English courts interpreted the Brussels Recast Regulation in *Liquimar* and *Etihad*.
[545] Matthias Weller, "Choice of court agreements under Brussels I a and under The Hague convention: coherences and clashes", (2017), 13(1) Journal of Private International Law, 91, 98.
[546] For more on formation and validity of the agreements see: Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (Oxford University Press, 2010).
[547] Ibid.

of data transmission or storage such as email, fax, or any other typical possibilities, holding the data retrievable so that it can be referred to and understood on future occasions.[548] The agreement not complying with form requirements is excluded from the scope of the HCCCA due to the lack of formal validity. National law cannot specify any further validity requirements. The agreement's effectiveness could not be refused due to being written in a foreign language, in a bold type, or not signed.[549] No signature is needed as long as an agreement is in writing and consent is established, although it might ease proving the existence of an agreement.[550] Formal validity rules might empower considerable uncertainties, particularly with the presumption of exclusivity.

The HCCCA does not include the phrase 'evidenced in writing' to prevent any impression that it constituted a rule of evidence.[551] Similar to the EU law, form requirements of the HCCCA execute double functions by ensuring parties' consent and providing evidence for such consent.[552] Consent of the parties is protected '…by avoiding jurisdiction clauses…going unnoticed'.[553] On the other hand, compliance with formal requirements would present consent in the courtroom, 'advancing the aim of securing legal certainty by making it possible to foresee which court will have jurisdiction reliably….'[554]

Brand differentiates consent, existence, scope, formal and substantive validity of a jurisdiction or forum selection agreement.[555] The existence of the parties' choice is far more complicated than it appears".[556] Regarding the HCCCA, it is claimed that the

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[548] Hartley/Dogauchi Report, para 112; UNCITRAL Model Law on Electronic Commerce 1996, Art. 6(1).
[549] See Hartley/Dogauchi Report, para 110; Dickinson and Lein (n 523) 286; *Elefanten Schuh GmbH v Jacqmain* [1981] ECR 1671, [26]-[27], *Transporti Casteletti Spedizioni Internationali SpA v Hugo Trumpy SpA* [1999] ECR I-1597 [52]; considering the HCCCA is also part of the EU law, case law of the CJEU on the provisions of the Brussels regime would be relevant here, as long as there is an overlap with the HCCCA.
[550] Hartley-Dogauchi Report, para 112.
[551] See: Hartley/Dogauchi Report, para 113. In contrast, according to Article 25.1(a) of the Recast Regulation, a jurisdiction agreement shall be in writing or evidenced in writing. Similarly, the NYC also has a provision requiring an arbitration agreement to be in writing. See NYC, Article II(1). For more discussions see thesis, Chapter 6.
[552] Dickinson and Lein (n 523) 286.
[553] *Transporti Casteletti Spedizioni Internationali SpA v Hugo Trumpy SpA* [1999] ECR I-1597, at [19].
[554] ibid. See also: *Deutsche Bank AG v Asia Pasific Broadband Wireless Communications Inc* [2008] EWCA Civ 1091; Dickinson and Lein (n 523) 287.
[555] Ronald A. Brand, "Consent, Validity and Choice of Forum Agreements in International Contracts" in LIBER AMICORUM HUBERT BOCKEN I, Ingrid Boone, Ignace Claeys, Luc Lavrysen (eds.), (Die Keure, 2009) University of Pittsburgh Legal Studies Research Paper No. 2009-35, 541, 550.
[556] Zheng Sophia Tang, "The Interrelationship of European Jurisdiction and Choice of Law in Contract" [2008] 4 *Journal of Private International Law* 35, 41; Tena Ratković and Dora Zgrabljić Rotar, "Choice-of-Court Agreements under the Brussels I Regulation (Recast)" (2013), 9(2) Journal of Private International Law, 260.

presence of a jurisdiction agreement does not fall within the scope of formal or substantive validity.[557] In contrast, according to the Hartley/Dougauchi Report, existence and consent are included in the definition of substantive validity.[558] Indeed, an agreement satisfying form requirements does not necessarily bring valid consent, particularly upon undue influence, misuse or illegality. Satisfaction of formal requirements makes an agreement both formally valid and further demonstrates the existence of consent, whereas contracting parties' intention makes an agreement materially valid. As stated by the court, 'the sole purpose for requiring the agreement as to jurisdiction to be or evidenced in writing is so that there is clear proof of that agreement'[559] and 'the agreement, or consensus, itself must be "clearly and precisely" demonstrated'[560] Comparing with English law, '…the existence or otherwise of the requisite agreement must be decided objectively regardless of what either or both parties thought they were agreeing to'.[561]

4.2.3 Choice of court agreements: Substantive validity and separability

The HCCCA entitles the law of the chosen court to determine the substantive validity of a jurisdiction agreement.[562] If an agreement is null or void under the law of the chosen court, that court shall not have jurisdiction. According to the Hartley/Dogauchi Report, 'the null and void' provision applies only to substantive (not formal) grounds of invalidity. It is intended to refer to generally recognised grounds like fraud, mistake, misrepresentation, duress, and lack of capacity.[563] It does not qualify, or detract from the form requirements[564], which define the choice of court agreements covered by the HCCCA and leave no room for national law as far as form is concerned".[565] However,

[557] Brand and Herrup (n 275) 79.
[558] Hartley/Dogauchi Report, para 94.
[559] *Iveco v Van Hool* [1986] ECR 1851, para 5.
[560] *Salotti v Ruwa* [1976] ECR 1832, para 7.
[561] *R + V Versicherung Ag V Robertson & Co Sa* [2016] EWHC 1243 (QB), per Judge Waksman QC, para 7.
Despite decided on the basis of the Lugano Convention, considering the central notions of Article 23 of that Convention are almost the same as the objectives of the HCCCA and provisions on choice of court agreements, the following conclusions arrived by the court could be compared in respect to the issues discussed here.
[562] *HCCCA,* Articles 5-6 and 9.
[563] The Convention differentiates nullity and avoidance of the agreement from the ground of lack of the capacity of a party to conclude an agreement. See: HCCCA, Articles 6(a) and 6(b).
[564] HCCCA, Article 3(c).
[565] Hartley/Dogauchi Report, para 126.

as stated above, a contract should satisfy proper form requirements to be valid and effective. If a jurisdiction agreement does not meet form requirements, it is void, null, and ineffective. 'Law of the State' as referred to by the HCCCA[566] covers conflict of laws rules of that State.

On the other hand, the lack of capacity of a party to agree with part of the substantive validity is a matter for the law of both the State of the court seised and requested State.[567] Some authors contend that the HCCCA ensures an entire system of rules to define if there is an exclusive choice of court agreement for its purposes.[568] However, it does not provide comprehensive guidance on nullity and voidance except formal requirements.[569] Formal validity is determined in the text, whereas substantive validity, including capacity issues, are left to different laws. On the one hand, it could be an intention of the drafters to provide predictability by determination of validity by the chosen court according to its rules. Surely there could be no other court more familiar with the law of the State of the chosen court than itself. On the other hand, this argument is not one-legged due to the particularities of each national law and the possibilities of conflicts that might jeopardise party autonomy and certainty objectives. Brand and Herrup remarked it as follows:

> 'While the Hague Convention's approach on the validity issue may appear to provide greater predictability, it also forces courts more often to engage in the application of foreign law (including foreign conflicts rules). In addition, the blanket subordination of state interests to a private agreement (especially the interests of a state whose courts are asked to recognise and enforce a judgment) may expand the public policy exception in ways that cut against the general thrust of the Convention. Whether this is an improvement on the New York Convention will not be entirely clear until courts have had the opportunity to demonstrate its application'.[570]

A court might interpret public policy widely to justify the ineffectiveness of a choice of court agreement. Therefore, to ensure predictability and solid protection of jurisdiction

[566] HCCCA, Articles 5(1), 6(a) and 9(a).
[567] HCCCA, Articles 6(b) and 9(b).
[568] Ahmed and Beaumont (n 405) 394.
[569] HCCCA, Article 3(c).
[570] Brand and Herrup (n 275) 47.

agreements, there should be a careful drafting process, and lawyers should be contentious while choosing the venue whose law would determine the validity; suitable wording should be used to place their clients at best possible place.[571] As stated by the Court, '…in each case, the court must construe the language of the contract in the context of its commercial background and ask itself whether a consensus on the subject matter of the jurisdiction clauses is clearly and precisely demonstrated."[572]
While differentiating the existence and effectiveness of a choice of court agreement, Brand defines that an agreement cannot exist or be effective or valid without mutual consent.[573] While parties' consent is the basis of the existence of an agreement, validity counts for its effectiveness.[574] This distinction in the application of the HCCCA to the questions of consent and validity has been described as follows:

> 'Although the Convention includes an autonomous choice of law rule on the question of validity, found in Articles 5(1), 6(a), and 9(a), such a determination may not be made until there exists an agreement, and an agreement will not exist absent consent of the parties. The Convention thus leaves the matter of consent to the law of the forum. This fact necessitates a clear understanding of the distinction between validity and consent. Questions of validity and consent often overlap in substantive contract law. Consent deals with whether there is a meeting of the minds such that an agreement has been formed, and it is the parties' intent that should be determinative.
>
> On the other hand, the validity deals with state interests and limitations on the ability of private parties to enter into agreements that the state will recognise. Such restrictions may be based on the subject matter of the obligations assumed or on the status of the parties. It is an issue of state interests – the question of validity – that is the subject of the autonomous choice of law rule found in Articles 5(1), 6(a) and 9(a) of the Convention'.[575]

[571] For more see: Brand (n 552) 552-553; *Deutsche Bank AG v Comune Di Savona* [2018] EWCA Civ 1740.
[572] Moore-Bick J reached a similar view in *AIG Europe v QBE Internationa*l [2001] 2 Lloyds 268, para 26.
[573] Brand (n 553) 542-543.
[574] Ibid, 544 and 549.
[575] Brand and Herrup (n 275) 20.

Adding to all broadside, the HCCCA ensures protection of a choice of court agreement by stating its independence from the underlying contract in which it is contained. Invalidity or nullity of the substantive contract does not affect the validity of a jurisdiction clause.[576] It is similar to the basic principle of international arbitration, called autonomy, separability, or severability of the arbitration clause.[577]

Moreover, while a valid jurisdiction agreement is effective for contracting parties, it may also bind third parties who have not expressly consented to it but got involved in the proceedings and taken over the rights and obligations of either party. The latter is the case under the HCCCA; however, national law of the chosen court regulates the related issues.[578] For example, Party A, who resides in France, sells goods to Party B, a resident in Singapore. The sale of goods agreement has a French exclusive jurisdiction clause. Upon delivery of the goods in Singapore, B sells them to C, a Singapore resident. The latter agreement does not contain any jurisdiction clause. C sues B in Singapore, claiming the goods are defective. If the Singaporean law allows, C could also sue A in the courts of Singapore. Nevertheless, if C sues B and then wishes to join A as a third party, French courts would have exclusive jurisdiction owing to the valid choice of court agreement between Party A and Party B. If the Singaporean court has already seised of action, it has to dismiss or stay the proceedings according to the HCCCA.[579]

4.2.4 Material scope of the HCCCA

4.2.4.1 International cases

[576] HCCCA, Article 3(d).

[577] Firstly, established in England in *Heyman v Darwins Ltd* [1942] App Cas 356, the doctrine was codified in Section 7 of the Arbitration Act 1996, Article 23.2 of the LCIA Rules 2014, Article 6(9) of the ICC Rules 2017 (ICC was the first arbitral institution recognizing separability of the arbitration agreement in 1955), Article 21(2) of the UNCITRAL Arbitration Rules 1976, Article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration 1985. For more see: Born (n 129). English position is the same, see: *Deutsche Bank AG v Asia Pacific Broadband Wireless Communications Inc* [2008] EWCA Civ 1091; *Sea Master Shipping Inc V Arab Bank (Switzerland) Ltd* [2018] EWHC 1902 (Comm); The Recast Regulation also has this principle in Article 25(5), See: *Benincasa v Dentalkit Srl (C-269/95)* (1997) ECR I-3767. See: Chapter 6.

[578] Hartley/Dogauchi Report, para 97.

[579] See: HCCCA, Article 6. See also: Hartley-Dogauchi Report, para 143. This is also the case under the Brussels regime and English law. See: *Php Tobacco Carib Sarl V Bat Caribbean Sa (2016)* [2016] EWHC 3377 (Comm); R + V Versicherung Ag V Robertson & Co Sa (2016) [2016] Ewhc 1243 (Qb); *Aspen Underwriting Ltd (As The Sole Underwriting Member Of Lloyd's Syndicate 4711 For The 2012 Year Of Account) & Ors V Credit Europe Bank Nv* [2020] UKSC 11.

The HCCCA applies to exclusive choice of court agreements concluded in international civil and commercial matters.[580] It differentiates the meaning of "international case" for jurisdiction and recognition and enforcement purposes. Determination of whether the case is "international" depends upon whether there are proceedings involving the exercise of jurisdiction over a dispute or recognition or enforcement of a judgment given by the chosen court.[581]

For jurisdiction purposes, a case is international where parties are residents in the different Contracting States and their relationship and elements relevant to the dispute other than the location of the court are connected with another State.[582] It means that unless all case elements are concerning one Contracting State, the case is international.[583] Suppose parties who are residents in the Contracting States conclude an agreement nominating a court of another Contracting State. In that case, the HCCCA comes into play unless all other elements of the dispute are connected with the latter or only the location of the chosen court. In other words, the choice of a foreign court alone in a domestic case is not sufficient to make it international.[584] "Relationship of the parties" and "all other elements relevant to the dispute" as used in the HCCCA will be defined by the national laws rather than the HCCCA.[585] It is another point of criticism, which would bring uncertainties due to the differences between domestic laws. Therefore, defining those notions in Article 1 or additional protocols would bring certainty while the HCCCA applies.

If a Dutch seller and an Italian buyer conclude an exclusive English jurisdiction agreement, that would be an international case for the purposes of the HCCCA.[586] However, suppose a Dutch seller and a Dutch buyer in their sale of goods agreement indicate dispatching the goods from the seller's warehouse in Rotterdam to the buyer. In that case, the case might be considered domestic, notwithstanding an exclusive

[580] HCCCA, Article 1(1).
[581] Guy S. Lipe; Timothy J. Tyler, "The Hague Convention on Choice of Court Agreements: Creating Room for Choice in International Cases" [2010], 33(1) Houston Journal of International Law, 15.
[582] HCCCA, Article 1(2). The Hague Conference employed a similar approach also in the Hague Principles on Choice of Law in International Commercial Contracts 2015 about their applicability to international contracts. According to the Principles, the contract is "international" unless establishments of the parties are in the same State and their relationship and all other relevant elements are connected only with that State notwithstanding the chosen law. See: Hague Principles on Choice of Law in International Commercial Contracts 2015, Preamble and Article 1(1) and 1(2).
[583] Brand and Herrup (n 275) 16.
[584] Hartley/Dogauchi Report, para 11.
[585] Ibid, para 51.
[586] If the same parties would non-exclusively designate the English court that case would be international falling into the scope of the HJC rather than the HCCCA, see: HJC, Article 5.1(m).

designation of the English court. Relevant to this point, Contracting States have an authority to declare that their courts may refuse seising on disputes to which an exclusive choice of court agreement applies. Still, there is no connecting factor between that State and the parties or dispute other than the location of the chosen court.[587] This option will be used by the states which want to prevent state expenditure on disputes involving foreign parties without any connection with the forum.[588] Adding to this potential advantage states that desire to grow their courts' international reputation by encouraging litigation will benefit from this option.[589] Nevertheless, it risks the objective of choosing a neutral venue, which is usually the primary goal of the parties. Moreover, this also enables the application of *forum non conveniens* regardless of its prohibition by the HCCCA.

Furthermore, a domestic case for jurisdictional purposes might become international regarding recognition and enforcement once 'a judgment is brought across a border'.[590] This was a deliberate course of action for extending the recognition and enforcement policy of the HCCCA.[591] According to the HCCCA, a case is international where recognition or enforcement of a foreign judgment is sought.[592] More precisely, the only requirement to make a case international is a judgment rendered by a court of another Contracting State for recognition or enforcement purposes.[593] In an example illustrated above, if a Dutch court renders a judgment in favour of the buyer who alleges a breach of the sale contract and the latter goes to the English court to recognise and enforce that judgment, the case would fall into the scope of the HCCCA.[594]

It should also be considered that for a judgment to get recognised and enforced under the HCCCA, it should be rendered by the exclusively chosen court in an international civil or commercial case.[595] Put differently, unless there is not "a Hague Convention judgment," the recognition and enforcement would not fall into the treaty's scope.

[587] HCCCA, Article 19.
[588] Brand and Herrup (n 275) 16.
[589] Ibid.
[590] Hartley/Dogauchi Report, para 53.
[591] Ibid.
[592] HCCCA, Article 1(3).
[593] Brand and Herrup (n 275) 16.
[594] Those presented examples and fact scenarios fall into the scope of the HCCCA only if the relevant States have acceded to it.
[595] Hartley/Dogauchi Report, para 54.

Therefore, if a French court is requested to recognise or enforce a judgment delivered by the Singaporean court that the parties chose, the HCCCA comes into play. On the contrary, in the case illustrated above, if a Dutch seller and a Dutch buyer conclude a sale agreement to dispatch the goods to the seller's warehouse in the Netherlands, yet the judgment held by the exclusively chosen English court might not be recognised and enforced under the HCCCA if that case would have been characterised as a domestic case.

In this regard, the HCCCA gives another option to the Contracting States to declare that courts of those states may refuse to recognise or enforce a judgment rendered by a court of another Contracting State where parties are resident in the requested State, and all elements of the dispute (including the relationship of the parties), other than the location of the court were connected only to that requested state.[596] The declaration options related to the definition of 'international' are based on the same principle, which considers the case domestic to the national legal system, approaching from two different ankles (jurisdiction and recognition/enforcement).

Judgments resulting from the cases that are not international for the recognition or enforcement purposes under the HCCCA or not rendered by the exclusively designated court could still get recognised or enforced according to the HJC as long as there is an international case within the meaning of the latter instrument, the grounds for recognition or enforcement exist, and there is not any reason for refusal.[597] Those judgments that are not international under either instrument would still be recognised or enforced under the domestic laws of the Contracting States. Nevertheless, that might potentially be insufficient for the prevailing party in whose favour the judgment was rendered and would not give any guarantee for the execution by the defendant, mainly when the assets are abroad.

[596] HCCCA, Article 20.

[597] See: HJC, Article 5-7. Furthermore, although the HJC does not expressly indicate the definition of international cases as the HCCCA does, yet it states application to the recognition and enforcement in one Contracting State of a judgment given by a court of another Contracting State. Similar to Article 20 of the HCCCA, the HJC also gives an option to the Contracting States to declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if parties were resident in the requested State, and their relationship and all other elements relevant to the dispute, rather than the location of the court of origin, were connected only with that requested State. In other words, the HJC implies that it does not regulate recognition and enforcement of domestic judgments and does not apply when a Contracting State makes a relevant declaration. On the other hand, unlike the HCCCA, the HJC includes a provision on the recognition or enforcement of judgments under the national laws. See: HJC, Articles 16 and 18.

4.2.4.2 Civil and commercial cases

The HCCCA applies only to civil or commercial matters.[598] There is no definition of this term in its text. In contrast, the Hartley/Dogauchi Report states:

> 'Civil or commercial matters" have an autonomous meaning: it does not entail a reference to national law or other instruments…It is primarily intended to exclude public law and criminal law. The reason for using the word "commercial" as well as "civil" is that in some legal systems, "civil" and "commercial" are regarded as separate and mutually exclusive categories'.[599]

In the cases where a State or State agency acts with commercial capacity, as said, *iure gestionis* also fall into the scope of the HCCCA in contrast to *iure imprerii* as government (public) acts.[600] The subject matter of the dispute in which a foreign state is involved is commercial in nature; reservations arising out of state immunity should not apply.[601] The case where there was an agreement for the sale of sugar between the Cuban state enterprise and private company based in Chile containing an exclusive choice of court agreement and the letter of credit showed payment to be made in U.S. dollars would fall into the scope of the HCCCA.[602]
However, not all of the civil or commercial matters fall into the scope of the HCCCA.

[598] HCCCA, Article 1(1).
[599] Hartley/Dogauchi Report, para 49.
[600] HCCCA, Article 2(5); Loon (n 167) 18. The United Nations Convention on Jurisdictional Immunities of States and Their Property 2004, Article 10-16 represent some options of the States for engaging in commercial transactions with a foreign natural or juridical person and by virtue of the applicable rules of PIL.
[601] Keyes (n 354) 61.
[602] This hypothetical example supposes application of the HCCCA and satisfaction of all other requirements. In *Playa Larga v Congreso del Partido* [1983] 1 AC 244, Lord Wilberforce took a contextual approach and stated that while negotiating the initial transactions the Republic of Cuba had acted as the owner of the ship, rather than an independent sovereign state, therefore a political decision not to deliver the cargo could not affect the outcome and therefore Cuba could not be granted immunity. In regard to this case E.K commented that when it comes to restrictive immunity, "that once a trader, always a trader", that is why the judge followed the purpose test not result test; For more see: Keyes (n 355) 61-63. A similar conclusion was reached by the Chancery Division Patents Court in *Chugai Pharmaceutical Co. Ltd (a company existing under the laws of Japan) v UCB Pharma S.A. (a company existing under the laws of Belgium), Celltech R&D Limited (a company existing under the laws of England and Wales) Chugai Pharmaceutical Co. Ltd. (a company existing under the laws of Japan) v UCB Biopharma SPRL (a company existing under the laws of Belgium)* [2017] EWHC 1216 (Pat)and it was held that the act of state doctrine relating to the sovereign acts of a foreign state did not apply to a contractual dispute concerning the payment of royalties. Though this case would not have fallen into the scope of the HCCCA, due to the exclusion of intellectual property.

According to Brand and Herrup[603], the exclusions consist of the agreements falling outside the HCCCA[604] and subject matter cases, which are closely connected to a state or raise particular concerns in cross-border commerce.[605] Those matters can be classified into three different frames:

- The contracts having vulnerable parties – consumer and employment contracts are excluded from the scope.[606] Similar to the Hague Principles and HJC, the HCCCA applies only to commercial issues between parties with comparable bargaining power[607] , aligning with the spirit of 'promoting international trade and investment.'[608]
- Some exclusions are based on the nature of the subject matter.[609] A number of them are of particular governmental interests and not civil or commercial in a business-related sense.[610] Some are subject to particular treaties and special procedural rules other than typical contentious litigation. [611] Other exclusions are related to special national, regional, or international laws acknowledging exclusive jurisdiction for those matters or governmental interests.[612]
- Validity of intellectual property rights and infringement proceedings do not cause any breach of a contract and emerge out of the act of the State; therefore,

[603] Brand and Herrup (n 275) 18
[604] HCCCA, Article 2(1).
[605] HCCCA, Article 2(2).
[606] HCCCA, Article 2. To compare, the BRR has specific provisions in relation to jurisdiction in consumer, employment and insurance matters for protection of weaker parties (Section 4-5). Furthermore, while the Regulation provides a protective regime regarding insurance matters (See: Recital 18-19, Section 3, Article 10-16), the HCCCA specifically stresses inclusion of the proceedings under a contract of insurance or reinsurance into its scope, despite those contracts could be related to a matter which is out of its scope (See: HCCCA, Article 17). To avoid any imbalance resulting from this disparity between the HCCCA and Recast Regulation, the EU and Denmark have made declarations based on Article 21 of the Convention, excluding choice of court agreements in respect of some insurance cases. Declaration is available at https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1044&disp=resdn.
[607] Loon (n 167) 18.
[608] HCCCA, Preamble. For more see: Nanda (n 233) 779-780.
[609] HCCCA, Article 2(2). Hans Van Loon categorises the exclusions as follows: a) Non-contractual matters: family law issues including succession and wills, insolvency, anti-trust matters, claims for injury of natural persons or damages to tangible property, rights in rem in immovable property, maritime issues, nuclear liability, and validity of entries in public registers; b) Particular contracts: carriage of passengers and goods, tenancies of immovable property. See Loon (n 167).
[610] Schulz (n 273) 247; See also: Ronald A. Brand, Introductory Note to the 2005 Hague Convention on Choice of Court Agreements, 44 I.L.M, (2005), 1291, at 1292.
[611] Schulz (n 274) 249.
[612] Brand (n. 608) 1292.

it cannot be an issue eligible for choice of court and party autonomy.[613] Notwithstanding the exclusion of intellectual property rights, the HCCCA covers proceedings on the validity and infringement of copyright and related matters.[614]

Furthermore, same as the BRR[615], the HCCCA expressly excludes arbitration[616] regulated by the NYC.[617] The HCCCA defines a "judgment" stating that an interim measure of protection does not fall into that category and is not governed by it.[618] Where any excluded matter 'arises merely as a preliminary question and not as an object of the proceedings'[619], the case falls into the scope of the HCCCA. Ultimately, instead of raising an excluded subject matter as a defence, the defendant may counterclaim. Since counterclaims have the same object as the original claim, they also fall outside the scope of the HCCCA.

According to Schulz, while the HCCCA's list of exclusions is longer than other treaties on civil and commercial matters, it has a great practical value.[620] In other words, since the HCCCA deals specifically with party autonomy and choice of court agreements, the best way to facilitate its practical use is to exclude the matters subject to the exclusive jurisdiction under specific instruments other than the national law.[621]

Additionally, any Contracting State may declare 'clearly and precisely' that it will not apply the HCCCA to a specific matter in which it has a strong interest.[622] This declaration should not be 'broader than necessary' and should apply reciprocally.[623] On the one hand, this option might substantially narrow the scope of application of the HCCCA unless there is a proper mechanism to assess if the exclusion is reasonable and necessary. On the other hand, considering the accessions to the HCCCA have

[613]However, licensing agreements fall into the scope of the HCCCA. See Loon (n 167) 19.
[614] HCCCA, Articles 2(2)(n) and 2(2)(o). For more on the discussion of the exclusions see: Brand and Herrup (n 275) 67-70.
[615] BRR, Article 1(d).
[616] HCCCA, Article 2(4).
[617] Arbitration exclusion.
[618] HCCCA, Article 4(1); Article 7.
[619] HCCCA, Article 2(3).
[620] Schulz (n 273) 249.
[621] A Asif Rashid, "The Hague Convention on Choice of Court Agreements 2005: An Overview" (2005), 45(4) Indian Journal of International Law, 558, 599; referred by Schulz (n 273) 249.
[622] HCCCA, Article 21.
[623] Ibid.

been subject to the declaration on insurance, Article 21 gives hopes about more ratifications.[624]

4.2.5 Parallel proceedings

The HCCCA does not include any express provision on parallel proceedings. It neither authorises the application of *forum non conveniens*[625] nor regulates *lis pendens*. Discretionary stay or dismissal is often granted, weighing up all relevant factors in a particular case, and applies irrespective of whether or not proceedings have already been commenced in another court; however, it could be a factor to be considered.[626] Such stays are not granted under the HCCCA even if it is acceptable in national law of a Contracting State. As part of the first fundamental principle of the HCCCA, a chosen court is not allowed to decline its jurisdiction on the ground that the dispute should be decided in a court of another State.[627] Further, while the BRR includes *lis pendens* rules, the HCCCA, same as the NYC, does not contain any specific provisions on multiple proceedings except those requiring the seised court to stay or dismiss the proceedings in favour of the designated court or arbitral tribunal.[628]
Indeed, the HCCCA practically opens doors for *forum non conveniens* through optional declarations.[629] A State may declare that its courts may refuse to determine disputes to which an exclusive jurisdiction agreement applies if there is no connection between

[624] The EU, UK and Denmark declared not to apply the HCCCA to insurance matters.
[625] The common law doctrine, *forum non conveniens* (known as "forum not agreeing" in Latin), gives a discretionary power to the court to dismiss the proceedings in favour of the forum which is more appropriate for the parties than any other. The doctrine with its roots in early Scottish law was expressly acknowledged in the United States in *Gulf Oil Corp. v. Gilbert* 330 U.S. 501, 504 (1947) where the district court dismissed a tort action in New York which was based on the facts occurring in Virginia. The House of Lords further established the two-part *Spiliada* test of the presence of an adequate alternate *forum* and balance between private and public interest factors for pursuit of the action and securing the ends of justice. See: *Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada)* [1987] 1 Lloyd's Rep 1; [1987] AC 460. Following, the *Spiliada* test was adopted by the Canadian Supreme Court, Singaporean courts *in the course of the doctrine of international comity.* See: *Amchem Products Inc v British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, For more discussion see: James J. Fawcett (ed.), *Declining Jurisdiction in Private International Law* (Oxford University Press, 1995) 124-127; *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391; *Reecon Wolf* [2012] SGHC 22. Yet, the doctrine is not exclusive only to the common law nations. See: **Mohamed Goush Marikan and Syed Isa Bin Mohamed Alhabshee**, "*Forum non conveniens* revisited - a strong stance on international comity", 29 February 2012, <https://www.lexology.com/commentary/shipping-transport/singapore/oon-bazul-llp/forum-non-conveniens-revisited-a-strong-stance-on-international-comity> accessed 26 November 2021.
[626] Hartley/Dogauchi Report, para 132.
[627] HCCCA, Article 5(2).
[628] BRR, Articles 29-34; NYC Article II. For the relevant discussions see: Chapter 5-6.
[629] HCCCA, Article 19.

that State and the parties or dispute except for the location of the chosen court.[630] Therefore, if a court considers that it has no connection with the parties or dispute, it may refuse to take jurisdiction as an inappropriate forum.[631] While the reversed *lis pendens* rules of the BRR was the impact of the HCCCA on the EU rules and intended to achieve alignment between the regimes before the EU's accession, the HCCCA does not regulate parallel proceedings. If the cases[632] decided under the previous BIR had been brought under the HCCCA, the exclusively designated court would have had jurisdiction, and any other court would have had to stay or dismiss the proceedings unless there would have existed particular reasons not to.[633] On the other hand, there is no specific provision in the HCCCA applicable to scenarios where there are parallel proceedings at the chosen court and court seised.

The Hague Convention 1971 was about to regulate *forum non conveniens* and *lis pendens*. It stated that the rules would not apply if parties concluded an exclusive choice of forum agreement.[634] The 2001 Interim Text also included similar compromises on matters related to declining jurisdiction.[635] Accordingly, the court second seised could continue the proceedings provided the first seised court could not process within a reasonable time,[636] but that approach was rejected. It intended to fix the *Gasser* problem arising under the BIR. Furthermore, *forum non conveniens* rules were provided subject to certain limitations, one of which was an exclusive jurisdiction agreement concluded by the parties.[637] The text offered a possible balance between

[630] HCCCA, Article 19.

[631] The Brussels regime likewise disables *forum non conveniens*, however, unlike the HCCCA, it includes *lis pendens* rules aiming at predictability and uniformity with the main principles of mutual trust and comity. See: Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Recital 16, 17; Regulation (EU) No 1215/2012 of the European Parliament and of Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), Recital 26; For more see: Evelien Brouwer and Damien Gerard, Mapping mutual trust: Understanding and framing the role of mutual trust in EU law, European University Institute, Max Weber Programme, EUI Working Paper 2016/13. See also Joel R. Paul, "The Transformation of International Comity" (2008), 71(19) Duke Law and Contemporary Problems, 19.

[632] *Turner v Grovit C-159/02; Erich Gasser GmbH v. MISAT Srl* C-116*/02.* For more discussions see: Chapter 5.

[633] HCCCA, Article 5-6.

[634] For more see Ronald A. Brand, "Comparative Forum Non Conveniens and the Hague Judgments Convention" (2002), 37 Texas International Law Journal, University of Pittsburgh Legal Studies Research Paper Series, 467.

[635] Permanent Bureau, Hague Conference on Private International Law, Commission II, Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6–20 June 2001: Interim Text.

[636] 2001 Interim Text, Article 21.3.

[637] 2001 Interim Text, Article 21-22.

common and civil law doctrines of *forum non conveniens* and *lis pendens*.[638] However, the final text containing no other grounds of jurisdiction than an exclusive jurisdiction agreement excluded the application of both of those doctrines.

Since non-exclusive jurisdiction agreements bring the possibility of parallel proceedings and inconsistent judgments, the reason behind the lack of *lis pendens* rules in the HCCCA might relate to the fact that it does not apply to such designations except there is a particular declaration.[639] Yet, this does not exclude litigation tactics, potential parallel proceedings, and multiple judgments on the same or related cases and between the same parties. Upon absence of a specific provision on the parallel proceedings, the HCCCA obliges the chosen court to decide on the matter and any other court not chosen but seised to stay or dismiss the proceedings.[640] While these provisions are theoretically helpful, they are not practically capable of being an entire solution.[641]

On a related note, the HCCCA contains no rule on submission. During the negotiation processes, it was proposed to include submission to the scope of the project; nonetheless, the final text focused only on exclusive jurisdiction agreements.[642] It might be helpful and practical if the Explanatory report provided relevant guidance, mainly when there is a jurisdiction agreement and one of the parties enters an appearance in another jurisdiction.[643] Another possible way to avoid potential uncertainties could be to revise Article 6 of the HCCCA to cover such scenarios.[644] It

[638] Ronald A. Brand, "Challenges to *Forum Non Conveniens*" (2013), University of Pittsburgh Legal Studies Research Paper Series, Working Paper No 21,1003, 1034.

[639] Based on such a declaration, the recognition and enforcement of judgments given by a non-exclusively chosen court might be regulated by the Convention. See: HCCCA, Article 22.

[640] HCCCA, Article 5-6.

[641] For the related discussions see: Chapter 3.

[642] In its original "mixed" convention version, Arthur von Mehren proposed to establish jurisdictional grounds of the three categories. Besides approved and prohibited grounds of jurisdiction, there was a "grey area" consisting of all other grounds of jurisdiction. Due to a shortage of time, varieties between national jurisdictional rules and impacts of technological developments including internet, it was confirmed that this type of convention would not be realistic to achieve. Following, it was firstly decided to proceed working on a document including choice of court agreements in business-to-business cases, submission, defendant's forum, counterclaims, trusts, physical torts and some other possible grounds. Later, the scope of the document was narrowed to only choice of court agreements in commercial cases as to provide protection and support for the parties' choices and the resulting judgments similar to the rules laid down in the NYC in respect to arbitration agreements and the resulting awards. See: Hartley/Dogauchi Report, Preface. For the related discussions and history of the negotiations at the HCCH see thesis, Chapter 2.

[643] In comparison, BRR, Article 26 defines submission as one of the jurisdictional grounds.

[644] As will be explained further, due to the difficulties of altering the text of the Convention, the best way could be to negotiate additional Protocols which would be open for the ratification by the States.

is also likely that, in some instances, a court seised but not chosen could decide not to stay regarding public policy reasons.[645]

"Give-way" rules of the HCCCA concerning the relationship with other international instruments could regulate such cases.[646] The HCCCA does not affect the application of the EU rules if none of the parties is resident in a Contracting State that is not a Member State and regarding the recognition and enforcement of judgments between the Member States.[647] Accordingly, if party A, a resident in France and Party B, a resident in Spain, designate the Italian court in their contract, the BRR will apply as long as there is no incompatibility between the mechanisms. Suppose Party A, regardless of the jurisdiction agreement, enters an appearance before the French court as a defendant. In that case, the latter will have jurisdiction unless the appearance was entered to contest the jurisdiction or where any other court has exclusive jurisdiction over the property.[648] On the other hand, if Party A, a resident in France, concludes an English jurisdiction agreement with Party B, a resident in Singapore, and enters an appearance before a court of any other State, the HCCCA would become applicable to this case; however, it does not provide any ruling regarding submission which would bring the application of the national rules.

Inclusion of the specific rules applicable to the scenarios involving parallel proceedings, possible remedies for staying proceedings in breach of an exclusive jurisdiction agreement, similarly regulation of submission would have contributed to certainty and predictability.

4.2.6 Consequences of the breach of choice of court agreements in a nutshell

The nature of a jurisdiction agreement determines the consequences of a breach. While breaching exclusive jurisdiction agreements might result in a stay, grant of an anti-suit injunction, and damages, non-exclusive jurisdiction agreements do not render similar rights and protection to the parties.

[645] HCCCA, Article 6(c).
[646] HCCCA, Article 26.
[647] HCCCA, Article 26(6)(a)-(b).
[648] BRR, Articles 24 and 26. Same position will be applicable in the cases where Party A resident in France has a similar contract containing the English choice of court clause with Party B resident in the US, which is not a Contracting Party to the HCCCA, but only a signatory.

The HCCCA does not expressly state any consequences of breaching exclusive jurisdiction agreements except defining an obligation of the court seised to stay or dismiss the proceedings in favour of the chosen one.[649] It does not govern interim measures of protection, including anti-suit injunctions.[650] It neither demands the States to grant or refuse such an injunction nor determines their applicability or inadmissibility. During the discussions at the Sessions, the delegates submitted that the HCCCA did not restrain the national courts from issuing anti-suit injunctions.[651] The Hartley-Dogauchi Report also confirms that those measures help to achieve the objectives of the HCCCA and effectiveness of jurisdiction agreements; however, they do not fall into its scope. Indeed, such measures are not considered judgments within the meaning of the HCCCA.[652] Therefore, it is up to the Contracting States to grant anti-suit injunctions according to their domestic laws; recognition or enforcement of those measures also depends on national laws.[653] National law determines if any remedies or damages are granted besides the stay of the proceedings. Under English law, the *prima facie* rule is that proceedings brought in breach of an exclusive jurisdiction agreement should stay, and damages are granted.[654] Further, a court can grant an anti-suit injunction to avoid injustice, 'unreasonable or oppressive conduct by a plaintiff in a foreign jurisdiction' or tactical litigation that is without purpose, vexatious or oppressive.[655]

While anti-suit injunctions run against the mutual trust principle in the European judicial area, there is nothing in the HCCCA preventing the Contracting States from granting such measures. In contrast, the HCCCA is based on "a system of qualified or partial mutual trust," which makes us assume the successful application of anti-suit

[649] For the discussions about the second fundamental rule of the HCCCA see thesis, 3.3.4.2.
[650] HCCCA, Article 7.
[651] Paul R Beaumount (United Kingdom), Trevor C Hartley (co-Reporter), K Kovar (United States), David Bennett (Australia), Gottfried Musger (Austria). See: Minutes No 9 of the Second Commission Meeting of Monday 20 June 2005 in Proceedings of the Twentieth Session of the Hague Conference on Private International Law (Permanent Bureau of the Conference, Intersentia, 2010) 622, 623-624; Ahmed (n 460) 243.
[652] HCCCA, Article 7.
[653] Hartley/Dogauchi Report, para 160-162.
[654] Although in some cases it was held that there is a discretion of a court to permit such proceedings to continue, See: *The El Amria* [1981] 2 Lloyd's Rep. 119 (C.A.); *The Eleftheria* [1969] 1 Lloyd's Rep. 237, 242; *Donohue v. Armco Inc.* [2002] 1 Lloyd's Rep. 425, 432-433, [24].
[655] See: Senior Courts Act 1981, s.37(1); *Airbus Industrie GIE v Patel and others* [1999] 1 AC 119, 133; *Star Reefers Pool Inc v JFC Group Co Ltd* [2012] EWCA Civ 14, [40]; Clearlake Shipping Pte Ltd and (2) Guvnor Singapore Pte Ltd v Xiang Da Marine Pte Ltd [2019] EWHC 2284 (Comm). See also: R.Fentiman "Anti-suit injunctions" in Encyclopedia of Private International Law, Basedow, J., Rühl, G., Ferrari, F., & de Miguel Asensio, P. (eds.). (Edward Elgar Publishing, 2017), 79-85.

injunctions within its framework.[656] The English High Court restrained "vexatious/oppressive" Singaporean court proceedings which breached the English jurisdiction agreement.[657] Because both the UK and Singapore are the Contracting States, it is evident that the HCCCA would not restrain granting of such measures. On the other hand, since the HCCCA also has a status of the European law, courts might refer the question regarding the use of anti-suit injunctions to the CJEU. Most likely, the Court would not overrule an anti-suit injunction issued against a Non-EU State court if an exclusive jurisdiction agreement is breached.

In addition to the positive perspectives under the HCCCA, Brexit also holds convincing promises concerning the availability of anti-suit injunctions.[658] Suppose the recognition and enforcement of such measures are addressed to the laws of the EU Member States, regardless of the application of the HCCCA. In that case, courts might not give effect to them due to mutual trust or public policy grounds. Hence, the provision of party autonomy might get ineffective under the HCCCA.

Unlike exclusive jurisdiction agreements, much scepticism has been expressed in academia and practice about whether the non-exclusive choice of court clauses could be breached. Although non-exclusive jurisdiction agreements are excluded from its scope, there is a greater likelihood of characterisation of asymmetrical variations as exclusive within the meaning of the HCCCA. Therefore, it would be helpful to touch upon the consequences of breaching non-exclusive jurisdiction agreements briefly.

Traditionally, such designations have not counted for the stay of the proceedings in common law, albeit they have been considered an important basis of jurisdiction.[659] Fawcett alleged that since this type of agreement has no negative effects, courts generally will not grant any stay or anti-suit injunctions for the chosen court's favour; permission for service out of that jurisdiction will not be refused.[660] Accordingly, the court refused to apply the principles relevant to exclusive designations and their

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[656] Ahmed (n 460) 245; Jonathan Harris, "Agreements on Jurisdiction and Choice of Law: Where Next?" (2009) Lloyd's Maritime and Commercial Law Quarterly 537, 560; Trevor C Hartley, *Choice of Court Agreements under the European and International Instruments* (Oxford University Press, 2013), 98; Briggs (n 138) at 531-532; Fentiman (n 3) 98.

[657] *Clearlake Shipping Pte Ltd and (2) Guvnor Singapore Pte Ltd v Xiang Da Marine Pte Ltd* [2019] EWHC 2284 (Comm).

[658] Post-Brexit there would be nothing to prevent the courts of the United Kingdom as a Non-Member State to grant an anti-suit injunction against the judicial proceedings in any Member State and vice versa.

[659] Fawcett (n 449) 260.

[660] Ibid.

breach to non-exclusive jurisdiction agreements based on the irrelevance of their exceptional nature.[661] In contrast, Briggs argues that non-exclusive choice of court agreements could also be breached.[662] Relevantly, in *Perform Content Services Ltd v Ness Global Services Ltd*, which was decided under the BRR, the English court held that Article 25 of the BRR confers mandatory jurisdiction on the courts designated in an exclusive or non-exclusive jurisdiction agreement.[663]

In practice, more than being a jurisdictional ground, they have been contended to be one of the factors in assessing if *forum non conveniens* doctrine applies as a strong *prima facie* element showing the appropriateness of a forum.[664] Case law particularly emphasised that policy of the law must be litigating in the most appropriate forum.[665] This matter is also linked to the enforcement of those agreements, which brings a grant of a stay in favour of the non-exclusively chosen court by applying *forum non conveniens*.

Indeed, non-exclusive clauses express parties' will and hold a positive effect; therefore, they should be recognised by much more effective means than that of the discretionary common law doctrine. As stated by the court, a neutral form deliberately chosen but not connected to parties or their dispute should be respected even if not a convenient forum based on the factors determined in *Spiliada*.[666] In other words, factors determining *forum non conveniens* should not be overestimated, considering that parties to large commercial contracts who are usually rational and sophisticated businessmen would prefer impartiality to convenience. The same conclusion would be applicable, also when the designation is non-exclusive, since an implicit agreement is a strong *prima facie* case showing the appropriateness of a forum.[667]

The parties will act vexatiously and oppressively while pursuing parallel proceedings in a non-contractual court, although they have agreed on a non-exclusive choice, as long as there are no exceptional reasons that were not foreseeable at the time of

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[661] *E.D. & F. MAN Ship Ltd. v. Kvaerner Gibraltar Ltd (The "Rothnie")* [1996] 2 Lloyd's Rep. 206
[662] Briggs (n 138) 376.
[663] See: *Perform Content Services Ltd v Ness Global Services Ltd* [2021] EWCA Civ 981. The Court of Appeal dismissed an appeal.
[664] Keyes and Marshall (n 447) 363.
[665] *Highland Crusader Offshore Partners LP & Ors v Deutsche Bank AG & Anor* [2009] EWCA Civ 725, Burton J. para 40; *Du Pont v Agnew* [1987] 2 Lloyds Rep 585, Bingham LJ, 589.
[666] *Attock Cement Co. Ltd. v. Romanian Bank for Foreign Trade* (C.A.) [1989] 1 Lloyd's Rep. 572; [1989] 1 W.L.R. 1147
[667] *Berisford (S. & W.) Plc. v. New Hampshire Insurance Co.,* [1990] 1 Lloyd's Rep. 454; [1990] 2 Q.B. 631; *Egon Oldendorff v Liberia Corp* [1996] 1 Lloyd's Rep 380.

contracting.[668] This fact brings a justification for granting respective stays and anti-suit injunctions in favour of a non-exclusive designation upon apparent vexation or oppression resulting from parallel proceedings.

Both the English and US courts have favoured and given effect to selecting neutral fora notwithstanding inconvenience grounds.[669] Later cases also confirmed that a non-exclusive jurisdiction agreement could get breached, and construction of the clause is important in this respect.[670] Moreover, while deciding whether anti-suit injunctions in breach of non-exclusive jurisdiction agreements would be granted, the primary point should not be merely parallel proceedings in a non-chosen forum; besides considering them as vexatious or oppressive, there should be a strong case for a justification and unforeseeability at the time of drafting or other exceptional circumstances.[671] Relevantly, Raphael suggested that "where a non-exclusive jurisdiction clause does not indicate whether prior or subsequent parallel proceedings in a non-selected forum are permitted or prohibited, the best interpretation will usually be that, by drafting a non-exclusive jurisdiction clause, parties have anticipated and accepted the possibility of parallel proceedings, and as a result, only foreign proceedings which are vexatious and oppressive for some reason and independent of the mere presence of the non-exclusive clause will be restrained by injunction."[672] According to Waller LJ, parallel proceedings elsewhere upon commencement of the proceedings in the non-exclusively designated court could not be the parties' intention unless there was an exceptional reason for doing so.[673] Raphael opposed this statement in his book, noting the following:

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[668] *British Aerospace plc* v *Dee Howard Co* [1993] 1 Lloyd's Rep 368; *Mercury Communications Ltd v Communication Telesystems* International [1999] 2 AER 33.

[669] *Mackender v. Feldia A.G.* [1967] 2 Q.B. 590 and the judgment of Burger C.J. in *The Bremen v. Zapata Off-shore Co.* (1972) 407 U.S*; Attock Cement Co. Ltd. v. Romanian Bank for Foreign Trade* (C.A.) [1989] 1 Lloyd's Rep. 572; [1989] 1 W.L.R. 1147

[670] *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2002] EWCA Civ 1643. In contrast, according to the decision in *Royal Bank of Canada v* Cooperative *Centrale Raiffeisen-Boorenleenbank Binding Authority* [2004] EWCA Civ 7, if the agreement stipulates the rights of the parties to commence proceedings in any other forum than a particular one (England), that act will not count to a breach. For more on the discussion of the relevant issues see Ahmed (n 460) 59.

[671] *Highland Crusader Offshore Partners LP & Ors v Deutsche Bank AG & Anor* [2009] EWCA Civ 725, per Toulson LJ, paras 105-110; See also: *Amoco (UK) Exploration Company etc. and Others v. Teesside Gas Transportation Ltd and v. Imperial Chemical Industries Plc and others (Consolidated Appeals)* [2001] UKHL 18.

[672] Thomas Raphael, *The Anti-Suit Injunction* (Oxford University Press, 2008), para 9.12.

[673] *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2002] EWCA Civ 1643, [36].

> ‘This may go too far. If this reasoning were adopted concerning non-exclusive jurisdiction clauses in general, it would mean that non-exclusive clauses could be converted into something close to an exclusive jurisdiction clause by the simple expedient of commencing parallel proceedings in England soon after the commencement of the foreign proceedings….’

In the same way, North and Fawcett asserted that:

> ‘Where the agreement provides for the non-exclusive jurisdiction of the English courts, there is no breach of agreement in bringing proceedings abroad and therefore; an injunction will not be granted based on a breach of an agreement. However, if one party (A) by way of a pre-emptive strike seeks an injunction abroad whereby the other party (B) will be permanently restrained from making any demand under a contract (containing a non-exclusive English jurisdiction clause) in the hope of preventing B from starting proceedings in England, this is a breach of contract and vexatious. An injunction restraining A from continuing the proceedings abroad will then be granted based on vexation or oppression. Moreover, the nature of the jurisdiction clause may be such that, although not exclusive, it does not contemplate parallel proceedings, and pursuing proceedings abroad would be vexatious and oppressive. Normally, though, a non-exclusive jurisdiction agreement will contemplate the possibility of simultaneous trials in England and abroad and, if the trial is pursued abroad, there will be not only no breach of agreement but also no vexatious or oppressive conduct’.[674]

In *BNP*, Mr Justice Males refused to grant an anti-suit injunction against the ongoing New York proceedings since a breach of the non-exclusive English jurisdiction clause was not shown.[675] This case also implies that there would be no reason not to grant an anti-suit injunction if a breach could be shown.

Perceived uncertainties related to non-exclusive jurisdiction agreements are minimised in English common law by giving them effect comparable to those of

[674] Cheshire, North and Fawcett (n 213) 474.
[675] *BNP Paribas v Anchorage Capital and* others [2013] EWHC 3073 (Comm), [93].

exclusive jurisdiction agreements.[676] As the English judges have shown some disposition for interpreting the asymmetrical jurisdictional agreement to fall into the scope of the HCCCA, this discussion might have important relevance regarding the provision of the parties' autonomous choices and granting anti-suit measures.[677]

4.2.7 Recognition and enforcement of judgments

A judgment given by an exclusively chosen court of a Contracting State shall be recognised and enforced in any other Contracting State.[678] Recognition and enforcement of judgments between the Contracting States are limited to judgments given by exclusively chosen courts. A decision is given effect under the HCCCA provided that it is capable of recognition or enforcement in the "State of origin."[679] This provision differentiates recognition from enforcement. By recognition, a court gives legal effect to rights and obligations determined in the decision; in contrast, enforcement means a judgment debtor or defendant obeys his duties defined by the court.[680] For example, if the addressed court admits the validity of the judgment, it acts for recognition. If the court obliges the defendant to obey his duties set by the judgment, it acts for enforcement. The latter would probably be followed by specific measures, i.e., freezing injunctions or seisure of assets against the defendant not paying his debts.

Enforceability of the judgment may be suspended when there is a pending appeal, and a decision is being reviewed in the country of origin.[681] In other words, the English court would recognise and enforce the judgment given by the chosen German court as long as it has such effect in Germany. Adversely, the court to whom recognition or enforcement is addressed shall not review the judgment on the merits, as long as it was given by default.[682] Indeed, the latter contrasts with the earlier point. In principle, to ensure the judgment is valid and effective in the country of origin, it should be reviewed. For instance, if a judgment-creditor never contests the force of the German

[676] Fentiman (n 3) 45.
[677] For the discussion of the English position on asymmetrical jurisdiction agreements see thesis, 4.2.1.5.
[678] *HCCCA,* Article 8.
[679] *HCCCA,* Article 8(3).
[680] Hartley/Dogauchi Report, para 170.
[681] *HCCCA,* Article 8(4); Hartley/Dogauchi Report 172; *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018] SGHCR 8, para 11; Singapore's Choice of Court Agreements Act 2016, S. 15(2)
[682] Ibid.

judgment against the English judgment debtor but refers the matter to the English court, how would the latter be able to recognise and enforce that judgment without examining whether it has effect in the country of origin - Germany? Or suppose a judgment has been achieved due to fraud, mistake, or illegality, but there is no appeal against it. In that case, it could still get recognised or enforced in another country, and the court addressed would not be able not to give effect or have a review of the merits. The addressed court could refer to public policy ground or apply its overriding mandatory rules. Yet, it does not guarantee that national laws of the State of origin and State of the court to which the recognition and enforcement are addressed would overlap in this sense. Put differently, the ground which would leave the judgment ineffective upon an appeal in the State of origin could not end up with the same outcomes in the other State.

Another matter is that if a judgment ceases to have effect in the State of the origin or is not enforceable anymore, i.e., as a result of an appeal, it should not have any effect in the other Contracting States either. Nevertheless, how would the latter court get informed of the judgment becoming ineffective after all? There is not any mechanism to provide this. On the one hand, having such merits review by the English court would be an intervention into the sovereignty of Germany (in the example above) which is not acceptable in international law. On the other hand, there should be a mechanism to resolve this uncertainty. The best way might be drafting a provision requiring an internal review of the effect of the judgment before addressing it to get recognised and enforced in another Contracting State under the HCCCA. This would also prevent ineffective or illegal decisions from getting global effect.

The Singapore High Court granted recognition and enforcement to the English judgment based on the HCCCA and applied the Choice of Court Agreements Act 2016.[683] The Court considered whether the decision was foreign if the case was international and if an exclusive choice of court agreement was concluded in a civil or commercial matter after the HCCCA entered into force. Regarding the issue discussed above, the Court also differentiated recognition and enforcement and pointed out that

[683] As the first case officially reported under the HCCCA, the decision in *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018] SGHCR 8 is useful owing to the interpretative remarks and particularly those related to Articles of the HCCCA on recognition and enforcement of the judgments. Applicants addressing recognition and enforcement to a court of the United Kingdom or any other Contracting State could refer to this judgment as helpful guidance. Following Singapore's ratification of the HCCCA on 2 June 2016, Singapore's Choice of Court Agreements Act came into effect on 1 October 2016. Paired with Order 111 of the Rules of Court, the Act gives domestic effect to the HCCCA.

there must be no review of the merits of a foreign judgment. Furthermore, the Court elaborated that there should not be any review except that it would be necessary to apply Part 3 of the Choice of Court Agreements Act.[684] The Court favoured the position of the Act, which enables examination of the effectiveness of a judgment by the addressed court before giving effect to it. A similar provision in the HCCCA would assure that the judgment is enforceable in the state of origin, and implementation by the national Statutes would be necessary for effective recognition and enforcement of judgments rendered by the designated courts.

To prevent parties' tactics or courts' abuse not to give effect to a judgment, the HCCCA determines that a judgment may be refused to be recognised or enforced relying upon:

- A null and void choice of court agreement, where it is found null and void under the law of the forum;
- Incapacity, where any party concluding an agreement was found incapable of doing so under the law of the requested court;
- Improper notification, where documentation of the proceedings and a claim were notified to a defendant neither in sufficient time nor by suitable manners;
- Fraud, where a judgment was given out of a fraudulent procedure;
- Public policy, where giving effect to a judgment would be manifestly contrary to public policy or fundamental principles of procedural fairness of the requested State;
- Inconsistent judgments, where a judgment in question is inconsistent with another judgment held in the requested State addressed to the same parties or is inconsistent with an earlier judgment given in another State on the same cause of action and between the same parties, only if the previous one is entitled of being recognised and enforced in the requested State.[685]

Another exception to the general rule to recognise or enforce a judgment rises where the chosen court transfers the case to a court of another Contracting State. Recognition and enforcement rules of the HCCCA also apply to a judgment given by the court to which the chosen court transfers the case.[686] In this respect, a court

[684] See: Singapore's Choice of Court Agreements Act, s. 12(a). Likewise, s. 13.3(a) of the Act states that while determining whether to recognise or enforce a foreign judgment the High Court must not review its merits, saving the extent necessary to apply the provisions of Part 3.
[685] HCCCA, Article 9.
[686] *HCCCA,* Article 8(5).

judgment to which the case was transferred, shall be recognised or enforced in the usual manner unless parties have objected to that transfer.[687]

Another intriguing ground of non-recognition is related to preliminary questions and excluded subject matters. Where an excluded subject matter[688] arises as a preliminary question, a ruling based on that question shall not be recognised or enforced under the HCCCA.[689] On the other hand, where a judgment was made on an excluded subject matter, the HCCCA gives discretion to the court to refuse recognition or enforcement of that judgment.[690] In that case, a judgment could get recognised or enforced under the HJC provided the matter is not excluded from its scope and all other requirements are met. If neither the HCCCA nor HJC is applicable, the judgment could get recognised or enforced under the national laws.[691]

The HCCCA provides a specific rule on recognising and enforcing the ruling on the validity of the intellectual property right other than copyright or a related right. Recognition or enforcement of such a ruling may be refused only if that ruling is inconsistent with another judgment of the courts of that State or there are pending proceedings.[692]

The HCCCA further states a provision related to the recognition or enforcement of the rulings on damages.[693] Where the defendant intentionally commits a malicious, violent, fraudulent, or oppressive act, exemplary or often called punitive damages are awarded.[694] The judgment on exemplary or punitive damages, which do not compensate the plaintiff for the actual loss (costs and expenses related to proceedings[695]) or exceed the actual harm, may be refused to be recognised or

[687] *HCCCA,* Article 5(3) and Article 8(5).
[688] *HCCCA,* Article Art 2.
[689] *HCCCA,* Article, 10(1).
[690] *HCCCA,* Article 10(2).
[691] HJC, Article 16.
[692] *HCCCA,* Article 10(3).
[693] Same as the HJC.
[694] Some states allow award of treble damages, where the amount of the damages is tripled than the actual sum. According to the several statutes in the United States, treble damages are mandatory for all of the violations whereas some states permit such damages to be awarded only if the violation was wilful, for instance, wilful patent infringement. See: Clayton Antitrust Act and Racketeer Influenced and Corrupt Organisations Act (RICO). In some cases, compensatory damages awarded on personal injury claims are to be paid on multiple amount of treble damages. Thus, where compensatory damages are on 100 dollars, the awarded sum will be multiplied being 300 dollars. See*: Commissioner v. Glenshaw Glass Co.* 348 U.S. 426.
[695] *HCCCA,* Article 11(2).

enforced.[696] This position could potentially lead to grave consequences regarding the ratification of the HCCCA.[697]

As discussed further, due to the wording and drafting techniques of the HCCCA in Article 9, the court does not have any mandatory obligation to refuse recognition or enforcement.[698] The Singapore High Court has also highlighted this point, though it did not differentiate the practical effect of 'may' or 'must' as found in the Singaporean Act.[699] Replacing the word 'may' by 'shall' (subject to the defined exceptions) and determining the court's obligation would avoid further inconsistencies and uncertainties.

4.3 Limitations to the principle in the framework of the HCCCA

Although the HCCCA brings significant developments into cross-border dispute resolution, it may not be a 'gold ring'[700] with several deficiencies restricting its effectiveness. Issues confining party autonomy may be related to:

- Formal conditions such as the exclusivity of choice of court agreements
- Subject matter terms such as exclusions from the scope of the HCCCA
- Normative structure of the HCCCA, i.e., drafting techniques.

4.3.1 Substantive validity or 'limitless' invalidity?

One of the most problematic issues in the HCCCA is related to the rules determining the substantive validity of the parties' choice.[701] As already discussed, null and void provision is the sole exception to the basic rules.[702] Whereas the provision defining

[696] *HCCCA,* Article 11(1).
[697] It draws an attention to why the United States has not adopted the Convention yet. Further comments on the issue below at chapter 7.
[698] For the discussion of possible uncertainties arising from the drafting techniques of the HCCCA see Thesis 4.3.7.
[699] In *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018], para 13, the High Court referred to the Choice of Court Agreements Act only being in an explanatory position. The latter, differing from the Convention itself, contains Article Sections 14 and 15 containing grounds on which High Court relevantly must and may refuse to recognise or enforce a foreign judgment. Although this approach brings some clarification to this discussion, ambiguities still continue to exist where the Court may deny giving effect to the judgment.
[700] William J. Woodward, "Saving the Hague Choice of Court Convention" [2008] 29 University of Pennsylvania Law Review 657.
[701] For general definition of substantive and formal validity under the HCCCA see thesis, 4.2.2 and 4.2.3.
[702] HCCCA, Articles 5.1, 6(a) and 9(a); Hartley/Dogauchi Report, para 125-126.

the law applicable to the substantive validity of choice of court agreements is applauded, the HCCCA refers the matter not only to the chosen court to decide under its law but also confirms the competence of the seised or recognising court to rule on this matter.[703] This facet of the HCCCA might be challenging since judges of those courts might be unaware or lack sufficient knowledge of the law of the chosen court. On the other hand, although the HCCCA intends to ensure consistent judgments on the issue, it is hardly possible that different courts would reach the same outcomes.

According to Brand and Herrup, once *lex fori* defines whether there is a valid agreement, the chosen court applies its choice of laws rules to determine validity in the sense of Articles 5, 6, and 9 of the HCCCA.[704] In my view, the seised court firstly checks visible features of a choice of court agreement and assesses if form requirements of the HCCCA[705] are met before applying its own rules to decide on substantive validity. Satisfaction of formal requirements brings the application of the HCCCA, and following, intrinsic qualities of the agreement are deeply examined. In other words, if formal requirements are not satisfied, there is not any consent at all, and the court will not proceed further to apply foreign law or its law to examine whether there is a valid agreement.[706] For instance, an oral choice of court agreement exclusively designating the Ukrainian court does not fall into the scope of the HCCCA regardless of no vitiation of consent or substantive validity. The priority of the HCCCA

[703] HCCCA, Articles 5(1), 6(1)(a) and 9(1)(a). Likely, under the BRR substantive validity of an exclusive choice of court agreement is determined by "the law of the Member State of the court designated in the agreement". See: BRR, Recital 20, 22, Article 25(1). The NYC leaves the matter to the court seised. See: NYC Article II(3), English Arbitration Act 1996, s. 9(4) also follows the same position by requiring a court seized of an action to stay the proceedings if the matter is referred to the arbitration by the parties' agreement. Case law on the stay of legal proceedings in favour of arbitration could be analogically used for interpretation purposes. In ***Franek Jan Sodzawiczny V (1) Andrew Joseph Ruhan (2) Gerald Martin Smith (3) Dawna Marie Stickler (4) Simon Nicholas Hope Cooper (5) Simon John Mcnally*** [2018] EWHC 1908 (Comm), it was held that **proceedings in relation to the claims for deceit and breaches of trust should be stayed to give effect to the arbitration clause and principle of party autonomy,** unless it was satisfied that the arbitration was null and void, inoperative, or incapable of being performed**. Similar decisions were held in** *Associated British Ports v Tata Steel UK Ltd* [2017] EWHC 694 (Ch), *Costain Limited v Tarmac Holdings Limited [2017] EWHC 319 (TCC)*, Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd [2013] EWHC 1240 (Comm), JSC BTA Bank v Mukhtar Ablyazov & ors [2011] EWHC 202 (Comm), *Halki Shipping Corporation v Sopex Oils* [1998] 1 WLR 726. In *Inco Europe Ltd and Others v First Choice Distributors (A Firm) and Others* [1998] EWCA Civ 1461, the judge refused to grant a stay in favour of arbitration, due to the arbitration agreement was "null and void or inoperative". See thesis, Chapter 4.

[704] Brand and Herrup (n 275) 40, 79.

[705] HCCCA, Article 3(c).

[706] See also: Hartley/Dogauchi Report, para 95.

is further evidenced by the fact that national law cannot set any formal requirements other than those of the HCCCA.[707]

According to the Hartley/Dogauchi Report, capacity is determined both by the law of the chosen court and by the law of the seised court. If a party lacks the capacity to conclude an agreement under either law, the seised court will not be required to suspend or dismiss the proceedings.[708] Furthermore, recognition or enforcement may be refused if a party lacks the capacity to conclude an agreement under the law of the requested State.[709]

As discussed, despite the HCCCA being carefully crafted to set "a hard-fought" applicable law rule for substantive validity[710], it is disparaged by multiplying the rules determining substantive validity, which directly affects the effectiveness of the parties' choices. This setback of the HCCCA makes it stuck to different tools, and non-uniformity disregards the effective provision of party autonomy. Furthermore, there are inevitable differences in interpretations given to substantive validity, "null and void," and "lack of capacity" notions by the national laws. For some States, validity is a matter of substantive law (*lex causae*), while others consider it an issue for procedural law (*lex fori*). On the other hand, "law of the State" as referred to by the Convention[711] covers the conflict of laws or choice of law rules of that State; otherwise, it would have used "internal law of the State."[712]

Additionally, national laws applicable in the second stage of the validity test may have *renvoi*[713] , followed by double *renvoi*. For example, parties might choose the Brazilian court, and Brazilian law might send the issue of substantive validity determined by Portuguese law. Portuguese law might point some grounds of substantive validity back to Brazilian law, which would again refer the question back to the law of Portugal. This endless process might also be the result of intentional abuse. Chains of various laws would put the effectiveness of the HCCCA at risk and open doors for irregularities with potential forum shopping, parallel proceedings, and inconsistent judgments, all of which sabotage parties' autonomy.

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[707] i.e., notarising or having a red ribbon and being seal affixed. See: Brand and Herrup (n 275) 45.
[708] Hartley/Dogauchi Report, para 150.
[709] HCCCA, Article 9(1)(b).
[710] Beaumont (n 259) 139.
[711] HCCCA, Articles 5(1), 6(a) and 9(a).
[712] Hartley/Dogauchi Report, paras 94 and 125.
[713] *Renvoi* (In French it means "send back" or "to return unopened") is a subset of conflict of laws, applying when a forum court is directed to consider the law of another state. For the definition see: <https://en.wikipedia.org/wiki/Renvoi> accessed 26 November 2021.

In contrast to the HCCCA, the Hague Principles exclude *renvoi* by not referring to the private international law of the State, unless parties expressly provide.[714] A similar exclusion is reflected in the Rome I Regulation, which excludes private international law rules unless provided otherwise by the Regulation itself.[715]

Weller[716] suggests a solution which is to use transnational non-state contract law, in particular the UPICC.[717] His rationale is mainly based on the globally harmonised nature of the UPICC applicable to business-to-business cases, same as the HCCCA. Nevertheless, the UPICC does not address the law governing arbitration agreements and agreements on choice of court; further, this exception refers explicitly to the material validity of such agreements.[718]

Inserting uniform substantive validity rules into the text of the HCCCA similar to the provisions on formal validity would avoid uncertainties and would not condition application of the HCCCA on other instruments. Considering the duration and complicated nature of reaching a consensus between the States, the best way would be negotiating supplementary protocols. Such protocols would include uniform rules on substantive validity and would be open for signature and ratification by the Contracting States.

4.3.2 Vague 'public policy' notion

'Public policy' notion of the HCCCA provokes many ambiguities. The HCCCA gives no option to the chosen court for refusing to enforce the choice of court agreement, contrary to public policy. It is pretty odd, whereas the HCCCA does include a public policy exception to the obligation of the court seised for declining jurisdiction in favour of the chosen court, also recognition or enforcement of judgments given by the chosen court. The court seised shall not dismiss or suspend proceedings if giving effect to the agreement would lead to manifest injustice or would be manifestly contrary to the

[714] HCCCA, Article 8.
[715] HCCCA, Article 20.
[716] Weller (n 543) 99-100.
[717] Weller refers to the UNIDROIT Principles of International Commercial Contracts (UPICC) 2010, whereas there is a 2016 edition: https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016.
[718] UPICC, Article 1.26.

public policy of its State.[719] Similarly, recognition or enforcement may be refused if manifestly incompatible with the requested State's public policy.[720]

All those bring 'double limitation' of the parties' autonomy and their will to get recognition and enforcement of the judgment given by the designated form. If the chosen court could have the authority to refuse the jurisdiction when the agreement is contrary to the public policy of its State, that would save time, costs, and resources of the court. Precisely, if such a contract is refused to be given effect at its earliest, there will not be a bunch of 'pointless papers' rejected to be recognised or enforced afterwards. A suggestion here is to reform Article 5(1) of the Convention as follows:

> 'The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies unless the agreement is null and void under the law of that State or manifestly contrary to the public policy of the State of that court.'

Another relevant suggestion is to identify a clear legal definition of 'public policy in the text of the HCCCA. According to the current text, the law applicable to manifest injustice and public policy is the law of the court seised containing basic norms or principles of its national law and conflict of laws rules.[721] In this case, the HCCCA authorises the seised court to refuse giving effect to the choice of court agreement at the time of commencement of proceedings.[722] Indeed, the public policy exception enables the court not chosen to exercise jurisdiction under the HCCCA. In other words, the scope of the HCCCA also extends to non-chosen courts.[723] It is unfair to make the HCCCA which aims to achieve party autonomy at a global level, sustained by the court, which the parties do not choose.

Likely, the court to which recognition or enforcement is addressed may refuse to do so if it would be manifestly incompatible with public policy of the requested State, including situations where the specific proceedings leading to the judgment were

[719] *HCCCA,* Article 6(c).
[720] *HCCCA,* Article 9 (e).
[721] *HCCCA,* Articles 6(b), 6(c). See also: Hartley/Dogauchi Report, para 153; Brand and Herrup (n 275) 13.
[722] For more discussions see: Woodward (n 698) 666.
[723] Not just the court requested to recognize or enforce the judgment of the chosen court, but also the other court where proceedings are pending. For more see also: Lipe and Tyler (n 579) 26.

inconsistent with the fundamental principles of procedural fairness of that State.[724] The provision mirrors Article 6(c) regarding public policy and contains a procedural aspect. However, procedural fairness could involve many elements, which would create another challenge while determining whether there is a ground of refusal to recognition or enforcement. In a broad sense, public policy would encompass any facet of procedure, but it would not be limited to only procedural matters.[725] Therefore, if A deliberately puts forward a misleading or false case[726] or serves a writ on the wrong address; as a result, B does not get notified due to that fraud, different grounds of refusal of recognition or enforcement such as improper notification, fraud, and public policy overlap.[727]

As mentioned above, there is no rule giving the chosen court an option to refuse to enforce a choice of court agreement opposing public policy at the very outset of the proceedings. The Draft Text[728] did not contain any general public policy restriction on enforcement of a choice of court agreement, same as the NYC, which had no such limitation over recognition of an arbitration agreement.[729] Nevertheless, the latter had set forth this exception regarding the recognition and enforcement of resulting awards.[730]

Legal systems define public policy, standards of procedural fairness of a State, and thresholds for refusing the recognition or enforcement of judgments differently.[731]

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[724] HCCCA, Article 9(e).

[725] Hartley/Dogauchi Report, para 189.

[726] It happened in *Grove Park Properties Ltd v The Royal Bank of Scotland Plc* [2018] EWHC 3521 (Comm).

[727] HCCCA, Articles 9(c), 9(d) and 9(e); Hartley/Dogauchi Report, paras 185-189.

[728] Hague Conference on Private International Law, Report on the work of the informal working group on the judgments project, in particular on the preliminary text achieved at its third meeting - 25-28 March 2003 (June 2003); For more discussions see Brand (n 305).

[729] NYC, Article II.

[730] ibid; *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd v Republic of Kazakhstan* [2015] EWHC 2542 (Comm); *RBRG Trading (UK) Limited v Sinocore International Co Ltd* [2018] EWCA Civ 838.

[731] For example, Restatement (Second) Judgments 1972, para 70 shows that in the US, according to the Full Faith and Credit Clause, a judgment of a sister state would be get recognised and enforced despite it is contrary to the public policy of the state of the recognizing or enforcing state. In *Baker by Thomas v General Motors Corp.* 522 U.S. 222, 2333 (2002), the US Supreme Court also held that "our decisions support no roving 'public policy exception' to the full faith and credit due judgments". This facet of the US law would not clash with the HCCCA, foreign judgments are not in the scope of the Full Faith and Credit Clause as stated in the Restatement (Second) Conflicts of Laws 1971, paras 98 and 102, comment g. Therefore, declining public policy consideration would not cause any problem in regard to the accession to the Convention as long as the judgments are that of sister states. For more on the recognition and enforcement of the state and foreign judgments in the U.S see Gary B. Born and Peter B. Rutledge, *International Civil Litigation the United States Courts* (6th edn, Wolters Kluwers, 2018), 1067-1142.

Uncertainties might arise from the differences between the court's law seised and the court to which the recognition or enforcement is addressed. For example, the Chinese court might refuse to stay proceedings when it decides on the incompatibility of a jurisdiction agreement with its public policy due to the lack of actual connection; the resulting judgment might be refused to get recognised or enforced.[732] Indeed, defining public policy and standards of procedural fairness in the HCCCA would contribute to legal certainty; it could be achieved by drafting uniform procedural rules contained in supplementary protocols.

4.3.3 Reciprocal declarations on the non-exclusive choice of court agreements

Exclusion of non-exclusive jurisdiction agreements from the scope of the HCCCA might be seen as the limitation of the parties' options only to the chosen court.[733] While non-exclusive designations might ensure commercial flexibility, they could frustrate the objectives of the HCCCA, in particular, certainty, predictability, efficiency, simplification of the dispute resolution.[734] Further, the HCCCA minimises litigation costs by applying only to exclusive jurisdiction agreements.[735] In contrast, upon a non-exclusive designation, it would be lawful to bring the proceedings in different fora, resulting in forum shopping, parallel proceedings, inconsistent judgments, and waste of time and resources. While one party would have goodwill during the negotiations, it does not prevent an abusing party from delaying proceedings by torpedo actions. As stated by Thomas LJ:

[732] For more discussions see: Civil Procedure Law of the People's Republic of China, Article 34; Bath Vivienne, "Overlapping jurisdiction and the Chinese courts" [2016] 31(3) Butterworths Journal of International Banking and Financial Law, 1-3; Guangjian Tu, "The Hague Choice of Court Convention - A Chinese Perspective" [2007] 55 American Journal of Comparative Law, 347; *Hin-Pro International Logistics Ltd v Compania Sud Americana De Vapores S.A.* [2015] EWCA Civ 401.
[733] Keyes and Marshall (n 446) 353-355.
[734] Unlike exclusive choice of court agreements, non-exclusive agreements don't render any negative effect impeding parties to sue elsewhere than the designated jurisdiction. For more discussions see Keyes and Marshall (n 447) 377.
[735] Adam E Kerns "The Hague Convention and Exclusive Choice of Court Agreements: An Imperfect Match" [2006] 20 Temple International and Comparative Law Journal 509, 515.

> ‘Jurisdiction clauses are rarely the subject of detailed negotiation … in most transactions in the financial markets this is the case as little attention seems to be paid to this element of risk management’.[736]

Let’s assume that upon a non-exclusive jurisdiction agreement, a plaintiff brings proceedings in State A before a claimant sues him in State B. Non-exclusive jurisdiction agreements do not get the same safeguards as given to exclusive choices under the HCCCA. On the one hand, non-exclusive agreements confer mandatory jurisdiction on the designated courts.[737] On the other hand, If both courts, or at least one of them, is in an HCCCA Contracting State, which is not an EU Member State, there would be no mandatory stay in favour of the court in State B as it is not exclusively chosen. If both States are the EU Member States, the general *lis pendens* rules[738] apply, and the court of State B, which is second seised, should stay the proceedings until the court of State A (and non-exclusively chosen) decides that it has no jurisdiction.

The HCCCA ‘attempts’ to prevent potential abuses giving an option to the Contracting States to declare that their courts will recognise and enforce judgments concluded by the courts of the other Contracting States designated in a non-exclusive jurisdiction agreement.[739] This option widens the application scope of the HCCCA concerning the recognition and enforcement but not jurisdiction. The HCCCA applies the same form requirements to non-exclusive choice of court agreements.[740] A key element is reciprocity, which could reduce the benefits of Article 22. The State where a judgment is given and the recognition and enforcement are sought should have such declarations.[741] Based on reciprocity, that judgment will be recognised and enforced unless any other court issues a judgment.[742] Besides, the court of origin should be first seised.[743] These features contrast with the aims of the HCCCA since non-exclusive jurisdiction agreements bring a real risk of parallel proceedings and inconsistent judgments. Notwithstanding recognition and enforcement of a judgment of the non-

[736] *Deutsch Bank v Sebastian Holdings* [2010] EWCA Civ 998; [2011] 2 All ER (Comm) 245, [57].
[737] See: *Perform Content Services Ltd v Ness Global Services Ltd* [2021] EWCA Civ 981. The Court of Appeal dismissed an appeal.
[738] BRR, Article 31(2) applies where there is an exclusive choice of court agreement.
[739] HCCCA, Article 22(1).
[740] HCCCA, Article 3(c).
[741] HCCCA, Article 22(2).
[742] HCCCA, Article 22(2)(a)-(b).
[743] HCCCA, Article 22(2)(c).

exclusively chosen court, there is nothing to prevent other courts from staying or giving a judgment, which could get recognised and enforced elsewhere.

It seems the inclusion of such a declaration option in the absence of the HJC was necessary. However, none of the Contracting States have given such declarations since the adoption of the HCCCA. The HJC ensures recognition and enforcement of judgments given by non-exclusively chosen courts. The suggestion is to remove Article 22 from the HCCCA. As shown above, it is not compatible with the objectives of legal certainty and a global treaty aiming to provide predictability and party autonomy by exclusive jurisdiction agreements. Such an option also contradicts the presumption of exclusivity set out by the HCCCA.[744] Moreover, such a provision in the HCCCA could impede accessions as the State might instead ratify the Judgments Convention, than acceding to the HCCCA with a declaration notice. Further, if the HCCCA would not deal with non-exclusive designations at all, that would contribute to the possible ratifications of both instruments by the States.

4.3.4 Declarations limiting jurisdiction

The HCCCA draws a bead on legal certainty and predictability in cross-border civil and commercial cases by determining an obligation of an exclusively chosen court to hear the case.[745] Nonetheless, the Contracting States can opt for a declaration allowing the exclusively designated courts to refuse the jurisdiction if there is no connection between the States and parties or their disputes.[746] It means that regardless of a valid exclusive jurisdiction agreement, its effectiveness would still depend on that court's discretion. Whereas the HCCCA disqualifies *forum non conveniens* and prohibits denial of the jurisdiction by the chosen court even if it considers any other court as a more appropriate forum for resolving the dispute[747], Article 19 impliedly authorises the States to utilise the doctrine under the HCCCA.

Furthermore, whereas it might be considered appropriate to consolidate proceedings involving third parties under the national laws[748], under the HCCCA, an exclusive

[744] HCCCA, Article 3. For the related discussions see 4.2.1.3.
[745] HCCCA, Article 5.1.
[746] HCCCA, Article 19.
[747] HCCCA, 5.2
[748] For instance, while in *Aratra Potato Co Ltd v Egyptian Navigation Co (The El Amria)* [1981] 2 Lloyd's Rep. 119, [1981] 5 WLUK 149, it was held that the contractual jurisdiction should be enforced unless strong cause was shown by the plaintiff for not doing so, in *M C Pearl Mahavir Minerals Ltd v. Cho Yang*

jurisdiction agreement is binding only on those parties who have signed it. In such cases, the chosen court cannot decline the jurisdiction in favour of any other court; likewise, any other court should stay or dismiss the proceedings.[749] For example, A and B negotiate an exclusive English jurisdiction agreement in a sale of goods contract. Later, B sells goods to C, but they have not negotiated any choice of court clause. If, due to defects in the goods, C sues B at the place of performance, B cannot join A as a third party as there is a jurisdiction agreement between A and B, and it is binding only on them. If B wishes to do so, the seised court shall stay proceedings in favour of the English court.[750] Yet, the Contracting States opting for Article 19 might limit the jurisdiction of the chosen court by allowing consolidation of the proceedings at the appropriate forum. In this sense, Article 19 hinders parties' goal to resolve their disputes at a neutral and transparent forum.[751] By limiting jurisdiction, neutrality might not be ensured; effectiveness, certainty, and fundamental principles of the HCCCA might be undermined. Provided none of the Contracting States have opted for Article 19, removing this provision from the text would enhance effectiveness; also, it would enshrine the scope of the HCCCA.

4.3.5 Declarations concerning specific matters

If a Contracting State has a strong interest, it may declare 'clearly and precisely' that it will not apply the HCCCA to a specific matter in which it has a strong interest. This declaration should not be 'broader than necessary' and should follow reciprocal declarations of the Contracting States.[752]

On the one hand, this provision restricts parties' autonomy to designate a forum to resolve their disputes over specific matters. At the same time, the HCCCA has already excluded several themes from the scope. On the other hand, 'if such opt-outs were

Shipping Co. Ltd. [1997] 1 Lloyd's Rep. 566, consolidation of the proceedings in England was considered appropriate regardless of the Singaporean jurisdiction clause. See also: Yvonne Baatz, "The MC Pearl: a blow for party autonomy" [1997], 1 International Trade Law Quarterly, 49-51.

[749] HCCCA, Article 6.

[750] Since the English jurisdiction clause has not been negotiated between A and C, C could also sue A in tort provided the court has jurisdiction under the national law. See: Explanatory Report, at 97 and 143.

[751] Further, neither party wants to go to the courts of the other party's State. See: Hartley/Dogauchi Report, para 230. See also: Brand and Herrup (n 275) 147; Jeffrey Talpis and Nick Krnjevic, "The Hague Convention on Choice of Court Agreements of June 30, 2005: The Elephant that Gave Birth to a Mouse" [2007] 13 Southwestern Journal of Law and Trade in the Americas 1, 32.

[752] HCCCA, Article 21.

not possible, some States might not be able to become Parties to the Convention'.[753] Considering the declarations given by the Contracting States on insurance, Article 21 may captivate more accessions to the HCCCA.[754]

Garnett is concerned that Article 21 could reduce the HCCCA to "a hollow shell" by narrowing its scope.[755] He contends that "one can only hope that this transnational enthusiasm for Article 21 declarations does not lead to the Convention's death by a thousand exemptions".[756] In this relevance, while the HCCCA covers insurance and reinsurance even if the insured risk is related to Article 2 exclusions[757], by such declarations, the Contracting States have eliminated any possible application of the HCCCA to those exclusions.

To prevent any abuse, the HCCCA determines the transparency, non-retroactivity, and reciprocity principles.[758] Transparency requires a State to notify the Depositary[759] to give information to the other States.[760] Not having applied retroactively, that declaration takes effect only after three months and will not apply to contracts before the HCCCA comes into force.[761] Reciprocity means that Contracting States will not apply the HCCCA regarding the matter in question if the chosen court is in the State making such a declaration.[762] While restricting parties' autonomy to some extent, the threshold established by the HCCCA intends on legal security and the prevention of unreasonable declarations. A declaration should not be made without compelling reasons, and parties' interests must be safeguarded.[763]

4.3.6 Subject matter jurisdiction or internal allocation of jurisdiction

Article 5(3) of the HCCCA states that its mandatory rules do not affect (a) subject matter jurisdiction and (b) internal allocation of jurisdiction among local courts of the

[753] Hartley/Dogauchi Report, 843.
[754] For the related discussions see thesis, Chapter 7.
[755] Garnett (n 201) 176.
[756] ibid, 179.
[757] HCCCA, 17(1); Hartley/Dogauchi Report, 221.
[758] ibid.
[759] The Depositary is the government of the Netherlands.
[760] HCCCA, Article 32(2).
[761] HCCCA, Article 32(4).
[762] Hartley Dogauchi Report, para 238.
[763] ibid; If that threshold is coupled with the uniform rules on substantive validity of exclusive jurisdiction agreements, it would contribute to avoid more abuses or restrictions imposed upon party autonomy principle which is encouraged by the HCCCA.

State under its national law.[764]

States may have rules on the division of jurisdiction among their courts based on the substance or amount of the claim. Only those specific or specialised courts may have the authority to determine particular disputes. For instance, a tax court would lack subject-matter jurisdiction to hear a case related to a breach of a contract. Parties are not able to waive subject-matter jurisdiction by negotiating exclusive jurisdiction agreements.[765]

On the one hand, it is reasonable to have specialised courts in a particular field, and freedom from courts of general jurisdiction eases decision-making in cases involving specific complexities. It would also decrease the workload of available courts and unreasonable delays in resolving disputes and bring more certainty. On the other hand, subject matter jurisdiction could obstruct predictability due to parties' lack of familiarity with the legal system and judicial structure of a particular State where the chosen court is. To assume, an English seller suggests that a German buyer designate the English court as an internationally reputable venue with a well-established legal precedent. Still, the buyer insists on choosing the US district court as a neutral venue before making this designation. Upon the English seller's delay in dispatching the products, the German party brings proceedings in the Southern District Court of New York. Nevertheless, the court decides to transfer this case to the United States Court of International Trade; as a result, the choice of court agreement signed by the parties becomes ineffective.

Such an outcome is very likely to occur since parties are often unaware of the internal procedural rules that bring party autonomy restrictions. Furthermore, it obstructs the effective operation of the HCCCA and diminishes uniformity ideals. Parties should be commercially aware and sophisticated enough to have sufficient knowledge on the Local Rules[766] regulating the jurisdiction of the chosen court, or they should get legal advice for predicting potential consequences of their designation.

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[764] HCCCA, Article 5(3); In regard to exclusive jurisdiction agreements, Chinese law has a requirement in a form of "actual connection" (*shiji lianxi)* of a dispute with a forum. See: Article 34 of the Civil Procedure Law of the People's Republic of China. For more discussions see: Chapter 7. See also: Vivienne (n 725); Tu (n 725); *Hin-Pro International Logistics Ltd v Compania Sud Americana De Vapores S.A.* [2015] EWCA Civ 401.

[765] Hartley/Dogauchi Report, paras 135-136 and 166. For more discussions see: Preliminary Document No 23 of October 2003 "Mechanisms for the Transfer of Cases within Federal Systems".

[766] The rules of the district courts in the U.S are usually available on their websites.

To prevent any abuse of party autonomy, the HCCCA identifies limitations on applying such internal rules. While exercising its discretion to transfer a case, the chosen court shall give due consideration to the parties' choice.[767] This due consideration could be explained concerning, i.e., the chosen District Court transferring the case to the International Trade court situated in New York.
Moreover, if Article 5(3) is combined with the Article 21 declaration, uncertainty risks could be reduced. The suggestion is to relocate Article 5(3) by bringing it to Article 21(1):

> 'Where a State has a strong interest in not applying this Convention to a specific matter, or it has rules on jurisdiction related to subject matter or the value of the claim or the internal allocation of jurisdiction among the courts of a Contracting State, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined'.

Such a language would enable the parties to get informed about the States making declarations and their internal rules on subject matter jurisdiction; further, transparency, non-retroactivity, and reciprocity would prevent potential abuses of the autonomy principle.

4.3.7 Refusal of the recognition or enforcement – discretion of a court?

The HCCCA identifies some grounds upon which the court may decide not to recognise or enforce a judgment.[768] As of its drafting techniques, the HCCCA uses "may" as a modal verb regarding the refusal grounds, which means that the matter is up to the discretion of the court to which recognition and enforcement are addressed.[769] On the one hand, it could be possible that the drafters did not intend to

[767] *HCCCA,* Article 5(3)(b).
[768] *HCCCA,* Article 9; Hartley/Dogauchi Report, para 182. As discussed earlier, the HCCCA determines three basic rules in support of the party autonomy principle. Prominently, the court chosen shall have jurisdiction, whereas any other court shall stay or dismiss the proceedings and the resulting judgment shall be recognised and enforced.
[769] HCCCA, Articles 8.1, 8.2, 8.5, 9, 10.2 and 11.1.

discretion the court. On the other hand, the French text of the Convention, which is equally authentic to the English text, also contains similar wording.[770] It seems that the reason behind the use of "may" is related to the different interpretations given to those grounds under the domestic rules of the court chosen or court requested, which might differ. Such wording raises suspicion whether the court will refuse to recognise and enforce the judgment referred to it. Courts of different Contracting States might reach other decisions on the same matter. Substitution of "may" with "shall" would serve certainty, and this, in turn, would enhance party autonomy.

4.3.8 Absence of uniform procedural rules

The three basic rules of the HCCCA apply to the initial and final phases of litigation, whereas the national procedural rules regulate courts' conduct during the entire proceedings. During dispute resolution, parties encounter diverse rules, being those of the law of the chosen court, court seised or court to which the recognition and enforcement are addressed. The Hartley-Dogauchi Report also asserts that the HCCCA was not supposed to touch the internal procedural laws of the States, except it is provided in the text.[771] As a result, uniformity is impeded by the application of non-uniform domestic laws.

As part of this gap, the HCCCA lacks uniform rules applicable to recognising and enforcing judgments. Parties may face a viable dilemma since a judgment eligible to be recognised and enforced in one Contracting State according to its law might not be treated similarly in another Contracting State. A need for uniform rules on the recognition, enforcement, and court conduct also presents itself regarding substantive validity and public policy. Achievement of the consistent procedural rules for complementing substantive rules would contribute to harmonisation. That target could be reached either by adding such provisions to the text of the HCCCA, drafting additional protocols, or referring procedural issues to the law of the chosen court. The last option might be problematic as different parties could designate different courts, and national laws would differ; as a result, uniformity would not be attained. Indeed,

[770] "La reconnaissance ou l'exécution peut être refusée si". French text of the HCCCA is accessible via: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98> accessed 26 November 2021.
[771] Hartley/Dogauchi Report, para 88.

uniform rules drafted and added to the HCCCA might be an optimistic way. Those rules could be outlined in annexes; however, considering the length of the negotiations and transmissions between the States, it might be complicated to achieve intext rules. The more optimistic way could be negotiating supplementary protocols which would be adopted upon ratifications or accessions by the Contracting States.

4.4 Conclusion

This chapter disclosed the main elements of the provision of party autonomy by the HCCCA. The HCCCA is given global prominence as the first international treaty securing party autonomy in international litigation and effectiveness of jurisdiction agreements and resulting judgments. Nevertheless, material scope limitations bring a lack of regulation and certainty, absence of the definition of public policy, non-uniform validity, recognition, and enforcement rules; moreover, ambiguous drafting techniques often subject its effectiveness to the application of the domestic laws. While the presumption of exclusivity would enshrine the scope of the HCCCA by the inclusion of more jurisdiction agreements, exclusion of non-exclusive jurisdiction agreements, absence of the *lis pendens* and submission rules might bring detrimental effects on the provision of parties' autonomy. As shown, the English courts have demonstrated higher respect to parties' choices by granting anti-suit injunctions in favour of non-exclusive designations and interpreted asymmetrical jurisdiction agreements as having exclusive nature. Despite excluding non-exclusive varieties from the scope of the HCCCA, the preserved English practice might widen the application perspectives of the HCCCA post-Brexit.[772] Based on this critical scrutiny of the limitations and ambiguities existing in the text of the HCCCA, the chapter's findings prompt the suggestions about revising the HCCCA, drafting supplementary protocols and model laws, the substitution of several wordings, and establishing the Hague Court, which would contribute to the more effective operation and uniform understanding of the HCCCA.

[772] On the other hand, such interpretation might also bring non-uniform interpretations of the HCCCA, at least between the UK and the EU courts.

Chapter 5 THE HCCCA v. THE EU RECAST REGULATION – A CLOSE FIT?

5.1 Introduction

In a few areas of law, European harmonisation has been as successful as in PIL.[773] Many years ago, Arthur Von Mehren foresaw the significant role of the European Union in PIL and, among others, particular 'sight of a factor' affecting the field of jurisdiction and recognition and enforcement of foreign judgments "communisation" of PIL.[774] Regardless of the regional nature of the EU rules, they have become a "role model" for many other international treaties. Likely, the HCCH intended to draft an instrument analogous to the Brussels regime but applicable at the global level. The HCCCA was drafted in 2005 as a global instrument to provide party autonomy and effective justice at an international level. In turn, the HCCCA also shaped the existing EU law, particularly revisions that were taken by the Commission aimed at coherence between the instruments and eased the EU's accession to the HCCCA.

The study[775] showed that around 3.4 million civil and commercial court proceedings in the EU in 2018 had cross-border implications. Such empirical grounds evidence potential overlaps between the HCCCA and Brussels regimes. This chapter examines the application of the Brussels regime to the choice of court agreements and judgments and compares similar perspectives of the two regimes to provide party autonomy.

The assessments are mainly focused on the relevant provisions of the BRR with some references to its predecessors - the Brussels Convention and BIR, where applicable. The discussions canvass the reforms brought by the BRR to achieve coherence with the HCCCA and witness how they strengthened the party autonomy principle and filled

[773] Adrian Briggs, *The Conflict of Laws* (Oxford University Press, 2019), preface.

[774] Fausto Pocar "The EU as an actor in Private International law", in Ronald Brand (ed.), *Private Law, Private International Law, Judicial cooperation in the EU-US relationship* (CILE studies, Thomson&West, 2005), 143; Fausto Pocar, "The Drafting of a World-Wide Convention on Jurisdiction and the Enforcement of Judgments: Which Format for the Negotiations?" in (Nafziger, J.A.R. and Symeonides, S. eds), Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren (Transnational Publishers Inc., 2002) 191.

[775] The economic study was contracted to Deloitte in 2018 under contract no. JUST/2017/JCOO/FW/CIVI/0087 (2017/07), Commission, Impact Assessment, SWD (2018) 287 final.

the gaps left in the previous frameworks. While applauding the bright sides of the BRR, the chapter also identifies remaining uncertainties which might harbour litigation tactics and threaten party autonomy. Following the implications between the instruments, the chapter sums the critical analysis to determine particular shortages. Based on the comparisons with the Hague regime, the chapter suggests several ways to avoid such drawbacks. The proposals stimulate joint efforts and closer collaboration between the HCCH and EU Commission for achieving further adjustments. Considering the common issues arising from the two regimes and the NYC analysed in the following part, the chapter also establishes a groundwork for the suggestions about enhancing cooperation with the UNIDROIT. The conclusions revealed by this chapter have implications for the provision of party autonomy and judicial cooperation post-Brexit.[776] Hence, the key findings bridge this chapter to the rest of the discussions in the thesis.

5.2 An overview of the EU law relevant to the discussion

Article 26 of the TFEU [777] stated that '…The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured'. Similarly, Article 67[778] provided that 'the Union shall constitute an area of freedom, security and justice…' and '…the Union shall facilitate access to justice, particularly through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters'. It aimed to ensure effective access to justice and the elimination of obstacles for the proper functioning of the internal market.[779]
The treaty of Rome did not regulate either judicial matters as of jurisdiction or recognition and enforcement of judgments across the national borders. On the other hand, it promoted simplification of formalities to recognise and enforce decisions and arbitral awards.[780]

[776] The EU should reasonably be willing to combat deficiencies of the existing legal tools and improve effectiveness of the European law to make Member state courts stable and attractive forum for the commercial parties to select or link their relations. On the other hand, considering membership of both the Union and UK to the HCCCA coherence between the Recast and Convention would be of paramount importance for legal certainty and consistency. For the related discussions see: Chapter 7.
[777] Consolidated version of the Treaty on the Functioning of the European Union (TFEU), 2007. Previously it was Article 14 of the Treaty establishing the European Community 1957.
[778] Previously it was Article 61 of the Treaty establishing the European Community 1957 and Article 29 of the Treaty on the Functioning of the European Union 2010.
[779] TFEU, Article 81.
[780] Treaty establishing the European Community 1957, Article 220.

As the European Commission stated, 'differences between national legal systems and the lack of unified rules of conflict impede the free movement of persons, goods, services, and capital among the Member States'.[781] Like the Rome Convention 1980 on applicable laws, the EU aimed to establish a uniform set of rules applicable to jurisdiction and judgments within the internal market. The Brussels regime was developed to regulate jurisdiction and recognition and enforcement of judgments in civil and commercial matters in the Union. Initially, the Brussels Convention aimed to ensure access to justice, strengthen the legal protection of persons in the Community, and achieve legal certainty by establishing common jurisdiction rules.[782] Likewise, issues arising out of the choice of the forum were considered globally crucial in the early 1960s.[783] The Convention unified the rules regulating choice of court agreements which later transformed into its successors – the BIR and BRR.[784] The instruments aimed to simplify formalities and added more guarantees for facilitating justice, legal certainty, and predictability between the Member States. As part of the EU PIL framework and foundation of the EU civil justice,[785] they ensure the right to a fair trial and effective remedy.[786]

BIR aimed at '…maintaining and developing an area of freedom, security, and justice…judicial cooperation in civil matters, which are necessary for the sound operation of the internal market'.[787] It particularly emphasised that parties' autonomy must be respected and provided for the prorogation of jurisdiction.[788] This ruling was very similar to Article 17 of the Brussels Convention except for a few revisions. Firstly,

[781] Giuliano/Lagarde Report [1980] O.J. C282/1.
[782] Brussels Convention 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters. See also: Jenard Report [1979] OJ C 59/79, [15].
[783] A Lenhoff, "The Parties' Choice of a Forum: 'Prorogation Agreements'" (1961) 15 Rutgers Law Review 414, Ratković and Rotar (n 554) 245.
[784] Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.
[785] Paul Beaumount and Mihail Danov, "The EU Civil Justice Framework and Private Law: Integration through Private International Law" (2015) 22 Maastricht Journal of European and Comparative Law 706. See also: Paul Beaumont, Mihail Danov, Katarina Trimmings, Burcu Yüksel (eds.), *Cross-Border Litigation in Europe* (Hart Publishing, 2017), 1.
[786] Europen Charter of Fundamental Rights, Article 47; BIR, Recital 38.
[787] BIR, Recital 1.
[788] See: BIR, Recital 14; Article 23(2). These targets were set also by the Lugano system regulating the same issues, but applicable only to the Member States of the European Free Trade Association. Likewise, in the Lugano Opinion, the European Court of Justice also stated that the purpose of the Brussels I Regulation is to harmonise jurisdictional rules, "not only for intra-Community disputes but also for those which have an international element" in order to support the operation of the internal market. See: Opinion of the Court (Full Court) of 7 February 2006, Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Opinion 1/03, [72] and [143].

inevitable technological developments necessitated the addition of any communication by electronic means, which provided a durable record of the agreement to be deemed equivalent to "writing".[789] It broadened types of agreements falling into the scope of the BRR. It also served international trade, characterised by chains of electronic correspondence and email negotiations between the contracting parties based in different countries. Another change was the deletion of the provision permitting formulation of asymmetrical jurisdiction agreements for the benefit of only one party who retained the right to bring proceedings in any court that would have jurisdiction under the Convention.[790] The BIR also expressly conferred the presumption of exclusivity, deeming jurisdiction agreements exclusive unless parties agreed otherwise.[791] It aimed at legal certainty and predictability that parties could achieve by exclusive formulations.[792]

Notwithstanding all these steps forward, the BRR was not entirely successful concerning the provision of party autonomy and effectiveness of choice of court agreements. The Heidelberg Report asserted its restrictive approach, particularly emphasising diverse interpretations given to the validity of the jurisdiction agreements in national practices.[793] Based on the empirical grounds[794], the Commission highlighted the significance of the effective choice of court agreements and accepted the Proposal for reforms to ensure they 'are given the fullest effect'.[795] Meanwhile, the

[789] Brussels Convention, Article 23(2)

[790] Brussels Convention, Article 17(3). The Commission did not explain the reason behind this revision except calling the provision on non-exclusive jurisdiction agreements as "additional flexibility" "warranted by the need to respect the autonomous will of the parties". Yet, non-exclusive jurisdiction designations were neither ruled out, nor directly excluded from the scope most probably leaving some discretion on courts. See: The Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters COM (1999) 348 final.

[791] Brussels Convention, Article 23(1). This approach is also preserved by the BRR in Article 25.1 on presumption of exclusivity. On the one hand, this presumption ensures respect to the parties' choice and exclusivity of the designated court.

[792] However, possible risks arising out of the presumption rule as discussed in regard to the HCCCA might be encountered under the BRR as well.

[793] Report on the Application of Regulation Brussels I in the Member States (Heidelberg Report), Study JLS/C4/2005/03.

[794] Around 70% of the European companies providing products and services in the Union negotiate forum selection clauses while drafting their contracts. See: Commission, Staff Working Paper, Impact Assessment, SEC (2010) 1547 final, para 2.3.1.3, 30.

[795] According to Article 73 of the BIR, the Commission no later than five years after the entry into force of the Regulation shall present a report on the application of the mechanism to the European Parliament, the Council and the Economic and Social Committee. Eight years after it entered into force, review of the application of the Regulation that was taken by the Commission resulted in necessary proposals for amendments. See: Commission, "Green Paper on the review of Council Regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters" COM (2009); Commission Proposal for a Regulation of the European Parliament and of the

Stockholm Programme also necessitated '…an evaluation of the effectiveness of the legal instruments adopted at Union level….'[796] After establishing the Program and Action Plan, the Union indicated its tension towards harmonising its laws, including procedural frameworks to advance internal consistency.[797] The BRR[798] was adopted in 2012 and has become the matrix of civil judicial cooperation in the Union.[799] Evolutionary reforms as the "logical end of a journey" were the Commission's response to the deficiencies of the previous Regulation and intended to facilitate cross-border litigation and enhance the area of freedom, security and access to justice; as noted, 'the overall objective of the revision is to further develop the European area of justice by removing the remaining obstacles….'[800]

5.3 Implications between the regimes

Both instruments determine their relationship with other conventions regulating jurisdiction, recognition, and enforcement.[801] According to the disconnection clause, the HCCCA shall not affect the application of the rules of an REIO[802] unless there is an overlap between the instruments.[803] Where there is not any inconsistency between the frameworks, both of them can apply. An overlap can occur where there is an exclusive choice of court agreement falling into the scope of both the HCCCA and BRR, provided the state of the chosen court is a party to both of the instruments and all other conditions are met. Furthermore, the application of the instruments would need to bring incompatible outcomes. The initial principle relevant to this disconnection

Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM (2010) 748 final, 3-4.

[796] European Council, The Stockholm Programme – An open and secure Europe serving and protecting citizens [2010] OJ C115/1.

[797] Action Plan Implementing the Stockholm Programme COM (2010) 171 final, [23].

[798] Regulation (EU) No 1215/2012 of the European Parliament and of the Council on 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)

[799] Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)) COM (2010) 748 final, [1.1].

[800] Ibid.

[801] HCCCA, Article 26; BRR, Article 71.

[802] As of the scope of the discussion the REIO and rules of the REIO in this chapter refer to the European Union and Brussels Recast Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. As regards Switzerland, Norway and Iceland the Lugano Convention 2007 governs the respective matters. It should also be noted that the EU is the only REIO that has ratified the HCCCA.

[803] HCCCA, Article 26.6.

is that the HCCCA shall be interpreted so far as possible to be compatible with the BRR.[804] Likewise, the application of the BRR is subject to its uniform interpretation.[805] When the case is "purely regional," the BRR is given precedence as provided in the "give-way" rules of the HCCCA.[806] It happens when the parties who are resident in the Contracting States, which are also the Member States, have chosen a Member State court regardless of their domicile. All other elements of their relationship are peculiar to the Union. Article 26.6(a) of the HCCCA in this effect mirrors Article 26.2, which determines residency criteria while solving the issue with the conflicting treaties.[807] Indeed, there is an alignment with the BRR when parties have chosen any EU Member State court, notwithstanding their residence or domicile.[808] The chosen court shall take jurisdiction in such a case, and any other non-chosen Member State court shall decline jurisdiction.[809]

Where none of the parties are resident in a Contracting State that is not a Member State, the HCCCA gives way to the BRR. Suppose Party A, who is resident in Austria and Party B, who is resided in Finland, designated Rotterdam District Court. Upon the Austrian proceedings brought by A, B initiates Dutch proceedings. In that case, the BRR applies without being interfered with by the HCCCA. Besides the "give-way" rule of the HCCCA, the application of the Union law can be reasoned by the absence of the *lis pendens* rules in the HCCCA. When the HCCCA and Hartley/Dogauchi Report were adopted, the BIR was in force; so, the Report referred to the previous *lis pendens* rules. It indicated that the Rotterdam court could not hear the case unless the Austrian court gave up jurisdiction.326 Accordingly, the Austrian court would have stayed the proceedings until the Dutch court found that it had no jurisdiction.[810]

In another case, Party A, who is resident in Austria, and Party B, who is resident in Russia, neither an HCCCA Contracting State nor EU Member State designate Rotterdam District Court. If Party A brings proceedings at the Austrian court before Party B sues him in Rotterdam, the "give-way" rule of the HCCCA will not prevent the application of the BRR. Accordingly, the Austrian court should stay the proceedings

[804] HCCCA, Article 26.1.
[805] BRR, Article 71.2.
[806] HCCCA, Article 26.6; Hartley/Dogauchi Report, at 291.
[807] According to Article 26.2, the HCCCA shall not affect the application of a treaty Contracting State in cases where none of the parties is resident in a Contracting State that is not a Party to the treaty.
[808] HCCCA, Article 26.6(a).
[809] BRR, Article 25. The provision is very similar to Articles 5-6 of the HCCCA.
[810] BRR, Article 31.2.

favouring the Rotterdam court, which the parties choose notwithstanding their domicile.[811]

The "give-way" rule of the HCCCA would still apply provided all the facts of the case are the same, but none of the parties are resident in any Member State. In coherence with the HCCCA, the BRR gives priority to the court chosen by the parties; therefore, in such a case, the Rotterdam District Court would have had jurisdiction regardless of being second seised. All the facts to be same as in the scenario above except the Mexican court would have been chosen, and the HCCCA would apply since the designated court is located in the HCCCA Contracting State, not the EU.

The language of Article 26.6(a) leads to confer that if Party A, who is resided in Austria and Party B, who is resided in Mexico, would have designated the Rotterdam District Court and the latter is seised after the Austrian company initiates proceedings in Austria, the designated court must hear the case based on the residual factors. This conclusion is justified based on the fact that one of the parties (the Mexican company) in such a scenario is resident in a Contracting State, which is not an EU Member State. That is regarded as why Article 26(6)(a) would not prevent the application of the HCCCA rather than the BRR. The HCCCA and Hartley/Dogauchi Report aimed to establish consistency with the BIR, which then was in force. The BIR necessitated at least one of the parties to be domiciled in a Member State for choosing a Member State court. Therefore, if at least one of the parties were resident in a Contracting State that was not a Member State, the HCCCA would be applicable. If a party were resident in a Contracting State that was also a Member State, the BIR would be applicable.

The BRR strengthened party autonomy and removed domicile requirements while enforcing jurisdiction agreements designating Member State courts. Domicile is mainly understood as the status enabling legally and permanently residing in a specific jurisdiction based on sufficient connection, and this should indeed be different from casual residency. The Brussels regime often employs the domicile concept next to "habitual residence." The BRR defines the domicile of legal persons but not that of natural persons.[812] The HCCH, on the other hand, uses "resident" and does not give its definition. Considering the global nature of the HCCCA and the varieties existing between the national systems in interpreting the concept, this approach is reasonable.

[811] BRR Article 25.1 and 31(2) apply whereas the Hartley/Dogauchi Report refers to Article 27 of the previous BIR in support of the *Gasser* reasoning.
[812] BRR, Article 63; BIR also defined domicile of legal persons similarly in Article 60.

On the other hand, understanding of the domicile and residence of the natural persons is similar under the two regimes, bringing presumption of the exact definition given to the concepts.[813]

Further, if at least one of the parties is resident in Singapore and French court is chosen, the BRR is not applicable for residential reasons. [814] That does not comply with the BRR and aims of the HCCCA. The HCCCA seeks to promote international trade and investment through enhanced judicial cooperation[815] and shall be interpreted so far as possible to be compatible with other treaties in force for the Contracting States.[816] Based on this rationale, identifying the applicable rules as conditional to residency contradicts the BRR and autonomy principle. Furthermore, it brings the perspectives for *forum non conveniens,* which is not acceptable under either instrument. To make coherence and compatibility between the instruments and promote party autonomy, Article 26(6)(a) could be entirely removed, or its language could be altered as follows:

a) *'Where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the Member State of the Regional Economic Integration Organisation;.'*

Furthermore, in some scenarios, the designation of Non-Member State courts might bring overlaps between the HCCCA and BRR regardless of domicile or parties' residency. If such a case is not subject to Articles 33-34 of the BRR[817] and the chosen Non-Member State court is a Contracting State, the HCCCA will apply. If none of the instruments is applicable, the case would be regulated by national law.[818] In its current form, Article 26.6 is not straightforward to cover such scenarios. Article 26.1 would contribute by its rule to achieve coherent interpretation of the HCCCA and international treaties. To encapsulate such cases, an additional Article 26.6(c) could be drafted:

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[813] HCCCA Article 4.2; BRR, Article 63.1.

[814] The Convention shall not affect the application of the rules of a REIO that is a Party to this Convention, whether adopted before or after this Convention where none of the parties is resident in a Contracting State that is not a Member State of the REIO. Currently, the EU (including all the Member States as well as Denmark) is the sole REIO that is a HCCCA Contracting State. See: HCCCA, Article 26(6)(a).

[815] HCCCA, Preamble.

[816] HCCCA, Article 26.1.

[817] For the related discussion see thesis, 5.4.6.

[818] For the related discussions see thesis, 5.4.6.

c) *'as concerns the choice of court or courts of a State that is neither a Member State of the Regional Economic Integration Organisation nor a Contracting State, unless there are specific rules of the Regional Economic Integration Organisation in this ambit.'*

There would be confronting arguments challenging this suggestion based on the other Regional Economic Integration Organisations whose rules would include residency as applicability requirements (if any). Indeed, the latter would limit the autonomy principle and hamper access to justice. On the other hand, while ratifying any Contracting State and REIO may declare the applicability of the HCCCA.

To sum up, Article 26(6)(a) restrains the applicability of the BRR and conflicts with Article 26.1. Inclusion of the proposed provisions to the HCCCA or drafting additional protocols would enhance applicability perspectives of the BRR, avoid unnecessary limits over party autonomy and ensure compatibility between the instruments.

Article 26(6)(b), on the other hand, states that as concerns the recognition or enforcement of judgments between Member States of the REIO, the HCCCA shall not affect the application of the rules of the REIO that is a Party to the HCCCA.[819] This provision serves the party autonomy principle and makes an alignment between the BRR and HCCCA. A judgment between the Member States is recognised and enforced under the BRR. It also implies that where a judgment was given by a Member State court and addressed for the recognition and enforcement in a Contracting State that is not a Member State (i.e., Singapore or Mexico) and vice versa, the HCCCA applies. If the recognition and enforcement relate at least to one Contracting State that is not an EU Member State, the HJC should also be considered.[820] For example, Parties A and B might negotiate a non-exclusive jurisdiction agreement favouring the Dutch court. Suppose the judgment given by the Dutch court is brought for the recognition and enforcement in Italy. In that case, the Italian court will apply the BRR, which will not be interrupted by the HCCCA. If the same judgment is addressed by B to get recognised and enforced in Singapore, which is a Contracting State but not a Member State, the HCCCA cannot apply due to the exclusion of non-exclusive

[819] HCCCA, Article 26(6)(b). It does not matter whether the rules were adopted before or after the HCCCA.
[820] For the discussion of the HJC see 3.3.5.

jurisdiction agreements. The latter brings perspectives for the HJC and enshrines the effectiveness of the judgments that do not fall into the scope of the REIO rules.

5.4 Party autonomy aspects of the BRR: Convergence and divergence with the HCCCA

The BRR punctuates that parties' autonomy should be respected.[821] It presents a public consequentialist justification to the provision of the principle by aiming at the sound operation of the internal market.[822] In this line, the revisions introduced substantive validity rules and severability of jurisdiction agreements. The provision of the BIR requiring at least one of the parties to be domiciled in a Member State for giving effect to the choice of court agreements was removed. One of the principal revisions was the new *lis pendens* ruling, which reinforced jurisdiction agreements and prevented litigation tactics. Besides, *exequatur* used to be in place to get the declaration of enforceability on the judgments was abolished. Furthermore, new rulings applicable to proceedings pending in third States were inserted. However, while the advantages of the reforms for the provision of party autonomy are undisputed, there are still significant issues that have been left unresolved.

5.4.1 Choice of court agreements: Effects

According to the BRR, parties may agree that a court or courts of a Member State have jurisdiction to settle any disputes that have arisen or may arise in connection with a particular legal relationship.[823] Unlike the HCCCA, the BRR includes not only exclusive jurisdiction agreements but also non-exclusive designations. Further, a claimant is given alternatives regarding the place where to commence proceedings.[824] It is claimed that an exclusive jurisdiction agreement is one of the most vital grounds for jurisdiction; in contrast, a non-exclusive jurisdiction agreement is merely a potential basis for jurisdiction.[825] This differentiated protection is associated with the assumption

[821] BRR, Recital 19.
[822] According to BRR, Recital 4, "Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market". See: Mills (n 1) 79-84
[823] BRR, Article 25.1.
[824] BRR, Articles 4, 7 and 8. See also Cheshire, North and Fawcett (n 213) 231.
[825] See: Mills (n 1).

that the jurisdiction of non-exclusively chosen courts can be established against the defendants domiciled in the Member States.

On the one hand, Recital 14 states that '…to safeguard the jurisdiction of the courts of the Member States in situations where they have exclusive jurisdiction and respect the parties' autonomy, certain rules of jurisdiction in this Regulation should apply regardless of the defendant's domicile'.[826] Most probably, the Recital is addressed to the exclusive jurisdiction of the courts under Article 24. It would be helpful if the text presented some clarification on this matter. On the other hand, the general rule enforcing jurisdiction agreements does not exclude non-exclusive designations; indeed, presuming exclusivity presents a broader approach covering both types of agreements. In *Perform Content Services Ltd v Ness Global Services Ltd*, the court held that Article 25 of the BRR confers mandatory jurisdiction on the courts designated in an exclusive or non-exclusive jurisdiction agreement, and the domicile rule in Article 4 cannot override this jurisdiction.[827]

By removing the domicile precondition, the BRR aimed to avoid diversities arising from the national laws and guarantee equal access to justice.[828] Such a requirement disregarded party autonomy; for example, an Italian jurisdiction agreement between Mexican and American parties; likewise, the resulting judgment did not get any protection under the BIR but the Italian law.[829] Despite the previous system leaving the determination of the jurisdiction of the chosen court by the non-domiciled to the national law, it derogated all different Member State courts from taking jurisdiction or proceedings unless the chosen court or courts had declined jurisdiction.[830] In this sense, the BIR offered some protection to non-domiciliaries.

According to the revisions, parties can agree that a Member State court or courts have jurisdiction regardless of domicile.[831] This provision is a step forward to enshrine the autonomy of the non-domiciled same as that of the domiciled. It should be noted that the application perspectives of the HCCCA are assessed concerning the residual

[826] BRR, Recital 14.
[827] See: *Perform Content Services Ltd v Ness Global Services Ltd* [2021] EWCA Civ 981. The Court of Appeal dismissed an appeal.
[828] BIR, Article 23; BRR, Article 25(1).
[829] This brought application of BIR Article 4 rather than Article 23 on prorogation of jurisdiction.
[830] BIR, Article 23.3
[831] BRR, Article 25.1.

factor.[832] In contrast, the elimination of the domicile requirement fostered parties' autonomy and intended to bring more jurisdiction agreements into the scope of the BRR.[833] It might be supposed that uniform jurisdictional rules vis-à-vis non-residents might not be liberal than the national rules. Nonetheless, strict uniform rules protect the integrity of the Union, provide certainty for the internal market and prevent more flexibility and diverse approaches of the Member States towards the external market.[834]

Unlike the HCCCA, the BRR does not contain any provision precisely stating that any other seised court shall suspend or dismiss the proceedings in breach of a jurisdiction agreement.[835] On the other hand, the reversed *lis pendens* rules brought derogative or negative effects of exclusive jurisdiction agreements. Prerogative effects of exclusive jurisdiction agreements got strengthened by reinforcing jurisdiction of the exclusively designated court, while derogative effects of such agreements were ensured by 'restraining' any other court's jurisdiction.

The reforms were necessary '…to enhance the effectiveness of exclusive jurisdiction agreements and avoid abusive litigation tactics....'[836] Yet, unlike the HCCCA, which neither requires nor prohibits anti-suit injunctions as the means promoting prerogative effects of exclusive choice of court agreements, such measures are incompatible with mutual trust in the European area.[837] Further, absent derogative effects of non-exclusive jurisdiction agreements, a risk of concurrent proceedings and inconsistent judgments remain under both instruments. On another note, since interim measures of protection is not a judgment within the meaning of the HCCCA, they might not get uniform enforcement after being granted.[838]

Regarding the effects of jurisdiction agreements, it should also be noted that there is an ambiguity about whether the reversed rules apply to asymmetrical designations. While the English courts have interpreted those variations as having an exclusive nature that would bring certainty and respect to party autonomy, there is still no uniform

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[832] For jurisdiction purposes, a case is international where parties are residents in different Contracting States and their relationship and elements relevant to the dispute other than the location of the court are connected with some other State. See: HCCCA, Article 1(2).
[833] BIR by Article 23.3 (as pointed out above) might function similarly.
[834] Pocar (n 772) 146.
[835] HCCCA, Article 6.
[836] BIR, Article 27; BRR, Recital 22, Article 29, 31(2); *Erich Gasser GmbH v MISAT Srl* [2003] Case C-116/02.
[837] For the related discussions see Keyes and Marshall (n 446) 355.
[838] HCCCA, Articles 4 and 7.

interpretation given by the CJEU; indeed, the Member States have often refused to enforce asymmetrical clauses.[839]

5.4.2 Choice of court agreements: Formal validity

In European PIL, form is understood as "every external manifestation required on the part of a person expressing the will to be legally bound, and in the absence of which such expression of will would not be regarded as fully effective."[840] Unlike the orthodox rigidity of the Brussels Convention, 'the evident trend in the EU regulation is towards a relaxation of formality requirements'.[841]

The BRR, similar to its predecessors, provides uniform formal validity rules.[842] Accordingly, a choice of court agreement shall be either "in writing or evidenced in writing"; it can be drafted "in a form which accords with practices which the parties have established between themselves"[843]; or "in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned."[844] Unlikely, both the HCCCA and NYC lack a provision regarding widely accepted usages in international trade and commerce.[845] The BRR, similar to the HCCCA, presents a broader approach to form by giving effect to an agreement that has been concluded by using any means of communication rendering information accessible. Furthermore, according to the BRR, any communication by electronic means that provides a durable record of the agreement shall be equivalent to "writing".[846] In this regard, the BRR accommodates protection to more agreements,

[839] For the discussion of the English position and views of some Member State courts on asymmetrical jurisdiction agreements see thesis, 4.2.1.5.
[840] Giuliano/Lagarde Report [1980] O.J. C282/1, [29]; For more see also: Pietro Franzina, "The substantive validity of forum selection agreements under the Brussels Ibis Regulation" in Peter Mankowski (ed.) *Research Handbook on Brussels Ibis Regulation* (Edward Elgar, 2020), 95-117.
[841] Mills (n 1) 214.
[842] See: Brussels Convention, Article 17; BIR, Article 23.1; BRR, Article 25.1.
[843] *Partenreederei Ms. Tilly Russ and Ernest Russ v NV Haven- & Vervoerbedrijf Nova and NV Goeminne Hout*, Case 71/83, [1984] ECR 02417, [18].
[844] Usages in international trade or commerce" addresses the repetitive transactions between the same parties in a specific field of international trade. See: Dicey, Morris and Collins (n 218) para 12-138.
[845] This matter would be subject to the expansive interpretation of the HCCCA and NYC by the national courts.
[846] BRR, Article 25.2; see also: UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996, Article 5.

including click-wrapping contracts being reached by electronic means.[847] Unlike the NYC but similar to the HCCCA, the BRR does not require any signature. Identical to the HCCCA and NYC, purely oral agreements without a subsequent written confirmation are not enforceable under the BRR, which is argued to be '… a significant constraint on party autonomy….'[848] Nevertheless, such a condition should be reasoned with a risk of abusing tactics; for instance, a party might refer to the absence of an agreement while it might be challenging for the other party to prove the existence of an agreement. In this regard, like the HCCCA, the form requirements of the BRR provide evidence for the parties' consent.[849]

While the CJEU has shown much more rigidity towards formal requirements and usually interpreted form as the evidence of the parties' genuine consent, the English courts have been more flexible and inclined towards party autonomy.[850] The main reason behind rigidity might be related to the fact that consensus brings jurisdiction of the court other than that which would have jurisdiction. Nevertheless, it might also be presumed that since the former EU instruments did not contain any substantive validity rule defining the genuine consent, the CJEU is used to adjust concerning the formal requirements and determination of the consensus.

Furthermore, parties can incorporate a jurisdiction clause by reference. Whether such incorporation is sufficient to establish a consensus is defined by the Member State law whose court is chosen.[851] Issues of incorporation should also be assessed solely by reference to the requirements of the EU law for promoting legal certainty, same as the applicability of jurisdiction clauses.[852] Incorporation of a jurisdiction clause by

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[847] *El Majdoub Jaouad El Majdoub v Cars on The Web Deutschland GmbH* [2015] (C-322/14) (21 May 2015).

[848] Mills (n 1) 214. See also: *F. Berghoefer GmbH & Co. KG v ASA SA* [1985] ECR 2699, Case 221/84; *Saey Home & Garden NV/SA v Lusavouga-Máquinas e Acessórios Industriais SA* [2018] Case C-64/17.

[849] See: Hartley/Dogauchi Report, para 113.

[850] See: *Estatis Salotti v Ruwa* [1976] ECR 1832, [7[, [10]; *Berghoefer v ASA SA* [1985] ECR 2699, at [13]; *Powell Duffryn v Petereit* [1992], [13]-[14]; *MSG*, C-106/95, EU:C:1997:70, [15]; *Refcomp*, C-543/10, EU:C:2013:62, [28]; *Aeroflot v Berezovsky* [2013] EWCA 784, [54]. See also: *Mastermelt Ltd v Siegfried Evionnaz SA* [2020] EWHC 927 (QB); *R + V Versicherung v Robertson* [2016] EWHC 1243; *7E v Vertex* [2007] 1 WLR 2175.

[851] Cheshire, North and Fawcett (n 213) 235-236.

[852] See: BRR, Article 2. See also: *The Public Institution for Social Security v Mr Fahad Maziad Rajaan Al Rajaan & Others* [2020] EWHC 2979 (Comm), at 103, 107. See also: *Aeroflot - Russian Airlines v Berezovsky* [2013] EWCA Civ 784, [2013] 2 Lloyd's Rep. 242, [2013] 7 WLUK 49, *Benincasa v Dentalkit Srl* (C-269/95) EU:C:1997:337, [1997] E.C.R. I-3767, [1997] 7 WLUK 82, *Custom Made Commercial Ltd v Stawa Metallbau GmbH* (C288/92) EU:C:1994:268, [1994] E.C.R. I-2913, [1994] 6 WLUK 341, *Refcomp SpA v Axa Corporate Solutions Assurance SA* (C-543/10) EU:C:2013:62, [2013] 1 All E.R. (Comm) 1201, [2013] 2 *WLUK 226 and Hoszig Kft v Alstom Power Thermal Services* (C-222/15) EU:C:2016:525, [2016] I.L.Pr. 36, [2016] 7 WLUK 162.

reference to another contract or general terms and conditions falls within the practices that have been established between the parties; it should also conform to the formal requirements set out by the BRR.[853] Such a reference should clearly and precisely demonstrate parties' intention and clear consent to or actual acceptance of a jurisdiction clause within the meaning of the EU law.[854] Suppose a contract expressly refers to one party's standard terms. In that case, a specific reference or communication of a jurisdiction clause is not necessary for the purposes of establishing consent under Article 25 of the BRR.[855] General conditions evidence an agreement conferring jurisdiction in writing.[856] General terms and conditions cannot be the subject of any negotiation, and "a duly diligent contracting party" could and should have read them.[857] Instead, if the terms of another contract were incorporated, a close connection of the clause with the new contract is considered, which might often be challenging to succeed.[858]

5.4.3 Choice of court agreements: Substantive validity and separability

The predecessors of the BRR did not have any express ruling on material validity of jurisdiction agreements but included provisions on formal validity.[859] Commentaries suggested the application of the facts and matters impugning contractual validity.[860]

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[853] The *Public Institution for Social Security v Mr Fahad Maziad Rajaan Al Rajaan & Others* [2020] EWHC 2979 (Comm), at 126.

[854] See: *Africa Express Line Ltd v. Socofi SA* [2010] 2 Lloyds Rep 181; see also: *Estasis Salotti di Colzani Aimo e Gianmario Colzani v RUWA Polstereimaschinen GmbH* (24/76) EU:C:1976:177, [1976] E.C.R. 1831, [1976] 12 WLUK 98, *Mainschiffahrts Genossenschaft eG (MSG) v Les Gravieres Rhenanes Sarl* (C-106/95) EU:C:1997:70, [1997] Q.B. 731, [1997] 2 WLUK 381 and *Coreck Maritime GmbH v Handelsveem BV* (C-387/98) EU:C:2000:606, [2000] E.C.R. I-9337, [2000] 11 WLUK 234, *Bols Distilleries BV (t/a Bols Royal Distilleries) v Superior Yacht Services Ltd* [2006] UKPC 45, [2007] 1 W.L.R. 12, [2006] 10 WLUK 313.

[855] *7E Communications Ltd v Vertex Antennentechnik GmbH* [2007] EWCA Civ 140, [2007] 1 W.L.R. 2175, [2007] 2 WLUK 616 and *Credit Suisse Financial Products v Societe Generale d'Enterprises* [1996] 5 Bank. L.R. 220, [1996] 7 WLUK 72, *Profit Investment Sim SpA v Ossi* (C-366/13) EU:C:2016:282, [2016] 1 W.L.R. 3832, [2016] 4 WLUK 406, *Credit Suisse Financial Products v Societe Generale d'Enterprises* [1996] 5 Bank. L.R. 220, [1996] 7 WLUK 727E *Communications Ltd v Vertex Antennentechnik GmbH* [2007] EWCA Civ 140, [2007] 1 W.L.R. 2175, [2007] 2 WLUK 616 and *Sherdley v Nordea Life and Pensions SA* [2012] EWCA Civ 88, [2012] 2 All E.R. (Comm) 725, [2012] 2 WLUK 517.

[856] *TRW Ltd v Panasonic Industry Europe GmbH* [2021] EWHC 19 (TCC), [79].

[857] See: Judgment of the Amsterdam court, C/13/697598 / HA ZA 21-183; BRR, Recital 20. For the discussion see https://gavclaw.com/2021/11/06/court-amsterdam-on-the-impact-of-the-lex-fori-prorogatis-consumer-laws-for-choice-of-court/.

[858] See: *Africa Express Line Ltd v. Socofi SA* [2010] 2 Lloyds Rep 181, [31]; *Dornoch Limited v The Mauritius Union Assurance Company Ltd* [2006] EWCA Civ 389, [2006] 2 Lloyd's Rep 475, [27].

[859] BIR, Article 23.

[860] Briggs (n 494) para 2.128; Cheshire, North and Fawcett (n 213) 233-234.

Some argued that the CJEU had already built a good practice of determining the substantive validity of jurisdiction agreements.[861] Nevertheless, principles of the European contract law created on a case-by-case basis would have brought considerable uncertainties for the foreseeable future.[862] It was further contended that form requirements set by the BIR also covered consent issues and the Community notion of good faith applicable in the cases where jurisdiction agreements were directly impeached.[863] Such an approach lacked precise determination of the substantive validity and was hardly acceptable from a common law perspective. The latter also brought provisions of the HCCCA to these ends as a logical consequence of the inclusion of more common lawyers to the negotiations at the Hague than were usually found in the European Council meetings.[864]

There were also claims that a rule on the material validity of jurisdiction agreements would indeed have a knock-on effect, raising many disputes.[865] Such arguments might result from the absence of uniform substantive validity rules in EU law. Upon this deficiency, form requirements would have applied to identify parties' genuine consent and avoid disputes arising from the relevant legal framework gap. Yet, the form cannot always define the substance. An agreement can satisfy formal requirements, but it does not always mean that consent exists. On another note, determining a valid jurisdiction agreement or denial of its existence based on the form requirements would afford potential grounds for bad faith.[866] Even where formal validity would imply substantive validity, it would not be convincing enough as the written agreement could have been agreed upon by fraud, misrepresentation, or undue influence.[867] Whereas some authorities were resorting to the national laws while defining if an agreement was valid[868], opponents alleged that the principle should be developed autonomously

[861] BIR, Article 23. See Andrew Dickinson, "Surveying the Proposed Brussels I Regulation – Solid Foundations but Renovation Needed" [2010] 12 Yearbook of Private International Law, 247, 301.
[862] See The Hess, Pfeiffer and Schlosser Report, Study JLS/C4/2005/03, Final Version September 2007, para 881; Louise Merrett, "Article 23 of the Brussels I Regulation: A Comprehensive Code for Jurisdiction Agreements?" [2009] 58 International and Comparative Law Quarterly 545; Simon P. Camilleri, "*Formal Validity*, *Material Validity or Both*?" [2011] 7 Journal of Private International Law, 297.
[863] See ibid, cf Merrett; If a jurisdiction agreement was formally valid it was submitted that 'the law of that forum must decide whether the agreement is valid', as the sole way of ensuring uniformity. See: Opinion of 20 May 1981, Case 150/80 *Elefanten Schuh GmbH v Pierre Jacqmain* ECLI:EU:C:1981:112.
[864] Briggs (n 494) paras 2.128-2.129.
[865] For more discussions see: Ahmed (n 460) 216-217.
[866] Berghoefer GmbH & Co v ASA SA [1985] ECR 2699 Case 221/84; Merrett (n 860), 560.
[867] Jan Jaap Kuipers, "Party Autonomy in the Brussels I Regulation and Rome I Regulation and the European Court of Justice" [2009] 10 German Law Journal 1505, 1512.
[868] The questions whether the dispute arose out of the legal relationship in connection with which the agreement was made and whether the scope of the clause applied to the dispute were specified as a

in the Union law.[869] Regardless of the CJEU's concerns for the genuineness of the parties' agreement and "clear and precise demonstration" of the consent, it had never explicitly ruled on the substantive validity or offered any guidance regarding 'the treatment of such consensus-influencing factors as error, misrepresentation, duress or fraud'.[870]

The BRR established the substantive validity rule applicable to the choice of court agreements. A court or courts of a Member State that the parties choose shall have jurisdiction unless the jurisdiction agreement is null and void as to its substantive validity under the law of that Member State.[871] In the recent case[872], Mr Justice Walksman articulated the courts' tendency to adopt a flexible approach towards the formal validity of jurisdiction agreements[873] while emphasising the importance of substantive validity for identifying the consent.[874] The 'substantive validity' concept within the BRR encapsulates the issue of whether parties' consent mirrors a properly-formed will.[875]

The BRR further determines that the question of nullity and voidance should be decided under the forum's law, including its PIL and conflict of laws rules.[876] In this way, similar to the HCCCA[877], the BRR does not prevent *renvoi* which risks certainty, predictability and party autonomy.[878] If the parties have chosen the German court, the

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matter for the domestic court applying domestic laws. See: *Powell Duffryn v Petereit* [1992] ECR I-1745 Case C-214/89, [32]-[33].

[869] Merrett (n 860); Paul Beaumont and Peter McEleavy, Anton's Private International Law (3rd edn, W Green & Son, 2011), para 8.108.

[870] Franzina in Mankowski (ed.) (n 838) 95.

[871] BRR, Article 25.1.

[872] *Mastermelt Ltd v Siegfried Evionnaz SA* [2020] EWHC 927 (QB).

[873] There is an established set of both the European and domestic case law interpreting formal validity and writing requirement exhaustively, see: *F. Berghoefer GmbH & Co. KG v ASA SA.* [1985] EUECJ R-221/84; *7E Communications Ltd. v Vertex Antennentechnik GmbH Rev 1* [2007] EWCA Civ 140; *R + V Versicherung AG v Robertson And Co SA* [2016] EWHC 1243 (QB).

[874] The judge referred to the opinion of the Advocate General Bot in *Profit Investment,* as well as several English authorities such as *ME Tankers v Abu Dhabi Container Lines* [2002] 2 Lloyds 643, *Claxton Engineering v TXM* [2007] 1WR 2175, *Chester Hall v Service Centres* [2014] EWHC 2529. See also: Aygun Mammadzada, "Mastermelt Ltd v Siegfried Evionnaz SA: Would the Lugano Convention Provide a Level Playing Field for Judicial Cooperation Post-Brexit?" (The European Association of Private International Law blog, 28 May 2020) <https://eapil.org/2020/05/28/mastermelt-ltd-v-siegfried-evionnaz-sa-would-the-lugano-convention-provide-a-level-playing-field-for-judicial-cooperation-post-brexit/comment-page-1/#comment-62> accessed 26 November 2021.

[875] Franzina in Mankowski (ed.) (n 838) 115.

[876] BRR, Recital 20. The Hartley/Dogauchi Report on the HCCCA 2005 also shows a similar approach.

[877] For the discussion of the similar problems arising from the substantive validity rule see thesis, 4.3.1.

[878] The Rome I and Rome II Regulations both avoid application of *renvoi* to the choice of law rules in contract and tort. But they exclude forum selection clauses from the scope. See: Rome I Regulation, Article 1.2(e), 20; Rome II Regulation, Article 24. Eady J. at [24] of *Islamic Republic of Iran v Berend* [2007] 2 All ER (Comm) 132 stated that "the modern approach to *renvoi* is there is no over-arching

German law should determine the material validity of their jurisdiction agreement. It might be possible that the German law would allow *renvoi* and, i.e., send the matter to be determined by the English law. Upon double *renvoi*, the English law might send the same issue to the German law. In the recent case, based on *renvoi* allowed under the Dutch PIL, the Amsterdam court applied Rome I Regulation to the choice of court agreement even though the Regulation excluded such agreements from the scope.[879] Relevant efforts were taken to ensure that cases would be decided similarly by application of *renvoi*; nevertheless, it has long been discredited; further criticisms asserted that "judicial mental gymnastics could not reach uniformity but only by international conventions."[880] Even where uniformity is attainable through *renvoi,* it is often fictitious[881] as Tennysonian wilderness of single instances.[882] It could undermine the national policy of a particular state, sending the issue to another state's law.[883] Therefore, by possible *renvoi*, the substantive validity rule brings inconclusiveness and prevents resolving the disputes.

As mentioned earlier, the HCCCA also contains a similar provision on substantive validity of the choice of court agreements.[884] Construction of the substantive validity

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doctrine to be applied but it will be seen as a useful tool to be applied where appropriate". On some occasions, due to the nature of the case or special connection *renvoi* could not apply, i.e. where there is an immovable property. See: *Blue Sky One v Mahan Air* [2010] EWHC 631. Or as pointed out by Millett J in *Macmillan Inc v Bishopsgate Investment Trust plc* (No. 3) [1995] 1 WLR 978 at 1008, the doctrine has been applied only in the field of succession and to legitimation by subsequent marriage, but it has not been applied in contract or other commercial cases. It might also be contemplated that *renvoi* does not apply where the legislator has fully or to more extent has achieved uniformity.

[879] See: Judgment of the Amsterdam court, C/13/697598 / HA ZA 21-183; BRR, Recital 20. For the discussion see Geert Van Calster, "Court Amsterdam on the impact of the lex fori prorogati's consumer laws for choice of court. A high net value Australian businessman sails away from Dutch jurisdiction", 6 November 2021, <https://gavclaw.com/2021/11/06/court-amsterdam-on-the-impact-of-the-lex-fori-prorogatis-consumer-laws-for-choice-of-court/> accessed 30 November 2021.

[880] Adrian Briggs, "Forum conveniens and the impecunious claimant: *Lubbe v Cape plc*." (2000) 71 British Yearbook of International Law 435, 465-468. Justifying the doctrine, LJ Mance stated that "the conflict of laws does not depend (like a game or even an election) upon the application of rigid rules, but upon a search for appropriate principles to meet particular situations". See: *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68, [2001] QB 825, at 841.

[881] Albert Armin Ehrenzweig, *Private International Law* (Springer, 1972) 145

[882] *Blue Sky One v Mahan Air* [2010] EWHC 631, [172]; Another interesting argument was put forward by Maugham J that application of *renvoi* insists everything turn on "the doubtful and conflicting evidence of foreign experts" about the PIL rules of the foreign system. See: *Re Askew* [1930] 2 Ch 259, [278].

[883] Dicey, Morris and Collins (n 218) para 4-029 – 4-034; Cheshire, North and Fawcett (n 213) 61- 66. In this regard, several courts have rejected the terminology of "reference back" or "reference on" of the rigid renvoi doctrine. Instead "the refinement of the choice of law rules of the forum by reference to the specific legal context which they regulate" have been promoted. See also: Dicey, Morris and Collins (n 218) para 4-021, the judgment of the High Court of Australia in *Neilson v Overseas Projects Corp of Victoria Ltd* [2005] HCA 54, (2005) 223 C.L.R. 331.

[884] According to HCCCA Article 5.1 and Hartley/Dogauchi Report, para 125, substantive validity of a choice of court agreements is decided by the law of the chosen court and the null and void rule is the only exception to the obligation of the designated court to hear the case.

rule by the Recast Regulation has been very significant and made aligned with the HCCCA.[885] While aiming at coherence between the instruments and consistency, adding the substantive validity rule to the Recast Regulation also eased the EU's accession to the HCCCA. However, most problems remaining within the Hague regime are experienced by the BRR and vice versa. Domestic varieties arise out of the absence of the unified intext rules to determine substantive validity. Besides, the HCCCA entitles several courts than the chosen court, likewise different sets of rules define consent.[886] Like the HCCCA, the BRR does not rule on particularities of consent and validity, which are to be decided by the applicable domestic law.[887] The goals pursued by both of the regimes '…deserve approval, but the means employed to achieve them fall short of providing the parties and the seised court with a clear and straightforward answer to a practically important issue, such as whether a choice of court agreement is valid as to its substance'.[888] As called, "a forum-dependent assessment" threatens uniformity, as well as predictability which is primarily considered as a justification for authorising parties to enter into an "electio fori."[889] The risks are becoming even more critical if abusive litigants negotiate a forum selection clause in favour of the state whose law might be more "advantageous." In the absence of a uniform definition of the substantive validity in either the Hague or Brussels regime, an agreement that would be valid under the English law might be invalid under the French law or vice versa. Both regimes leave the matter to the national laws and justify drafting direct rules on the substantive validity. Similar rulings would bring consistency and certainty and ensure parties' autonomy uniformly at the regional and global levels. An enforceable clause within the meaning of the BRR would also be given effect by any Hague state, adjusting to modern trends and globalisation objectives.

Moreover, such a uniform rule would prevent *renvoi* and provide consistency and harmonisation. These objectives are of particular commercial significance and

[885] HCCCA, Article 5.1.

[886] Under the HCCCA the chosen court determines substantive validity of the jurisdiction agreement according to its national law. On the other hand, the court seised and the court addressed to recognize or enforce the resulting judgment can also assess capacity of the parties to conclude the agreement which is directly linked to consent and therefore substantive validity. For more discussions see: Chapter 4.

[887] Franzina in Mankowski (ed.) (n 838) 95.

[888] ibid. Pietro Franzina quoted this in regard to the substantive validity rule of the Recast Regulation, Article 25. It is also a case under the HCCCA 2005.

[889] ibid.

consistent with the goals of both the HCCCA and BRR. Yet, the Council does not have any political desire to harmonise the European contract law.[890] Similarly, the HCCH has not presented any intention to such ends.

Before the reforms of the BRR, the CJEU had confirmed severability of a jurisdiction agreement by stating that legal certainty would be jeopardised if one party could frustrate a jurisdiction agreement on the ground that the contract containing it was null or void.[891] Like the HCCCA and NYC, the BRR provided severability or separability of a choice of court agreement.[892] The ruling applies only to a jurisdiction clause that forms part of the main contract and defines that it will be treated as an independent agreement; nullity or voidance of the main contract will not affect the validity of a jurisdiction agreement. As submitted, "issues of contractual enforceability exogenous to the consent or capacity of the parties…"[893] should not affect the validity of the forum selection clause. This rule brings more protection to jurisdiction agreements and ensures the autonomy of the parties. Moreover, if the main contract is claimed to be null or void, the chosen court decides on the question of validity. While the court assesses the validity of the jurisdiction clause according to the formal and substantive validity rules of the BRR, contract law rules apply to the existence or validity of the main contract.

5.4.4 Material scope of the BRR

Like the HCCCA, the BRR also applies to civil and commercial matters. Both are double instruments determining jurisdictional, recognition, and enforcement grounds, while the BRR has broader bases exceeding exclusive jurisdiction agreements.[894] As discussed earlier, BRR applies to non-exclusive jurisdiction agreements. The nature

[890] Beaumont and McEleavy (n 859) 8.108

[891] *Francesco Benincasa v Dentalkit Srl* [1997] ECR I-03767 (A valid jurisdiction agreement and consent had to satisfy formal requirements set out by the Convention. This was also concluded in *Transporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA* [1999] ECR I-01597) and Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Others* [2015] ECLI:EU:C:2015:335. In accordance with *Case C-214/89 Powell Duffryn* [1992] ECR I-1745 [37] *i*t was further submitted that validity of the contract had to be determined by the national court.

[892] HCCCA, Article 3(d); BRR, 25(5).

[893] Francisco Garcimartin Alférez, "Prorogation of Jurisdiction", in Andrew Dickinson and Eva Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press 2015), 297.

[894] Unlike the HCCCA, the BRR not only provides rulings for jurisdiction agreements including non-exclusive ones, but also contains a default rule on general jurisdiction, special jurisdiction, exclusive jurisdiction, prorogation of jurisdiction through submission as well as protective rules applicable to weaker parties. See: BRR, Articles 4, 7-8, 24, 26; Section 3-5.

of an agreement also determines whether general or reversed *lis pendens* rulings are employed.[895] Article 25 indicates the jurisdiction of the court or courts of a single Member State, while the CJEU held that an agreement giving jurisdiction to the courts of two Member States was within what is now Article 25.[896] It was assumed that Article 31 would apply in such a case, and the court second seised would defer to the court first seised.[897] However, the CJEU's ruling was relevant to the Brussels Convention, which expressly retained parties' rights to agree for the benefit of only one of the parties.[898] Such agreements might be given effect under the BRR as the object and purpose of Article 25 is to give effect to parties' agreements but not to preserve their equal rights.[899] The English authorities have interpreted asymmetrical jurisdiction agreements exclusive within the meaning of the BRR, but the CJEU has rendered no similar decision.[900] The English practice would be irrelevant to the European Union Post-Brexit and cannot be precedent for the Member State courts.

Like the HCCCA, the BRR also applies to civil and commercial cases only if the proceedings are ongoing or related to the European judicial area. The Regulation also excludes matters such as the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage; insolvency; maintenance obligations and other family law matters; wills and succession as well as arbitration.[901] While the BRR excludes social security matters, the HCCCA does not expressly mention them among the exclusions. Unlike the

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[895] However, there is a remaining uncertainty related to the nature of the asymmetrical jurisdiction agreements which are very often negotiated in commercial relations.

[896] According to the agreement in *Meeth v Glacetal Sarl* the parties could be sued in the courts of the Member States where they were domiciled.

[897] Cheshire, North and Fawcett (n 213) 236.

[898] Brussels Convention, Article 17.

[899] Cheshire, North and Fawcett (n 213) 236-237. In the 2012 judgment of the Court of Cassation of France ruled in the case of *Mme 'X' v. Banque Privée Edmond de Rothschild* 26 September 2012 (the *Rothschild* case) and *Cass. 1ère Civ., 25 March 2015,* (Crédit Suisse), asymmetrical jurisdiction agreements were held contrary to the object and purpose of the Brussels regime as well as equality of the parties. However, in Apple Sales International v eBizcuss: Cass. 1ere Civ, 7 October 2015, The French Supreme Court concluded that asymmetrical jurisdiction clauses are valid if each party at the outset can identify the competent jurisdictions (the foreseeability condition).

[900] *Etihad Airways PJSC v Flother* [2019] EWHC 3107; Etihad Airways PJSC v Flother [2020] EWCA Civ 1707, the Court of Appeal confirmed the decision of the first instance and held that asymmetrical jurisdiction agreements are exclusive for the purposes of the BRR 31(2); *Commerzbank v Liquimar* [2017] EWHC 161 (Comm). See also: *Mauritius Commercial Bank Ltd. v. Hestia Holdings Ltd. & Sujana Universal Industries Ltd.* [2013] EWHC 1328, where the asymmetrical jurisdiction agreement was given effect upon party autonomy. For the discussion see: Chapter 3.

[901] BRR, Article 1.2.

HCCCA, the BRR applies to consumer and employment contracts and protects weaker parties. The HCCCA applies to insurance contracts that are characterised with special protection under the BRR.[902]

Moreover, the BRR, unlike the HCCCA, covers carriage of passengers and goods, maritime issues, competition matters, claims for personal injury brought by or on behalf of natural persons, tort or delict claims, tenancies or rights in rem in immovable property, intellectual property rights, the validity of entries in public registers. On the other hand, the BRR determines exclusive jurisdiction over immovable property, intellectual property rights, the validity of entries in public registers, which override parties' autonomous choices.[903] Likely, choice of court agreements cannot be contrary to the provisions determining special jurisdiction regarding the consumer, employment, and insurance contracts.[904] The HCCCA does not address submission (the latter overrides jurisdiction agreements as provided by the Regulation).[905] Indeed, by submitting to any other forum, parties express their freedom, which would be helpful to be regulated by the HCCCA.[906]

5.4.5 Parallel proceedings

Unlike the HCCCA, the Brussels regime employed the *lis pendens* rules for preventing multiple proceedings and inconsistent judgments.[907] According to the BIR, upon the proceedings involving the same cause of actions between the same parties, which were brought in the courts of the different member states, the court second seised even if there was an exclusive jurisdiction agreement, had to stay proceedings until the court first seised determined its jurisdiction.[908] The *lis pendens* rules took precedence over jurisdiction agreements 'based clearly and solely on the

[902] The Contracting States have usually declared not to apply the HCCCA to insurance on the basis of Article 21.
[903] BRR, Article 24.
[904] BRR, Article 25, 15, 19 and 23.
[905] BRR, Article 26.
[906] For the related discussions see: 4.2.5.
[907] *Lis pendens* rules with the main principles of mutual trust and comity apply in civil law systems and preclude application of the common law *forum non conveniens* doctrine. See: BIR, Recital 16, 17; BRR, Recital 26; For the related discussions see: Brouwer and Gerard (n 627). See also: Paul (n 627).
The European Court of Justice held that Brussels Convention inhibits any court to dismiss jurisdiction based upon the domicile principle, alleging appropriateness of the other forum*, See: Owusu v Jackson and Others* C-281/02.
[908] BIR, Article 27.

chronological order in which the courts involved are seised'.[909] The Court stated that it was a legitimate use of the Regulation's provisions regarding the mutual trust principle; the matter related to delays had to be addressed to the European Court of Human Rights.[910] Furthermore, a measure issued by a Member state court to restrain another Member State court from hearing a case was not compatible with mutual trust even if such proceedings were vexatious or oppressive and brought in bad faith.[911] Although the rules intended to prevent parallel proceedings and conflicting judgments in the interests of the proper administration of justice within the Community, they led to torpedo actions[912] and restriction of party autonomy.[913] The rules also brought legal uncertainty about the place of litigation and waste of the legal expenses[914] and 'seriously jeopardised effectiveness of choice of court agreements in the European Union'.[915] Indeed, the BIR undermined party autonomy for the sake of mutual trust. Some authors claimed that it led arbitration to become a preferable instrument to litigation in Europe.[916]

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[909] *Gasser v. MISAT Srl,* [46], [47], *[48].* According to *AG Leger,* "the court second seised is never in a better position than the court first seised to determine whether the latter has jurisdiction". However, the Court did not adopt the AG Leger's opinion suggesting that choice of court agreements made an exception to the general *lis pendens* rule.

[910] *Gasser v. MISAT Srl, [69].*

[911] *Turner v Grovit C-159/02.*

[912] As stated "*The 'Italian Torpedo' is the name given to a common tactical abuse of process in cross-border disputes to defeat a jurisdiction agreement. A party may seek to frustrate its opponent by bringing an action in an EU member state that has a reputation for a slow or inefficient judicial system with a considerable backlog of cases, even where that jurisdiction has no connection to the claim. The court of the member state in whose favour the jurisdiction clause is drafted must then wait until the first court seised has dealt with the jurisdiction dispute. The resulting delay and expense in many cases forces the unfortunate torpedoed victim to settle*". See: Jonathan Wood, "*Sinking the Italian Torpedo: the recast Brussels Regulation*", 10.2.15, (published on 10 February 2015), <https://www.lexology.com/commentary/litigation/european-union/rpc/sinking-the-italian-torpedo-the-recast-brussels-regulation> accessed 26 November 2021.

[913] Firstly, posited in 1997; "The "torpedo" is a litigation device that relies on a combination of the relationship between choice-of- court agreements and *lis pendens* under BIR Article 23 and Article 27", as stated by Peter Arnt Nielsen, "The Recast Brussels I Regulation (2014), 83 Nordic Journal of International Law 61, 65. For more discussions see: Trevor C Hartley, "The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws" 2005, (54) International and Comparative Law Quarterly 813, 816–817. See also: Arnaud Nuyts, "Enforcement of Jurisdiction Agreements Further to *Gasser*" in Pascal de Vareilles-Sommières (ed), *Forum Shopping in the European Judicial Area* (Hart Publishing, 2007), 56.

[914] Jonathan Mance, "Exclusive Jurisdiction Agreements and European Ideals" [2004] 120 *Law Quarterly Review* 357, 362; A Dodd, "European Court Ruling Promotes Delaying Tactics" (2004) 39 *European Lawyer* 16, 16; Ratković and Rotar (n 553) 261.

[915] Trevor C Hartley "Choice-of-Court Agreements and the New Brussels I Regulation" (2013) 129 Law Quarterly Review 309, 310.

[916] Mance (n 903) 358; Dodd (n 903) 17; Ilona Nurmela, "Sanctity of Dispute Resolution Clauses: Strategic Coherence of the Brussels System" [2005] 1 *Journal of Private International Law,* 115, 146; Richard Fentiman, "Jurisdiction Agreements and Forum Shopping in Europe" [2006] 7 *Butterworths* Journal of International Banking and Financial Law 304; Ratković and Rotar (n 553) 262.

Tactical abuses arising out of the *lis pendens* rules were going against the principle of natural justice.[917] A "sinking"[918] torpedo action brought a "slow-moving ship" upon the proceedings taking place in a slow jurisdiction, and "the slowest ship determines the speed of the entire convoy."[919] Assuming similar facts as in *Gasser* and *Turner* occurred under the HCCCA, the exclusively chosen court would have exercised its jurisdiction based on the valid jurisdiction agreement. Any other court would have stayed or dismissed the proceedings. To avoid hazards to certainty and safeguard parties' choices, the Commission proposed to recognise derogative effects of exclusive choice of court agreements and determine a timeline of six months for the court first seised to decide on its jurisdiction.[920] Influenced by the HCCCA, the BRR provided an exception to the general *lis pendens* rules to enhance the effectiveness of the exclusive choice-of-court agreements and avoid abusive litigation tactics.[921] The revision 'softens the derogative effect of the jurisdiction agreements and circumvents the need to seek a declaration of invalidity before seising a non-chosen court'.[922] Accordingly, any other Member State court shall stay proceedings until the court seised based on the agreement declares that it has no jurisdiction.[923]

In the recent case, Foxton J ruled that where the proceedings fall within the scope of an exclusive jurisdiction agreement, the exclusively designated court which is seised has priority.[924] The tricky element of the new rules is that the chosen court shall seise for Article 31(2) to apply. Any other court would be required to stay only if a party has brought an action in the chosen court. The threshold is on the party claiming

[917] Chrispas Nyombi, Moses Oruaze Dickson "Tactical litigation in the post-recast Brussels Regulation era" [2017], 38(10) European Competition Law Review, 459.
[918] ibid. See also: Michael Bogdan, "The Brussels/Lugano Lis Pendens Rule and the 'Italian Torpedo'" (2007) Scandinavian Studies in Law 89, 92.
[919] Mario Franzosi, "Worldwide patent litigation and the Italian torpedoes" [1997], 7 European Intellectual Property Review, 382,384.
[920] Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)) COM(2010) 748 final, Art 29(1).
[921] BRR, Recital 22.
[922] Ratković and Rotar (n 553) 262.
[923] BRR, Recital 22, Articles 29(1) and 31(2). See also: *Generali Italia SpA v Pelagic Fisheries Corporation [2020] EWHC 1228 (Comm).*
[924] See *Generali Italia SPA & Ors v Pelagic Fisheries Corporation & Anor* [2020] EWHC 1228 (Comm). See also *Dexia Crediop SPA v Provincia Di Brescia [2016] EWHC 3261 (Comm); Ablynx NV and another v VHsquared Ltd* [2019] EWCA Civ 2192, [73]. The Lugano Convention lacks such a qualification given to the choice of court agreements, instead it still contains the usual lis pendens rule and Gasser scenarios are still valid under the framework. See: *Mastermelt Ltd v Siegfried Evionnaz SA* [2020] EWHC 927 (QB). See also: Mammadzada (n 863).

jurisdiction of any other non-chosen court.[925] For instance, upon an exclusive French jurisdiction agreement, if the Italian court is seised without any proceedings initiated in France and the other party does not challenge the proceedings in Italy, that might be inapplicable of the reversed *lis pendens* rules. The Italian court might decide on its jurisdiction, and even if the outcome were incorrect, notwithstanding its procedural nature, that would bring *res judicata*[926]. All other Member States shall respect the Italian judgment, and based on mutual trust, the judgment shall be recognised and enforced.

To prevent potential misinformation and parallel proceedings, the BRR provides that the court second seised upon a request of the court first seised shall without any delay inform it of the date when it was seised. This provision raises two issues. Firstly, it applies to the proceedings referred to in Article 29.1, which is about the general *lis pendens* rule leaving Article 31.2 out. Secondly, even if it had applied to exclusive jurisdiction agreements, such a notification would be given only upon the chosen court's request. For instance, the Italian court could be seised first upon an exclusive designation of the Spanish court. Potential risks would include the circumstances upon which the Spanish court would not request the Italian court to inform it of the date of seisure. That is probably why the BRR provided a special provision defining when a court shall be deemed to be seised. On the other hand, as noted earlier, if any party does not trigger the application of Article 31(2), the Italian court would proceed and make a final decision.

Relevantly, one of the novelties of the BRR, which would also guide the application of *lis pendens,* determines when the court shall be deemed to be seised.[927] On another note, the BRR states that where the designated court has established jurisdiction per the agreement, any other court shall decline jurisdiction in favour of that court.[928] Some authors commented that any parallel adjudication would not occur as aimed by the BRR in this way.[929] Nevertheless, it should also be emphasised that the BRR uses different wording regarding seising the court and establishing jurisdiction. Where

[925] *Generali Italia SPA & Ors v Pelagic Fisheries Corporation &* Anor [2020] EWHC 1228 (Comm), see also: *Ablynx NV and another v VHsquared Ltd* [2019] EWCA Civ 2192.
[926] *Gothaer Allgemeine Versicherung AG and Others v Samskip GmbH* [2012] ECR 00000, Case C-456/11, judgment of 15 November 2012.
[927] BRR, Article 32. See also: Peter Arnt Nielsen, "The End of Torpedo Actions?" in Paul Beaumont, Mihail Danov, Katarina Trimmings, Burcu Yüksel (eds.), *Cross-Border Litigation in Europe* (Hart Publishing, 2017), 153-169..
[928] BRR, Article 31(3)
[929] Ratković and Rotar (n 553) 263; BIR, Recital 15.

jurisdiction is found based on a jurisdiction agreement without initiating the proceedings that contrast with Article 31(2). Establishing jurisdiction could also be identified as a preliminary matter without the seisure of the proceedings. National laws might interpret the same notions, and the seised court would establish its jurisdiction equally. That differentiation becomes quite captivating, particularly concerning the diverse national laws. Differences between the national systems might bring suspicions over mutual trust and affect the realisation of the objectives of the Union, including the effective provision of party autonomy and free circulation of judgments.

If a party brings proceedings in any other court than the chosen one and the other party enters an appearance without seising the chosen court and challenging jurisdiction of the court already seised, that would equalise to submission and override the choice of court.[930] The BRR excludes the application of the new *lis pendens* rules if a defendant enters an appearance at another venue.[931] This inclination towards submission should not be regarded as overriding party autonomy. Submission is also an expression of the parties' will, which could be reversed at any stage of the process. To further promote parties' autonomy, the BRR excluded the application of the new *lis pendens* rules to the cases where the claimant is a weaker party (a beneficiary of the insurance contract, the injured party, the consumer, or the employee) and the agreement is not valid.[932] Application of the general *lis pendens* rules and recognition of the jurisdiction of the first seised court in such scenarios aim at safeguarding weaker parties from torpedo actions at invalidly designated courts.

Article 31(2) is a welcome novelty of the BRR aiming at the effectiveness of the parties' autonomy and fighting with abuses by a race to a court where proceedings might be prolonged. As commented, 'the problem with choice-of-court agreements has been adequately addressed by the BRR'.[933] Nevertheless, the reforms hardly preclude prolonged jurisdictional challenges, parallel proceedings, particularly "litigation about litigation."[934] The revisions leave further opportunities for abuses by putative

[930] BRR, Article 26.

[931] BRR, Article 31.2; The Regulation in Article 26.1 provides that these rules will not apply where a defendant enters an appearance for contesting the jurisdiction, or where another court has exclusive jurisdiction as defined by Article 24.

[932] Recast Regulation, Articles 15, 19 and 23.

[933] Paul Beaumont and Mihail Danov, "Effective remedies in cross-border civil and commercial law disputes: a case for an institutional reform at EU level" in Paul Beaumont, Mihail Danov, Katarina Trimmings, Burcu Yüksel (eds.), *Cross-Border Litigation in Europe* (Hart Publishing, 2017).

[934] Mihail Danov, "Data Analysis: Important Issues to be Considered in a Cross-border Context" in Paul Beaumont, Mihail Danov, Katarina Trimmings, Burcu Yüksel (eds.), *Cross-Border Litigation in Europe*

designations. While there are some positive interpretations about getting dispute settlement without further continuation of litigation[935], negative effects of the new rules might lead a claimant to give up on a claim due to uncertainty and excessive delays in some jurisdictions.[936] This fact, in turn, evidences the ineffectiveness of the provision of parties' autonomy.

When the United Kingdom Government showed a similar approach to the BRR and proposed that the first seised court must stay the proceedings until such time the court designated in an agreement ruled on its jurisdiction, Advocate General Leger anticipated tactical actions brought by "an unscrupulous party" before the supposedly designated court to delay the judgment.[937] This argument has been further developed by referring to a danger arising out of sham jurisdictional agreements which contribute to torpedo actions.[938] Following an abusive action based on a sham agreement, the other party would bring another set of parallel proceedings. According to the language of the BRR, the court second seised might have to stay proceedings until the chosen court decides on its jurisdiction. Besides, the concurrent proceedings might result in the wrong judgment of the first seised court, and mutual trust might necessitate its recognition and enforcement in all other Member States. Subsequently, the court second seised might continue with the proceedings and reach a different outcome. Due to the reversed *lis pendens* ruling, the latter might not be recognised and

(Hart Publishing, 2017). See also: Andreas F Lowenfeld, "Introduction: The Elements of Procedure: Are they separately portable?" [1997] 45(4) American Journal of Comparative Law 649, 651.

[935] Cuniberti posites that a race to a court of the parties' preference bases on the rules of the Regulation and would give them an advantage of resolving their disputes "amicably". See: Gilles Cuniberti, *Conflict of Laws: A comparative approach*, (Edward Elgar Publishing, 2017), 208.

[936] These were underlined by the respondents interviewed as part of the EUPILLAR project titled "European Union Private International Law: Legal Application in Reality" led by Paul Beaumount in 2014-2016. Different contributions by the academics brought the book *Cross-border litigation in Europe* in 2017. See: Paul Beaumont, Mihail Danov, Katarina Trimmings, Burcu Yüksel (eds.), *Cross-Border Litigation in Europe* (Hart Publishing, 2017).

[937] Opinion of Advocate General Léger, C-116/02, *Erich Gasser GmbH v. MISAT Srl*, [74].

[938] Richard Fentiman, "Access to justice and parallel proceedings in Europe" [2004] 63(2) Cambridge Law Journal, 312-314; Yvonne Baatz, "Who decides on Jurisdiction Clauses" [2004] Lloyd's Maritime and Commercial Law Quarterly 2004, 25-29; Mance (n 903) 358.

As interpreted by Lord Diplock, sham *"… means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create",* see: *Snook v London & West Riding Investments* [1967] 2 QB 786. In his judgment in *Broxfield Limited v Sheffield City Council* [2019] EWHC 1946 (Admin), Mostyn J referred to Munby J in *A v A* [2007] 2 FLR 467 stating that Diplock LJ's statement had been treated canonical. Likewise, Neuberger J delivered that *"… a sham provision is simply a provision or agreement which the parties do not really intend to be effective, but have merely entered into for the purpose of leading the court or a third party to believe that it is to be effective …"* See: *National Westminster Bank plc v Jones* [2000] BPIR 1092, [59].

enforced. Nevertheless, the party might get the judgment given effect under the national law. All these show extant threats to certainty and party autonomy which the current language of the BRR cannot prevent.

Similar outcomes might be brought by the language of the Regulation rendering the new rules applicable only upon objection of one of the parties to the jurisdiction of the first seised court. It implies that without any objection by a party the court first seized would continue proceedings and rule on its jurisdiction. That might similarly bring a wrong judgment to be recognised and enforced in all other Member States based on mutual trust. Still, it is neither appropriate to authorise the defendant to challenge the jurisdiction of the seised court at any stage of the proceedings since it might bring delays, waste of resources, and legal expenses.[939] It was suggested that adopting the six-month condition to determine jurisdiction by the chosen court would have restrained abusive tactics and delays.[940] It was further alleged that sanctions, i.e., state liability, could be imposed upon the Member States for breaching those timeframes.[941] On the one hand, including such a requirement into the text of Article 31.2 would have favoured party autonomy.[942] On the other hand, time limits might be a matter of national procedural law and intervene with state sovereignty and public policy. Uniform rules might be hardly achieved due to differences between the national laws and procedure, further bringing incompatibilities with the EU law's effectiveness. States might hardly agree on such a revision. Determination of jurisdiction could, in some cases, be a preliminary issue, whereas some national rules might define this question as part of the proceedings on the substance of the dispute. The latter would demand even more time for achieving the final resolution, which would disable ruling on the existence of jurisdiction in a shorter period such as six months.[943]

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[939] Zheng Sophia Tang, "Cross-border contract litigation in EU", in Paul Beaumont, Mihail Danov, Katarina Trimmings, Burcu Yüksel (eds.), *Cross-Border Litigation in Europe* (Hart Publishing, 2017), 627.

[940] It was claimed that where a choice-of-court agreement exists setting such a time period should be reasonable supposing only existence would have to be decided. See: Ratković and Rotar (n 553) 264.

[941] *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239, Case C-224/01.

[942] In this regard, the Court confirmed the importance of the time limits as they ensure legal certainty and should serve effectiveness within the EU**. See: EU Charter of Fundamental Rights, Article 47;** *Rosalba Palmisani v Istituto nazionale della previdenza sociale (INPS)* Case C-261/95.

[943] Report on the Application of Regulation Brussels I in the Member States (Heidelberg Report), Study JLS/C4/2005/03.

5.4.6 Choice of Non-Member State courts

Assessment of the party autonomy perspectives of the BRR involves the question of the effectiveness of a choice of non-Member State courts. The parties' jurisdiction agreement is among the circumstances when a third State court could be seised of the cases.[944]

The BRR lacks an express provision on choice of court agreements in favour of non-Member State courts.[945] For instance, where a French seller and a German buyer negotiate a jurisdiction agreement favouring the Brazilian court, that clause will not get any protection under BRR, Article 25. In comparison, if these parties negotiate a choice of law clause selecting Brazilian law, that will be given effect according to the Rome I Regulation.[946] The significance of the discussion gains more weight post-Brexit due to the change of the UK's status and English jurisdiction agreements.[947] The reforms in the BRR aimed at a flexible mechanism authorising the Member State courts to consider proceedings pending before the courts of third States.[948] Discretionary provisions of the BRR deal with the parallel proceedings pending at the Member and third State courts, which might be the case upon the existence of a choice of a third State court.[949] Accordingly, Member State courts may stay the proceedings

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[944] A third State court might be natural or more appropriate forum based on forum non *conveniens or* there might be exclusive jurisdiction of a third State court in certain disputes related to for example, a land. Relevant to the scope of the thesis, this discussion examines possible application perspectives of the Recast Regulation to jurisdiction agreements in favour of the courts of third States.

[945] While the CJEU refused stays of the proceedings in favour of the Non-Member State courts on the *forum non conveniens* grounds or existence of a jurisdiction agreement, the English courts often referred to the reflexive effect of the Brussels regime while granting such stays. See: *Ferrexpo AG v Gilson Investments Limited & Others* [2012] EWHC 721 (Comm), [2012] 1 Lloyd's Rep 588; *Plaza BV v The Law Debenture Trust Corporation plc* [2015] EWHC 43 (Ch); *Winnetka Trading Corp v Julius Baer International Ltd* [2008] EWHC 3146 (Ch) and the *obiter* view of Colman J in *Konkola Copper Mines plc v Coramin Ltd* [2005] EWHC 898 (Comm).
By contrast, in *Catalyst Investment Group Ltd v Lewinsohn* [2009] EWHC 1964 (Ch), Barling J stated that, since the Recast Regulation deals with the parallel proceedings in a non-Brussels-Lugano state in Articles 33 and 34, the reflexive application of the Regulation has been ruled out. The High Court in *Gulf International Bank BSC v Aldwood* [2019] EWHC 1666 (QB) also ruled that the new provisions of the Recast Regulation have overridden the doctrine of reflexive effect which was established by the previous case law. See also: *Peter Ola Blomqvist v Zavarco PLC* [2015] EWHC 1898 (Ch). 'Reflexive effect' was proposed by Mr Droz in *Compétence judiciaire et ejfets des jugements dans le marché commun* (1972), [164]-[169] referring to the recognition of *l'effet réflexive des compétences exclusifs*. See: Briggs (n 501) para 2.305.

[946] Rome I Regulation, Recital 13.

[947] For the related discussions see: Chapter 7.

[948] BRR, Recital 23 (Whether flexibility means discretionary nature of those rulings or consideration of the wills of the parties is still controversial as discussed in this chapter).

[949] BRR, Article 33-34. Discussion of these rulings intends to examine the BRR's position towards provision of party autonomy and their free wills to designate third state courts.

in favour of the third State courts, which are seised of a case involving the same cause of action and between the same parties or related proceedings.[950] The rules serve the same underlying principle of avoiding parallel proceedings and inconsistent judgments between the Member State courts.[951]

While the provisions do not mention designation of non-Member State courts, provided all other conditions are met, the BRR might cover such jurisdiction agreements. Suppose there are pending proceedings in Brazil based on a jurisdiction agreement. At the same time, there are ongoing German proceedings involving the same cause of action and between the same parties or which are related. For the German court to consider a stay in favour of the Brazilian court, the following conditions should be met:

- Jurisdiction of the German court should be based on the domicile rule in Article 4 or special rules in Articles 7, 8, or 9,
- It is expected that the Brazilian court would give a judgment capable of recognition and, where applicable, of enforcement in Germany,
- A stay should be necessary for the proper administration of justice,
- For the purposes of Article 34, apart from the points above, it should be expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings.[952]

It should be noted that even when those conditions are met, a Member State court, based on its discretionary power, is free to decide if to grant a stay or not. A tremendous amount of flexibility allows a court to continue proceedings at any time if:

- Proceedings in Germany are themselves stayed or discontinued,
- Proceedings in Germany are unlikely to be concluded within a reasonable time,
- The continuation of those proceedings is for the proper administration of justice,
- For the purposes of Article 34, it appears to the German court that there is no longer a risk of irreconcilable judgments.

As noted above, apart from the recognition and enforcement perspectives, Recital 23 necessitates considering the proper administration of justice while assessing the

[950] BRR, Article 33-34.
[951] See: BRR, Article 29-30 See also*Tatry v Maciej Rataj*; *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG*. There are some academic commentaries contending that absence of mutual trust in third states excludes identical or similar interpretations of the notions. See: Dickinson and Lein (n 882) 354. Nevertheless, both sets of provisions share the same notions and objectives; therefore, should be interpreted identically regardless of the location of the chosen court.
[952]*TRW Ltd v Panasonic Industry Europe GmbH* [2021] EWHC 19 (TCC), [84]-[92].

proceedings in third States. Recital 24 determines several circumstances for evaluating the ambiguous paradigm of proper administration of justice:

- Connections between the facts of the case, parties, and third State,
- The stage to which the proceedings in the third State will have progressed by the time of initiation of the proceedings in the court of the Member State, and
- Whether or not the third State court can be expected to give a judgment within a reasonable time.

While consideration also depends on evaluating the proper administration of justice, no clear definition is given to this vague notion. The provision, which is 'an unusual notion in a civilian inspired instrument,' [953] could seem like a "European version of *forum non conveniens* doctrine" since the facts for assessment remind "*Spiliada* test" set out by Lord Goff [954]. As Briggs remarks, "Member State courts would have what looks awfully like a *forum non conveniens* discretion,"[955] and there is hardly any guidance as to how the "legion" factors are to be weighed in a particular case.[956] To compare, the equivalent provisions applicable to parallel proceedings in the Member States[957] do not necessitate such distinctive conditions to be met; instead, they prioritise the first seised rule, which is not replicated by Articles 33-34.[958]

In the example above, the German court should assess all the circumstances of the case, including connections between the facts of the case, parties, and Brazil, the stage to which the Brazilian proceedings have progressed by the time of the initiation of the German proceedings and whether the Brazilian court can be expected to give a judgment within a reasonable time.[959] The assessment might also include the question of whether the Brazilian jurisdiction agreement is exclusive.[960] While deciding on its discretion, a Member State court should foresee whether a third State court could give a judgment that would be recognisable and enforceable in its territory. Accordingly, the German court shall stay only if the Brazilian court has concluded a judgment

[953] Elizabeth B Crawford and Janeen M Carruthers, International Private Law: A Scots Perspective, (4th edn, W.Green, 2015) 92.
[954] *Spiliada Maritime Corporation v Cansulex Ltd* [1986] UKHL 10.
[955] Adrian Briggs, "The Brussels I review proposal uncovered" [2012] Lloyd's Maritime and Commercial Law Quarterly, book reviews.
[956] *Spiliada Maritime Corporation v Cansulex Ltd* [1986] UKHL 10, per Lord Templeman.
[957] BRR, Articles 29-30.
[958] *Peter Ola Blomqvist v Zavarco PLC* [2015] EWHC 1898 (Ch), [23] per Donaldson DJ.
[959] BRR, Recital 24.
[960] BRR, Recital 24.

capable of recognition and enforcement in Germany.[961] There is no analogical provision on a mandatory stay in the related proceedings since a judgment in those proceedings is less likely to become a complete *res judicata* to resolve all issues in action in a Member State.[962]

It is reasonable that the BRR does not contain any uniform recognition and enforcement rules or refusal grounds applicable to the third State judgments; still, various standards of each jurisdiction would lead to more manipulations and uncertainties.[963] Based on the diversities existing between the national laws, a judgment rendered by the Brazilian court might be recognised and enforced in, i.e., France while it would not have any effect in Germany; the German court would not stay in favour of the Brazilian proceedings regardless of either an exclusive jurisdiction agreement or final judgment. Such discrepancies are also incompatible with the mutual trust objectives of the regime. By allowing Member State courts to take up jurisdiction upon negligence of exclusive jurisdiction of a third State based on a choice of court agreement, the Regulation indirectly disregards breach of contract law.[964] In addition to this gap, another problem arises because besides pursuing proceedings on the substantive dispute, a party would have to file a suit for the recognition and enforcement.[965] That would bring an additional set of multiple proceedings, inconsistent judgments, waste of time and resources. Adding to all, in cases where a Non-Member State court including that of the chosen one is second seised, irrespective of all other conditions of Articles 33 and 34 are met, that court would still face a lack of dignity by the European regime, which confines party autonomy significantly.

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[961] BRR, Article 33.3.

[962] Dickinson and Lein (n 882) 355

[963] The “obvious flaw” of the Regulation was interestingly considered an incentive for the negotiations on the Hague Judgments Project. See: Felix M Wilke, "The impact of the Brussels I Recast on important Brussels case law", 11(1) Journal of Private International Law 128, 132.

[964] Richard Fentiman, "Ousting Jurisdiction and European Conventions" [2000] 3(2) Cambridge Year of European Legal Studies 107; Richard Fentiman, "National Law and the European Jurisdiction Regime" in Arnaud Nuyts and Nadine Watte (eds.), *International Commercial Litigation in the Europe and the relations with third states*, (2nd edn, Bruylant, 2005), 125.

[965] See: Dickinson and Lein (n 882) 353. According to Gilles Cuniberti, the reason behind the necessity of examining if the foreign judgment would eventually be capable of recognition in the forum is due to the presumption of recognition; that is why grounds for refusing to recognise a judgment made by the court of another Member State are limited. See: Cuniberti (n 924) 203. Although *exequatur* is abolished within the Union, there are substantial challenges arising out of the refusal grounds. Indeed, varieties between the national laws, lack of a uniform definition given to public policy, as well as discretionary language of the text of the relevant articles should be highlighted. For more see the discussion below.

Therefore, jurisdiction clauses favouring third State courts are now even more 'vulnerable' and not fully respected.[966] The lack of an express rule on the choice of a third State court would undermine party autonomy; the high threshold of examination of the ambivalent "proper administration of justice", absence of the uniform standards of recognition and enforcement of third State court judgments in the Member States and national varieties as well as discretion of the judicial authority would bring legal uncertainties. In light of the remaining problems, Articles 33 and 34 present "the inevitable drawback of inhomogeneity"; on the other hand, this should also be accepted as "a fallback solution" until there is proper regulation of the matters.[967] It is true that politically the EU cannot legislate on the jurisdiction of non-Member State courts; nevertheless, the existing provisions might be reformed to address absurdities. In this regard, the study[968] recommended that unilateral coordination of the issue by adopting the specific uniform rules at the EU level would contribute to legal certainty, effectiveness, and harmonisation. A further recast of the BRR could achieve this.[969] The EU Justice Scoreboard would immensely contribute to progress and information exchange between the Member States and Commission/Council.[970] Meantime, the Non-EU states' proceedings, including those based upon jurisdiction agreements, would be regulated by the national laws, bilateral agreements, and the HCCCA where applicable.[971]

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[966] Kramer and Themeli (n 135) 7

[967] Among others, this incomplete regulation by Articles 33 and 34 are justified referring to the lack of mutual trust, reciprocity or unilaterally shared common values between the Member and Non-Member states. Furthermore, the Regulation's approach is reasoned by uncertainty regarding the ability of the third state court proceedings to provide effective judicial protection for the parties or "incompleteness of prognostic evaluation" on the recognition and enforcement capabilities of the judgment. For more see: Fabrizio Marongiu Buonaiuti, "Lis alibi pendens and related actions before third country courts under the Brussels Ibis Regulation", in Peter Mankowski (ed.) *Research Handbook on Brussels Ibis Regulation* (Edward Elgar, 2020), 263-269.

[968] The study also promoted drafting specific conventions with third States containing rules for coordination of jurisdictional issues between the European and non-European States. See: I. Pretelli, et al., Possibility and terms for applying Brussels I Regulation (Recast) to extra-EU disputes, Study for the JURI Committee, European Parliament, European Union, 2014.

[969] A further reform will not take place earlier than at least 11 January 2022 before the Commission presents a report to the European Parliament, Council and European Economic and Social Committee on the assessment of application of the BRR and the need for a further extension and amendment of the rules. See: BRR, Article 79.

[970] The instrument was established by the EU, in 2013, to provide comparable data on the independence, quality, and efficiency of national justice systems, Notwithstanding being a non-legislative initiative, it helps the Union to achieve more effective justice by making country specific recommendations and having dialogues with the Member States on procedural reforms while allocating funds. See: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en.

[971] In *Gulf International Bank BSC v Aldwood* [*2019] EWHC 1666* (QB), [141], John Kimbell QC touched upon the relevance of the HCCCA to exclusive jurisdiction agreements designating Non-EU courts,

5.4.7 Consequences of the breach of choice of court agreements in a nutshell

The BRR does not expressly state consequences of non-compliance with jurisdiction clauses; instead, it determines the *lis pendens* rules and stays of parallel proceedings. While whether any remedy for a breach would be available is a matter of the national law, the EU law has primacy and prevails over domestic laws of the Member States. Whereas the English courts would grant a stay together with anti-suit injunctions and damages, such injunctions are prohibited within the Union.

The court which has jurisdiction over the substance of the matter also has inherent power to grant provisional or protective measures, including anti-suit injunctions.[972] On the other hand, upon an application to the Member State court, such measures may be available under the national law, even if the courts of another Member State have jurisdiction as to the substance of the matter.[973] The Brussels regime precluded an injunction to refrain a party from commencing or continuing legal proceedings before another Member State court, even where that party was acting in bad faith to frustrate the existing proceedings.[974] Prohibition of anti-suit injunctions is based on trust which the Member States accord to one another's legal systems and judicial institutions.[975] Therefore, even if an injunction could be regarded as a matter of national law, application of the procedural rules may not impair the effectiveness of the Brussels regime.[976] Furthermore, even if the main proceedings are not in the scope of the Brussels regime, such injunctions are still not permitted due to the potential

however the Convention was not applicable to the case since the Kingdom of Saudi Arabia was not a Contracting State; therefore, the English proceedings against the domicile were not stayed in favour of the designated Non-EU state court.

[972] See: Arnaud Nuyts, "Cross-Border Provisional Measures: Stepping Backwards in the Brussels I Recast" Geert Van Calster and Jura Falconis (eds.), *European Private International Law at 50: Celebrating and Contemplating the 1968 Brussels Convention and Its Successors* (Intersentia 2018) 83-108. See also: *Van Uden* [1998] ECR I-1709, Case C-391/95, [22]; *Hans-Hermann Mietz v Intership Yachting Sneek BV* [1999] ECR I-2277, Case C-99/96, [41].

[973] BRR, Article 35.

[974] *Turner v. Grovit* Case C-159/02, [31]. According to Fentiman, an anti-suit injunction which is a remedy usually characteristic to common law jurisdictions, reflects historical and procedural differences between the common law and civil law traditions, rather than any objection in civil law systems to the principle of restraining foreign proceedings. The courts of civil law systems are prepared to enforce such measures obtained in common law courts. See: Fentiman (n 3), para 16.154.

[975] *Turner v. Grovit* Case C-159/02, [24].

[976] *Hagen* [1990] ECR I-1845, Case C-365/88, [20]; *Turner v. Grovit* Case C-159/02, [29]. See also: Raphael (n 667) para 7.07.

threat to the effectiveness of the EU law.[977] In contrast, the English courts held that an injunction might be granted to restrain the proceedings outside the Brussels regime's material scope.[978]

Further, whereas parties can seek an anti-suit injunction issued by an arbitral tribunal that does not affect the effectiveness of the EU law or is not incompatible with the mutual trust principle within the Union, the EU courts might be reluctant to enforce arbitral awards containing such reliefs. The mentioned rulings of the CJEU are not good law for the UK post-Brexit, and the English courts may grant measures against the EU proceedings in breach of choice of forum clauses either under national law or HCCCA.[979] Similarly, Member State courts are not precluded from granting such measures against the English courts post-Brexit. However, it should also be considered that interim measures do not qualify as judgments under the HCCCA; therefore, their enforcement depends on national laws, which might still be restrained in the EU States. On the other hand, incompatibility of anti-suit injunctions with the EU law does not prevent Member State courts from granting such remedies against the third State courts since no trust element is applicable outside the Union.[980] For instance, if one of the parties has breached the jurisdiction clause designating the German court by bringing the proceedings in France, the German court cannot issue an anti-suit injunction against the French court. In contrast, based on the reversed *lis pendens* rules, a stay and damages may be granted. In contrast, an injunction issued by the German court against the US court would not be restrained. Recently, the

[977] At first instance, Colman J referred to "*Angelic Grace*" and *Donohue v Armco* and granted an injunction against Italian judicial proceedings in breach of London arbitration clause. Subsequently, the Brussels Regulation was interpreted as meaning that an English court can no longer grant such a remedy against the proceedings in a foreign court within the Brussels/Lugano regime. See: *Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc* [2009] AC 1138, *Case* C-185/07, [23]. See also: *Nori Holdings Ltd & Ors v Public Joint-Stock Company Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm).

[978] See: Fentiman (n 3), para 16.137. See also: *Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato KFT [2010] EWHC 2567 (Comm)*; *Excalibur Ventures LLC v Texas Keystone Inc [2011] EWHC 1624 (Comm).*

[979] Most likely, the English court will return back to *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2005] 1 Lloyd's Rep 67 *(the "Hari Bhum")* reasoning where the Court of Appeal stated that, the English courts were free to grant anti-suit injunctions if one of the parties to an arbitration agreement started proceedings in a Member State in breach of the arbitration clause. This power roots from the Supreme Court Act 1981, Section 37(1), and the court might transfer it to arbitrators in accordance with Section 48(5).

[980] See: *The Angelic Grace* [1995] 1 Lloyd's Rep 87; *Donohue v Armco Inc* [2002] 1 All ER 749; *West Tankers Inc v Ras Riunione Adriatica Di Sicurta Spa & Anor* [2005] EWHC 454 (Comm), paras 13, 59 and 72; *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35 [27]; *BNP Paribas v Anchorage Capital and others* [2013] EWHC 3073 (Comm).

Commercial Court granted an anti-suit injunction against the South African proceedings, which breached the English jurisdiction agreement.[981]

It should also be noted that, notwithstanding the impossibility of anti-suit injunctions within the Union, there is no obstacle to granting damages by courts or arbitrators even where the competing proceedings are in the EU.[982] The CJEU further specified that the decision on costs was a matter for the national court.[983] Likewise, where the plaintiff brought proceedings in the US upon the German jurisdiction and German law clauses, the German Federal Supreme Court, based on the general principles of German law, ruled that a breach of the contract gave rise to contractual claims for damages and the claimant had to reimburse legal costs and expenses against the counterparty.[984]

5.4.8 Recognition and enforcement of judgments

The European judicial policy is developed on judicial cooperation based upon mutual trust, free movement, and mutual recognition of judgments.[985] Mutual trust in the administration of justice as a political reason for the incentive was identified as a

[981] See *Axis Corporate Capital* UK Ltd & Ors *v Absa* Group Ltd & Ors [2021] EWHC 225 (Comm). The Court had regard to BRR, Article 25, Section 37(1) of the Senior Court Act 1981 and its inherent jurisdiction.

[982] See *Starlight Shipping Company v Allianz Marine & Aviation Versicherungs AG & Ors* [2011] EWHC 3381, [35] per Mr Justice Burton. See also: *Ellerman Lines Ltd v Read* [1928] 2 KB 144 CA, *Union Discount Co v Zoller* [2002] 1 WLR 1517 CA, *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd* [2009] 1 Lloyd's Law Rep 213, and Adrian Briggs and Peter Rees, Civil Jurisdiction and Judgments (3rd edn, LLP Professional Publishing, 2002); Briggs (n 138); Raphael (n 667), para 14.05.

[983] *Turner v. Grovit* Case C-159/02, [32].

[984] **Judgment of October 17, 2019 - III ZR 42/19, <**https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2019/2019134.html?nn=10690868**> accessed 26 November 2021.**

[985] Based on such a policy, the Union has aimed to reduce legal uncertainty and strengthen cooperation and trust in the Member States and European judicial system, to ensure smooth functioning of internal market and the area of freedom, security and justice, furthermore, to safeguard fundamental rights of the citizens and improve efficiency. See: Commission, Staff Working Paper, Impact Assessment, SEC (2010) 1547 final, Figure 1. Further, the European Council in its different documents including Tampere Conclusions[985] promoted the mutual recognition principle as the cornerstone of judicial co-operation in both civil and criminal matters within the Union. During its special meeting in Tampere, Finland, in October 1999, The European Council concluded its political guidelines in the field of immigration, police and justice cooperation and fight against crime. These conclusions generated the Tampere programme for the establishment of an Area of Freedom, Security and Justice. Enhancement of mutual recognition of the judicial decisions and judgments facilitates judicial cooperation between authorities and protection of individual rights. In the mentioned document the Council further highlighted the importance of reducing intermediate measures for enabling the recognition and enforcement of the judgments. See: Tampere Council Conclusions, [33]-[34].

justification for abolishing a declaration of enforceability.[986] High expenses and delays would refrain creditors from cross-border enforcement and block the free circulation of judgments within the single market.[987] The BRR determined that a judgment given by Member State courts should be treated as if it had been given in the Member State addressed[988]; similarly, if it is enforceable in the Member State of origin, it shall also be enforceable in the other Member States without any declaration of enforceability.[989] Regardless of the positive outcomes and efficiency, a great dilemma still leads to more obstacles for effective justice and parties' autonomy. The absence of *exequatur* might lead to the debtor's unawareness of a pending enforcement process elsewhere. Therefore, the BRR posited a certificate issued by the court of origin confirming its jurisdiction as to the substance of the matter and enforceability of the judgment in that State.[990] By determining this tool, the BRR contemplated the provision of certainty and avoided any ineffective judgment to get recognised or enforced. However, such a certificate might be issued if the interested party had requested it. If no request is

[986] Commission, Staff Working Paper, Impact Assessment, SEC (2010) 1547 final, [1.1]. See also: BRR, Recital 26. Abolition of *exequatur* was based on economic and political grounds. In the Commission's review reports and relevant studies it was admitted that exequatur proceedings lead to vast amount of costs and waste of time. Report on the Application of Regulation Brussels I in the Member States (Heidelberg Report), Study JLS/C4/2005/03, [506], also asserted that exequatur proceedings within the Union offers "a considerable efficiency" excluding long delays. It showed that whereas in the states such as Luxembourg and Hungary exequatur proceedings may last several days or hours, in some other states like Estonia and Greece they may be six or seven months in length. Furthermore, it was found out that in not more than 1% to 5% of the cases there are appeals from declarations of enforceability. Relevant to these findings, the CSES Report evidenced 9,922 exequatur cases in the Member States in 2009 and 93% of them showed success. The Report also estimated the average cost of all exequatur cases in straightforward and appealed-complex cases to be around €48 million. Where enforcement of a judgment did not require a special procedure or arrangements 66.1% of respondents tended to get more involved in cross-border activities. See: Heidelberg Report, [506], [514]; Centre for Strategy & Evaluation Services (CSES), Data Collection and Impact Analysis – Certain Aspects of a Possible Revision of Council Regulation No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Final Report (December 2010), <http://ec.europa.eu/justice/doc_centre/civil/studies/doc_civil_studies_en.htm> accessed 26 November 2021. See also: Philippe Hovaguimian, "The enforcement of foreign judgments under Brussels I bis: false alarms and real concerns" [2015] 11(2) Journal of Private International Law 212, 240-241.
The results of the CSES Report were questioned due to the data that was used in the study was collected in only eight Member States. See: Andrew Dickinson, "Surveying the Proposed Brussels I bis Regulation: Solid Foundations but Renovation Needed" [2010] 12 Yearbook of Private International Law 247, 254; Xandra Kramer, "Cross-border Enforcement in the EU: Mutual Trust versus Fair Trial? Towards Principles of European Civil Procedure" [2011] 2 International Journal of Procedural Law 202, 216.
[987] Ulrich Magnus and Peter Mankowski, "Brussels I on the Verge of Reform – A Response to the Green Paper on the Review of the Brussels I Regulation" [2010] 109 Zeitschrift für Vergleichende Rechtswissenschaft 1, 2; Hovaguimian (n 976) 241.
[988] BRR, Recital 26.
[989] BRR, Articles 39 and 58.
[990] BRR, Articles 42.2 and 53.

made, any incorrect judgment given by the court not having jurisdiction could move forward to the recognition and enforcement stage. For the provision of the parties' autonomy, the Commission stated that abolition of *exequatur* 'will be accompanied by procedural safeguards which ensure that the defendant's right to a fair trial and his rights of defence. . . are adequately protected'.[991] In this sense, the BRR provided that abolition of *exequatur* and direct enforcement of a judgment given by a Member State court within the Union should not jeopardise respect for the rights of the defence. The person against whom enforcement is sought should be able to apply for refusal of the recognition or enforcement of a judgment and on the ground that he/she had no opportunity to arrange for his defence.[992]

Regardless of the abolition of *exequatur*, the grounds for refusal of the recognition and enforcement have mainly been left as they were. In this regard, it has been suggested that refusal grounds might be entirely removed, and judgments given in the Member States might enjoy the same level of effectiveness as domestic judgments.[993] While it might be too ambitious to achieve, it would manifest the mutual trust principle within the Union.

Even if potential risks might be overcome by the refusal grounds for challenging a judgment, they are not entirely free of scepticism.[994] As a result of the abolition of *exequatur*, grounds for non-recognition are not scrutinised *ex officio*, which is appropriate regarding the grounds related to the protection of private interests but more challenging when it comes to public interests such as public policy reservations.[995] Since public policy prevents the free movement of judgments within the internal market, it should be given a narrow interpretation and recourse in limited circumstances.[996] Even though the content and interpretation of public policy are up to Member State courts, there could be some limitations set at the Union level onto the application and circumstances when to refer to this exception; and the CJEU is

[991] The European Commission's Proposal, COM(*2010*) *748 final*, [3.1.1].
[992] BRR, Recital 29.
[993] Luigi Fumagalli, "Refusal of Recognition and Enforcement of Decisions under the Brussels I Recast Regulation: where the Free Circulation meets its Limits" in Franco Ferrari and Francesca Ragno (eds.), *Cross-border litigation in Europe: the Brussels I recast regulation as a panacea* (Wolters Kluwer, 2015), 217.
[994] BRR Article 45-46.
[995] Thomas Pfeiffer, "The Abolition of Exequatur and the Free Circulation of Judgment" in Franco Ferrari and Francesca Ragno (eds.), *Cross-border litigation in Europe: the Brussels I recast regulation as a panacea* (Wolters Kluwer, 2015), 190.
[996] *Denilauer v. S.n.c. Couchet Frères,* ECJ, 21 May 1980; *Hoffmann v. Krieg*, ECJ, 4 February 1988, C-145/86; *Dieter Krombach v. André Bamberski*, ECJ, 28 March 2000, Case C-7/98.

authorised to take such a review.[997] The latter aligns with the European integration ideals where prerogatives have been left to the Member States and are exercised under European control by the CJEU.[998] A diverse understanding of public policy might hamper the effectiveness of the BRR, similar to the HCCCA and NYC.

Moreover, a party challenging the enforcement of a judgment should be able to invoke the refusal grounds available under national law in addition to the grounds for refusal provided for in the BRR; however, the recognition should be refused if any ground set by the BRR exists.[999] The procedure for enforcement shall be governed by the law of the Member State addressed.[1000] On the other hand, grounds for refusal or suspension of enforcement shall apply in so far as they are not incompatible with Article 45.[1001] Indeed, Article 45 presents the grounds for refusal of the recognition of judgments. Further, the BRR might remove the refusal grounds at all or bring clarification to the contrasting provisions. Otherwise, the Recital does not render any use.

Moreover, governance of the procedure for the refusal of enforcement by the law of the Member State addressed[1002] leads to non-uniformity and detriments party autonomy due to the diversities between domestic laws. Differences between national laws might result in a refusal to enforce a judgment under particular national law while getting effective according to others. On the other hand, even if a judgment is refused to be given effect later, skipping *exequatur* proceedings doubles the wasted time and expenses regardless of the possible grant of damages and costs. Further, if there is no claim to refuse recognition and enforcement, a wrong judgment might get effective. Therefore, the mutual trust rationale behind the abolition of *exequatur* would ultimately prejudice party autonomy and judicial certainty.

Under the HCCCA, declaration of enforceability and registration for enforcement are required.[1003] Unlike the BRR, the HCCCA is a global instrument, and it defines that recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter excluded according to a declaration made by the requested State under Article 21.[1004] The HJC also shows the same approach

[997] Fumagalli (n 983) 206.
[998] ibid.
[999] BRR, Recital 30.
[1000] BRR, Article 41.1.
[1001] BRR, Article 45.
[1002] BRR Article 47.2.
[1003] HCCCA, Article 14.
[1004] HCCCA, Article 10.4.

towards recognising and enforcing judgments and requires a declaration of enforceability.[1005]

Like the BRR,[1006] both the HCCCA[1007] and HJC[1008] preclude any review of the court's jurisdiction or substance of the given judgment during the recognition and enforcement. Nevertheless, whereas "fraud in connection with a matter of procedure"[1009] is a refusal ground under the HCCCA, the HJC refuses to give effect to a judgment if it has been "obtained by fraud."[1010] The public policy exception might cover fraud as to the substance; however, in some legal systems, public policy cannot be used regarding procedural fraud.[1011] This might be the reason behind specifically mentioning the procedural facet of the fraud in the text. The HJC entails procedural fraud and gives the court broader discretion to assess the judgment's substance. In this sense, as both the substantive and procedural fraud is covered by the HCCCA being part of either refusal grounds or public policy exception, the linguistic differences do not impact practice. On the other hand, while there should not be any review of the merits under the Conventions, the ground related to fraud might bring such reviews inevitable. As stated, '…this may invite a review of the merits of the judgment…' contrary to the prohibition of such a review.[1012]

5.5 Conclusion

As presented, the provision of party autonomy in the EU civil justice area is confined to its nucleus, the mutual trust principle. Indeed, the BRR has substantially changed the Union's legal portrait by promoting party autonomy, certainty, and predictability, particularly by the rules on substantive validity, reversed *lis pendens,* and the priority

[1005] HJC, Article 13.
[1006] BRR, Articles 45.3 and 52.
[1007] HCCCA, Article 8.2.
[1008] HJC, Article 4.2.
[1009] HCCCA, Article 9(b). According to the Hartley and Dogauchi Report, para 228, fraud as to the substance might be covered by the public policy exception, however, in some legal systems public policy cannot be used regarding procedural fraud. This was the reason behind specifically mentioning the procedural facet of the fraud in the text. Further, as both the substantive and procedural fraud is covered by the HCCCA being part of either refusal grounds or public policy exception, the linguistic differences do not have any impact on practice. See also: Garcimartín and Saumier Report, paras 255-257.
[1010] HJC, Article 7(b).
[1011] Hartley and Dogauchi Report, para 228.
[1012] Hans Van Loon, "Towards a global Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters" (2020) 1 Nederlands Internationaal Privaatrecht (NIPR), 17.

of the chosen court to decide on its jurisdiction. In this context, the BRR has "the most significant impact on the choice of court agreements," [1013] coherence between the instruments, and the EU's accession to the HCCCA. Nevertheless, as stated, the BRR '…does not aim a complete and comprehensive recodification of all issues related to jurisdiction agreements…' or '…does not emulate a European sidekick to the HCCCA'.[1014] Obscurities remaining in the revisions stir serious controversies, procedural ineffectiveness, and legal uncertainties. Tactical litigation is still 'a paramount feature of intra-European civil and commercial litigation despite the imposition of *lis pendens*'.[1015] Whereas mutual trust respects and often strengthens party autonomy and aims at preventing high costs and delays, there is also a flip side of the coin. Notwithstanding increased significance given to the parties' choice, there are no adequate remedies for breaches. While stays and damages might be granted, anti-suit injunctions are not allowed within the Union based on the trust factor.

Further, the Regulation does not expressly address the choice of Non-Member State courts. Due to the non-unified rules, the operation of the framework is often contingent on the various national laws and domestic courts' discretionary powers. There is "a compelling need" for further reform of the EU PIL framework, including the Brussels regime.[1016] The EU, based on its authority,[1017] might harmonise conflict of laws rules. The reforms could have taken a holistic view to break existing instabilities and prevent potential hazards to party autonomy. However, considering the duration of the previous reforms, the expected development of the regime would hardly take place operatively and flexibly.[1018] In this regard, it has been stated that 'Europeanisation of civil procedures', which covers harmonisation of the EU PIL rules, is 'a process of

[1013] The European Commission's Proposal, COM(*2010*) *748 final*, [1.1].
[1014] Peter Mankowski, "The Role of Party Autonomy in the Allocation of Jurisdiction in Contractual Matters" in in Franco Ferrari and Francesca Ragno (eds.), *Cross-border litigation in Europe: the Brussels I recast regulation as a panacea* (Wolters Kluwer, 2015), 125.
[1015] In this regard, comparisons are made between the EU Brussels regime and English common law and *forum non conveniens* as ensuring justice is opposed to *lis pendens*. Relevant to this, prohibition of the use of anti-suit injunctions within the Union is also indicated to encourage more abuses. See: *Owusu v Jackson; MISAT v Gasser, Turner v Gravit;* Nyombi and Dickson (n 906); Ralf Michaels, "Two Paradigms of Jurisdiction" [2006] 27 Michigan Journal of International Law 1003, 1061-1064.
[1016] Jonathan Fitchen, "Unharmonised Procedural Rules: Is there a Case for Further Harmonisation at EU Level?" in Paul Beaumont, Mihail Danov, Katarina Trimmings, Burcu Yüksel (eds.), *Cross-Border Litigation in Europe* (Hart Publishing, 2017), 55.
[1017] TFEU, Article 81.
[1018] The timeline between the date of the *Gasser* judgment and adoption of the Recast Regulation can be considered.

gradual change', and indeed, the Union is 'in the stage of judicial cooperation rather than procedural unification'.[1019]

The ball is in the CJEU, and more hopes are rested on the Hague instruments. The CJEU and national courts are 'indispensable agents in the progressive creation of the already considerably evolved area of civil justice'.[1020] On the one hand, the Member States have procedural autonomy and national civil procedural matters are within the sovereignty of each state. The subsidiarity principle ensures the independence of national authorities unless there is the exclusive competence of the EU. On another hand, against the established practice of the EU's incompetence over national procedure, civil procedural harmonisation is an ongoing trend within the Union and the CJEU takes a leading role in the process. Indeed, the CJEU has been successful in its harmonisation and integration efforts while interpreting the concepts as part of the Union law and based on the direct effect of the Union law, the definitions given by the Court have been precedents for national judges to incorporate within the domestic law. By interpreting EU law and its autonomous notions in its preliminary rulings, the CJEU ensures that they are defined and applied uniformly. As the Court itself determined, to ensure the uniform application, throughout the European Union, the CJEU has jurisdiction to interpret acts and such harmonised standards form part of EU law.[1021]

Yet, the EU civil justice system is still fractured. Apart from different interpretations given to the same concepts in different jurisdictions, courts do not always make a preliminary reference to the CJEU on the issues that result in more uncertainty. On a side note, together with the integrative impact, the rulings of the Court also hold political and cultural influence. While the Court's decision might reflect the Union policy and national policy, as well as the legal culture of the respective Member States, the political elements in the rulings and judicial restraints later become precedents. In this sense, judicial practice and harmonisation efforts of the CJEU are characterised also

[1019] The law that governs the horizontal relations between the European citizens should focus on what it actually concerns: the reasonable expectations of private parties rather than on the exclusive needs of the internal market. See: Kuipers (n 857) 1526.

[1020] *Carmen Otero García-Castrillón*, "Legal Certainty and Predictability in the EUPILLAR Project's Regulations: An Assessment", in Paul Beaumont, Mihail Danov, Katarina Trimmings, Burcu Yüksel (eds.), *Cross-Border Litigation in Europe* (Hart Publishing, 2017), 585,

[1021] *James Elliott Construction Limited v Irish Asphalt Limited*, Case C-613/14, EU:C:2016:821, [34] and [40].

by its political spirit.[1022] Moreover, the Court's decisions get new implications by further interpretation and application of national courts. A harmonised set of uniform rules coupled with the interpretative authority of the CJEU would add more to establish consistency. This fact necessitates an appropriate institutional architecture for the effective operation of the EU civil justice and avoiding adverse impacts of the national varieties on the coherent application of the Union law.

The problems also witness the importance of training for judges and lawyers at the regional level and the need to access precise information on foreign law, including civil procedure rules and case law.[1023] The European Judicial Network in civil and commercial matters would be a vital reference point for identifying practical problems arising from applying the current legislation and achieving more effective administration and implementation of the Regulation.[1024] The EUPILLAR project also showed a strong case for institutional reform authorising the Member States' courts to deal with litigation tactics effectively.[1025]

[1022] For more on the studies related to the political impact of the European jurisprudence see: Michael Blauberger & Susanne K. Schmidt (2017) The European Court of Justice and its political impact, West European Politics, 40:4, 907-918, DOI: 10.1080/01402382.2017.1281652

[1023] Fitchen (n 1006) 67.

[1024] See: Beaumount and Danov (n 776); B.Hess, "Harmonized rules and minimum standards in the European Law of Civil Procedure – In depth analysis" PE 556.971 EN, <https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/556971/IPOL_IDA(2016)556971_EN.pdf> accessed 26 November 2021. Furthermore, the European Judicial Network in civil and commercial matters would be a vital reference point for identifying practical problems arising out of the application of the current legislation and achieving more effective administration and implementation of the Regulation. The EJN (in civil and commercial matters) was established by Council Decision 2001/470/EC of 28 May 2001 (modified once in 2009) aiming at facilitating judicial and legal cooperation between Member States and providing support and information through a specific network to the national authorities dealing with cross-border cases to facilitate judicial and legal cooperation between Member States. On the basis of exchanging experience, discussion of practical and legal problems and dissemination of the best practices the Union would be able to improve, simplify and expedite judicial cooperation and bring advanced reforms to the existing legislature. That would contribute to the efficiency and effective provision of party autonomy. The EJN channels might contribute also to the operation of such a web system by collection and transmission of necessary data between the Member States and judiciary (yet, there might still be tech problems). The Hague Conference has a similar tool establishing a network of the judges operating only in relation to the matrimonial issues and family matters. The author has suggested that such a mechanism dealing with the judicial matters would build a bridge between the Member countries and Contracting States, furthermore, contribute to harmonisation, effective cooperation and implementation of the respective Hague frameworks. Coupled with the country-specific data published in the ambit of the European Justice Scoreboard, the Network would have an essential role in harmonisation and achievement of the uniform rules at the regional level.

[1025] Another suggestion was to create an intra-EU forum for the curation and improvement of the respective legal instruments, which would also lead to the better and more effective functioning of the regime. See Fitchen (n 1006); See also Giesela Ruhl, "Judicial Cooperation in Civil and Commercial Matters After Brexit: Which Way Forward?" [2018] 67 International and Comparative Law Quarterly 99.

Beyond all these assumptions, inevitable policy considerations and their impact on regulatory frameworks should not be undermined.[1026] Concerning the challenges and potential risks to the parties and proceedings, it is supposed that Brussels might '…end up taking one step forward but two steps back'.[1027] Optimistically, common issues arising from the BRR and HCCCA might bring an initiative to organise joint expert groups by the Commission and HCCH to determine the gaps and address them in coherent legislative actions. Likely, uncertainties arising from the lack of uniform procedural rules stimulate drafting model laws and procedural standards by the EU. Such efforts might be achieved only upon enhanced collaboration between the EU Commission, HCCH and UNIDROIT.

[1026] Mutual trust will always have substantial impact on the EU policy and legislation.
[1027] Hovaguimian (n 976) 251.

Chapter 6 THE HCCCA v. THE NEW YORK ARBITRATION CONVENTION – UNEASY COMPLEMENTARITY?

6.1 Introduction

Before achieving the HCCCA, there was no framework containing uniform rules to protect the choice of court agreements and resulting judgments, and the Brussels regime has applied only to the European Union.[1028] On the other hand, the central role of the parties' will has been given prominence by the rhetoric of international commercial arbitration.[1029] The NYC has been an effective mechanism for the international regulation of arbitration and providing party autonomy by giving global recognition and enforcement to arbitration agreements and foreign arbitral awards.

The HCCCA and NYC share mutual objectives rooted in freedom of contract and free wills of the parties, and they aim at the provision of party autonomy. Apart from the party autonomy targets, the reasons behind the study in this chapter relate to the fact that the HCCH intended to achieve a worldwide instrument like the NYC but applicable to jurisdiction agreements. Furthermore, both mechanisms have Brexit implications on providing the parties' wills to choose the forum and enforce the final decisions on their disputes. Regardless of all these harmonisation premises and shared goals, the Conventions are not identical, and distinctive features characterise the accommodation of party autonomy. How effectively does each instrument operate while giving force to parties' choices? Would the parties tend to choose arbitration rather than litigation as their dispute resolution means? Would there be lessons for the HCCCA to be learned from NYC for becoming more effective? These are the questions to which this chapter responds. While the chapter occasionally touches upon the reasons behind the popularity of NYC, it does not hold a more expansive room for this discussion considering the scope of this study. The findings bridge the previous discussions to the final chapter of the thesis on the future of the HCCCA, particularly its potential application post-Brexit.

[1028] For the detailed discussions see: Chapter 5.

[1029] Giuditta Cordero-Moss, "Limitations on Party Autonomy in International Commercial Arbitration [2015], in *Collected Courses of the Hague Academy of International Law*, Volume 372, 141, <http://dx.doi.org/10.1163/1875-8096_pplrdc_A9789004289376_02> accessed 26 November 2021.

6.2 An overview of the landscape

As dispute resolution becomes essential for the smooth operation of international trade and commerce, the instrument used by the parties gets 'great tactical significance'[1030] with the potential of bringing different outcomes. Arbitration and litigation are more common venues for the parties to refer their disputes among various dispute resolution tools. Without the inclusion of any forum selection clauses, commercial disputes are litigated at courts by default. Often courts at the home jurisdiction of one or both parties are grasped by the other party to be unreliable or undesirable venues, either because of the delays resulting from overfilled dockets, excessive discovery, unpredictable awards, or possible bias. As described by Teitz:

> 'in a world where daily transactions routinely involve multiple countries, litigants are increasingly likely to find themselves embroiled in simultaneous contests in several theatres'.[1031]

Where joint wealth of the parties is reduced by litigation, they are pushed by the market forces towards alternative forms of dispute settlement, especially arbitration.[1032] On a similar note, parties would not go to a state-sanctioned method of dispute resolution, namely trial before a court; instead, they would adopt alternative dispute resolution tools if there are expected mutual advantages.[1033]

Furthermore, since giving effect to a court judgment across the national borders might become problematic, arbitration is frequently argued to be the only way a prevailing party can secure enforcement. In this sense, arbitration has been alleged to be "a better mechanism with monopoly."[1034] Arbitration and international arbitration are

[1030] Baatz Y., Maritime Law (5th edn, 2021, Routledge at Informa), 2.
[1031] Louise Ellen Teitz, "Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings" [1992] 26(1) The International Lawyer 21, 22.
[1032] Born (n 208) 2-4.
[1033] Kaplow Louis and Shavell Steven, "Economic Analysis of Law", Harvard Law School and National Bureau of Economic Research, Working Paper 6960, 1999, <https://www.nber.org/system/files/working_papers/w6960/w6960.pdf> accessed 26 November 2021.
[1034] Lipe and Tyler (n 577) 2; Jan Paulsson, "International Arbitration is not Arbitration" [2008] 2(1) Stockholm International Arbitration Review 1; In this regard, there are empirical evidences, especially studies and surveys which are touched below in this chapter, showing businesses sometimes hesitate to opt for a litigation. Similarly, "manifest success" of business arbitration is described to be "outside the law". See: Heinrich Kronstein, "Business Arbitration-Instrument of Private Government" [1944] 54 Yale

differentiated by stating that international arbitration '… is a monopoly and that makes it a different creature as a sea elephant is a different creature with fundamentally different qualities than an elephant'.[1035] It is further claimed that 'in the transnational environment, international arbitration is the only game'[1036]; thus, lawyers tend to refer a significant number of contracts to international arbitration even when the parties prefer courts.[1037] These allegations might make sense when delivering those lectures before the latest international and regional instruments were developed. In the absence of a global treaty applicable to jurisdiction agreements and judgments, arbitration might have been more attractive because of the protection given by the NYC.[1038]

Nevertheless, international litigation no more lacks worldwide enforceability. The HCCCA has neutralised the dispute resolution landscape by the comparable guarantees in favour of litigation and influenced reforms of the Brussels regime.[1039] Some authors comment that the adoption of the HCCCA broke arbitration's 'monopoly' and conveyed more comprehensive options for businesses to resolve transnational disputes.[1040] However, litigation and arbitration are companions supplementing each other rather than opponents fighting for 'monopoly.'[1041] The dispute resolution landscape is also characterised by the inclination towards achieving a reliable equilibrium between them.

The NYC played a role model for the HCCH while drafting the HCCCA.[1042] The objective was to achieve an instrument providing similar immunity for choice of court

Journal 36, 39. Ana E. Bastida and others note that in regard to the cross-border unitisation agreements, "common practice has been to subject most disputes to arbitration". See: Ana E. Bastida, Adaeze Ifesi Okoye, Salim Mahmud, James Ross, Thomas Wälde, "Cross-Border Unitisation and Joint Development Agreements: An International Law Perspective" [2007], 29(2) Houston Journal of International Law 355, 391.

[1035] ibid, cfr Paulsson, 1 and 9.

[1036] ibid, 2.

[1037] Paulsson also states that countries may "encourage, discourage, or even outlaw arbitration – but if international arbitration goes, international economic exchanges will suffer immensely". ibid, 1.

[1038] Brand and Herrup (n 276) 215. See also Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, Redfern and Hunter on international arbitration (6th edn, Oxford University Press, 2015).

[1039] See: Chapter 5.

[1040] Lipe and Tyler (n 577) 2.

[1041] Parties' choices for the resolution of their disputes are ensured regionally by the Brussels regime and European Convention on International Commercial Arbitration while the HCCCA and NYC maintain the balance at the international level. The European Convention on International Commercial Arbitration was opened for signature on 21 April 1961 and entered into force on 7 January 1964. It has 16 signatories and 31 parties.

[1042] Willibald Posch, "Resolving Business Disputes Through Litigation or Other Alternatives: The Effects of Jurisdictional Rules and Recognition Practice [2004], 26 Houston Journal of International Law, 363, 380.

agreements and resulting judgments as what the NYC accomplished for arbitration agreements and resulting awards.[1043] In a survey before the adoption of the HCCCA, over 98% of the participants indicated that a convention on choice of court agreements would be helpful for their practice.[1044] Notably, over 70% of those remarked that such an instrument would make them 'more willing to designate litigation instead of arbitration' in their contracts.[1045] It was hoped to 'create a level playing field for an exclusive choice of court clauses with arbitration clauses' by balancing the rules applicable to private party negotiations.[1046] As the first truly global treaty on the recognition and enforcement of the choice of court agreements and resulting judgments, the HCCCA aims at identically ensuring certainty and predictability as to the NYC.[1047] The HCCCA was identified as "a sort of mini version of the NYC for the enforcement of court judgments. "[1048]

Born claims that due to the HCCCA's 'grave defects', states should not ratify it; instead, they should withdraw from it promptly.[1049] He further argues that limitations and exceptions of the HCCCA would leave enforcement of the choice of court agreements with significant uncertainties; hence, international arbitration agreements will continue to supply a substantial "enforceability premium."[1050]

Nevertheless, exceptions should not be understood as a risk of uncertainty; instead, they should evidence the existence of the general rule.[1051] The refusal grounds of the HCCCA are not more expansive than those of the NYC, and indeed the latter might sometimes go beyond the HCCCA. Moreover, the Hague Judgments Convention

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[1043] Hartley/Dogauchi Report, Preface and [1].

[1044] The survey was organised by the ABA Section of International Litigation and Practice on the draft text of the Convention prior to December 2003 Special Commission. See "Louise Ellen Teitz, "Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation" [2004] 10(1) Roger Williams University Law Review, Faculty Scholarship, Paper 38, 1, 63.

[1045] ibid.

[1046] ibid, 30; Beaumont (n 260) 158.

[1047] Brand (n 394) 24.

[1048] Michael Hwang SC, "Commercial Courts and International Arbitration – Competitors or Partners?" [2015] 31 Arbitration International 193, 199.

[1049] Gary B.Born, "Why States Should Not Ratify, and Should Instead Denounce, the Hague Choice-Of-Court Agreements Convention" Part I, II and III, 18 June 2021, <http://arbitrationblog.kluwerarbitration.com/2021/06/16/why-states-should-not-ratify-and-should-instead-denounce-the-hague-choice-of-court-agreements-convention-part-i/> accessed 29 November 2021.

[1050] See: Born (n 129). See also: Born and Rutledge (n 731), 442, 459 and 1017.

[1051] See: <https://en.wikipedia.org/wiki/Exception_that_proves_the_rule> accessed 27 November 2021. As noted before, limitations over recognition and enforcement rules of the Convention serve its main aims and derive from the fundamental principles of contract law, civil procedure rules and public policy. See: Chapter 4.

further augments the global enforceability of judgments not covered by the HCCCA.[1052]

Moreover, the Conventions should not be seen as competing instruments as they operate along similar lines of the two different dispute resolution means.[1053] The HCCCA is a "game-changer in the international enforceability of court judgments," which "aims to do for court judgments what the NYC has done for arbitral awards."[1054] As believed, the Convention is a litigation analogue for the NYC, as it seeks to ensure "an equal and viable alternative to arbitration."[1055]

Yet, debates over whether arbitration or litigation is a more convenient method of dispute resolution have not resulted in any absolute outcome.[1056] There are still many contentions identifying arbitration as the "universal panacea" in international commercial relations. Some empirical estimations show that 90% of international contracts include binding arbitration clauses.[1057] In contrast, some claim that arbitration is not preferred among corporate lawyers despite its 'purported benefits'.[1058] Credit has been given to judges for the following precedent rather than being "undisciplined wild cards," rendering "split the difference" awards that lack principle.[1059] Evidence shows that litigation was 'preferable to arbitration' because international contracts (20%) included arbitration clauses more than domestic contracts (10%).[1060]

Regardless of the different components presented as the background justifications for

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[1052] See: Chapter 4.

[1053] See: Nanda (n 233) 787-788. See also: Eisenberg and Miller (n 206) 10.

[1054] Chief Justice Sundaresh Menon, "International Commercial Courts: Towards a Transnational System of Dispute Resolution" (Opening Lecture for the DIFC Courts Lecture Series 2015, Dubai, 2015) [35].

[1055] See Teitz (n 232) 548; Trooboff (n 232).

[1056] Brand and Herrup (n 276) 215; Ronald A Brand, *Fundamentals of International Business Transactions* (Kluwer Law International, 2000), 542-87; Born (n 129); Redfern and Hunter (n 1026).

[1057] See Berger Klaus Peter, "Set-Off in International Economic Arbitration" [1999] 15(1) Arbitration International 53. See also: Eisenberg and Miller (n 206) 17.

[1058] Callahan Rebecca, "Arbitration v. Litigation: The Right to Appeal and Other Misperceptions Fueling the Preference for a Judicial Forum", Bepress Legal Series, 2006, Working Paper 1248.

[1059] Brand and Herrup (n 276) 215; William W. Park, Arbitration of International Business Disputes: Studies in Law and Practice (2nd edn, Oxford University Press, 2012). In this relevance, Andrea Schulz contends that litigation is likely to be employed by medium-sized businesses where arbitration would be extremely expensive or there would be a need for bringing a third party into the proceedings, as well as to get an enforceable judgment immediately. See: Schulz (n 274) 268. Likewise, William Park observes that banks prefer to litigate rather than arbitrate loan defaults. See: William W. Park, "Arbitration in Banking and Finance" [1998] 17 Annual Review of Banking Law 213, 215-16.

[1060] Eisenberg and Miller concluded that corporate representatives of the big public companies were on the side of the litigation: "…in the simple economic view, … litigation can add value over arbitration. See: Eisenberg and Miller (n 206) 2 and 52.

the presumed preference given to arbitration, parties might experience considerable disadvantages compared to litigation.[1061] Proceedings can result in a significant amount of expense and considerable delay depending upon the circumstances and parties' negotiations; therefore, scepticism would be inevitable while making accurate one-size-fits-all generalisations about dispute resolution means.

This study propounds that the state of play is distinctive to the particular relationship of the parties and the circumstances of each case. Together with the substantive qualities characterising each dispute resolution means[1062] and certain features shared by both, assumptions about advantages and disadvantages of arbitration and litigation vary with no peculiarity in a sense.[1063] The actual benefits of each mechanism in dealing with international disputes together in a vein may hide the problems created by their 'so-called' disadvantages. Before deciding whether to arbitrate or litigate, parties should get proper legal advice for assessing potential outcomes. The HCCCA and NYC share mutual objectives and principles for providing party autonomy, promotion of commercial certainty, and predictability. Regardless of the overlaps and mutual goals of the means, they are not mirroring each other with the eminent incompatibilities defining the effectiveness of the provision of party autonomy. The following discussion determines their distinctive features and implications of the NYC for the principle.

6.3 Implications between the regimes

[1061] Born (n 208) 8.

[1062] Arbitration is always civil in nature, whereas litigation may cover both civil and criminal cases; Litigation has a mandatory character by virtue of the rules determined by the government, whereas arbitration is consensual with the procedural freedom and rules specified by the parties themselves; Arbitration has a decisive body who is an arbitrator or arbitrators with non-governmental identity selected by the parties, whereas litigation is held by judges who are appointed by the government; Subject matter is a distinguishing feature, while courts are competent to hold trial of any matter related to a case, an arbitral tribunal's competence is limited to only particularly specified disputes as nominated by parties. See: Born (n 208) 256-259.

[1063] Enforceability, Neutrality, Cost, Speed, Finality of the decisions, Confidentiality and privacy, Commercial competence and expertise of the parties, Party autonomy and procedural flexibility and Centralization are often enclosed as the background reasons of the commercial preferences by the proponents of arbitration. For more see: Born (n 208); Robert Merkin, *Arbitration law* (1st edn, Informa Law from Routledge, 2004); Surbhi S "Difference Between Arbitration and Litigation", 12 October 2017 <https://keydifferences.com/difference-between-arbitration-and-litigation.html> accessed 27 November 2021.

The NYC has become a more successful framework effective in and between the 168 Contracting States.[1064] Even if it has been argued that the HCCCA contains a lot of exclusions shrinking its material scope, indeed, the text of the NYC is relatively narrow, leaving many issues to national laws and courts. Whereas the NYC refers to arbitrability, there is no definition given to the notion. Further, there is no list of the issues falling into the material scope defined under domestic laws. While positive and negative effects of arbitration agreements are accepted, the latter might not be ensured due to many conditions that need to be met for a court to stay. Apart from those circumstances related to the stay of the legal proceedings, there is no uniform position regarding the measures granted for the breach of an arbitration agreement.

Furthermore, the NYC does not identify the law under which the court seised decides the validity of an arbitration agreement while deciding on a stay. While *kompetenz-kompetenz* and separability are firmly established as 'the conceptual cornerstones of arbitration as an autonomous form of international dispute resolution'[1065], the NYC does not provide complete or as stated negative competence of an arbitral tribunal. Again, unlike the HCCCA, there is no direct ruling on separability linked to the substantive validity rules.

On the other hand, substantive validity of arbitration agreements is mostly dependant on national practices, which bring inconsistencies. This fact brings extra complexities at the recognition and enforcement stage; furthermore, the absence of definition given to "public policy" and the "binding" nature of an award creates similar problems. Indeed, an internationally accepted set of standards and rules based on domestic arbitration practices exists, but national diversities and inconsistent interpretations cannot be denied.[1066] While containing formal requirements for arbitration agreements, they are not in line with modern developments. Unlike the HCCCA or BRR, the NYC does not recognise oral agreements, and a signature is necessary. In contrast to the HCCCA and BRR, there is not any relevant provision on the incorporation of arbitration clauses or electronic or 'any other means of

[1064] The HCCCA has been ratified only by the EU, Denmark, United Kingdom, Mexico, Montenegro, Singapore and has been signed by China, Ukraine, the United States, North Macedonia and Israel without ratification. Considering the timeline of the adoption of the Conventions in 1958 and 2005 this substantial difference in the number of Contracting States is reasonable.

[1065] Henri Alvarez, "Autonomy of International Arbitration Process" in Loukas A. Mistelis, Julian David Mathew Lew QC (eds.), *Pervasive Problems in International Arbitration* (Kluwer Law International, 2006) 131.

[1066] ibid, 119.

communication,' which are widely used in practice, particularly at the very time of the modern technological developments.

As shown earlier, the HCCCA also lacks uniform interpretations of similar concepts; it also leaves many fundamental issues determined by national laws and practices. Furthermore, parties cannot derogate from the mandatory rules of the states under either regime.[1067] From the other perspective, liberal points and pro-enforcement bias of the NYC should be emphasised as the aspects contributing to commercial certainty and facilitating parties' business. As expressed, the NYC should apply directly and supersede national laws without any room for the application of the law of the domestic court.[1068] However, non-uniformity and lack of harmonisation are still cases under the NYC similar to the HCCCA, which the relevant authorities should consider. There could be joint expert groups established by the UNCITRAL and HCCH to share insights and learn lessons for global uniformity and consistent application of the instruments; that would reshape the provision of party autonomy at the international level. Furthermore, taking common issues under the three regimes, the EU Commission might also get involved in joint harmonisation efforts.[1069]

6.4 Party autonomy aspects of the New York Convention 1958: Convergence and divergence with the HCCCA

NYC is the centrepiece in the mosaic of treaties and arbitration laws that ensure the acceptance of arbitral awards and arbitration agreements.[1070] It aims to provide commercial security and promote international trade by settling international commercial disputes and its pro-enforcement bias facilitating and safeguarding

[1067] See: George A. Bermann and Loukas A. Mistelis (eds.), *Mandatory rules in international arbitration* (Juris Net Llc, 2010); see also: George A. Bermann, "Mandatory Rules of Law in International Arbitration", in Franco Ferrari and Stefan Kröll (eds), *Conflict of Laws in International Arbitration* (Sellier European Law Publishers, 2010), 325–339. See also: Jack J. Coe and Donald Earl Childress (eds.), *Private International Law and Arbitration* (Edward Elgar Publishing, 2018), 465-479.

[1068] A J van den Berg, *The New York Arbitration Convention of 1958* (Kluwer Law International, 1981), 268-270; See also: Sherina Petit and Ewelina Kajkowska, "Issues relating to Challenging and Enforcing Arbitration Awards: Grounds to refuse enforcement", August 2019, <https://www.nortonrosefulbright.com/en/knowledge/publications/ee45f3c2/issues-relating-to-challenging-and-enforcing-arbitration-awards-grounds-to-refuse-enforcement> accessed 27 November 2021.

[1069] For the discussion of the proposals for such collaborations see thesis, Chapter 5.

[1070] It is stated that the success of international commercial arbitration is based upon "the twin pillars of the Convention and the UNCITRAL Model Law on International Commercial Arbitration of l985 (and amended 2006)". See: Foreword by Professor Pieter Sanders to the ICCA Guide to NYC, published by the International Council for Commercial Arbitration, 2011.

recognition and enforcement of arbitration agreements and arbitral awards.[1071] The HCCH also shared similar objectives, which stimulated learning lessons from the NYC while drafting 'the litigation analogue'[1072], ensuring protection to international litigants. Which crossing lines do connect the Conventions? To what extent does the HCCCA alternate the NYC? How do the positions of the two instruments differ? Are there any boundaries over party autonomy? By contrasting equivalent elements of the treaties, this chapter reveals the effectiveness of the NYC in the provision of party autonomy versus its litigation companion.

6.4.1 Arbitration agreements: Effects

An arbitration agreement is the key source of arbitration and the most robust proof of party autonomy.[1073] The NYC determines the obligation of the Contracting States to recognise "an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."[1074] Similar to the HCCCA, the NYC ensures positive effects of an arbitration agreement in the power to compel the parties to commence proceedings and exclusive authority of an arbitral tribunal to determine the matters which were referred to it.[1075] The *kompetenz-kompetenz* principle, exclusively known in international arbitration, authorises the tribunal's competence to rule on its jurisdiction and validity issues.[1076] Party autonomy establishes a rebuttable presumption that parties submit all of their disputes, including matters related to validity and jurisdiction, to the chosen forum while negotiating a

[1071] Neil Kaplan, Introduction to ICCA's Guide 2011 to the Interpretation of the 1958 New York Convention: A Handbook for Judges.
[1072] Teitz (n 232) 548.
[1073] Elizabeth Shackelford, "Party Autonomy and Regional Harmonization of Rules in International Commercial Arbitration" [2006], 67 University of Pittsburgh Law Review 897, 900.
[1074] NYC, Article II.1.
[1075] Leonardo D. Graffi, "Securing Harmonised Effects of Arbitration Agreements Under the New York Convention" [2006] 28(3) Houston Journal of International Law 663, 679-680.
[1076] Together with the separability principle, the doctrine serves to the party autonomy principle as to recognize their wills and give effectiveness to their choices. See: 1961 European Convention on , Article 21 (1); International Commercial Arbitration (the "Geneva Convention"), Article VI (3); UNCITRAL Arbitration Rules; ICC Arbitration Rules, Article 6 (2); LCIA Rules, Article 23; UNCITRAL Model Law, Article 16.

dispute resolution clause.[1077] Once an arbitral tribunal is constituted, it has the power to proceed and render an award without any duty to stay the proceedings if a domestic court is seised with an action or aims to declare the arbitration agreement null and void.[1078] Unlike the HCCCA, the NYC does not expressly state the arbitral tribunal's competence to decide on its jurisdiction; instead, it touches upon the issue regarding the enforcement stage. The court may refuse to recognise or enforce an award if parties were under some incapacity or the agreement was not valid.[1079] In addition, the court may also refuse the recognition and enforcement if the subject matter of the dispute is not capable of settlement by arbitration under the law of that country or recognition or enforcement of the award would be contrary to public policy of the country of the addressed court.[1080] Another provision related to this discussion states that the court of a Contracting State, when seised of action in a matter in respect of which parties have agreed shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.[1081] These provisions authorise courts to determine the jurisdiction of an arbitral tribunal both at the enforcement stage and upon parallel proceedings. Indeed, an arbitral tribunal's decision on its jurisdiction may not be final and be subject to judicial review. While *kompetenz-kompetenz* has been accepted in English law, the case law also revealed the courts' powers over the tribunal and arbitral proceedings. As stated,

> '…the court of the seat always remains the primary arbiter of the substantive jurisdiction of the tribunal and will examine that jurisdiction not only in a challenge to the tribunal's ruling on its substantive jurisdiction but if necessary in advance of it…There must be a court with the power to determine the substantive jurisdiction of an arbitral tribunal, and when an arbitral tribunal has been constituted or is in contemplation, this role is assigned to the court of the seat both before and after an award is made'.[1082]

[1077] Zheng Sophia Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Routledge, 2014), 76.
[1078] Graffi (n 1062) 680.
[1079] NYC, Article V.1(a).
[1080] NYC, Article V.2.
[1081] NYC, Article II.3.
[1082] According to the judgment in *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, regardless of the NYC's pro-enforcement policy and resting the burden of proof on the resisting party, the Court was not bound or limited by the arbitral

Arbitrators can only declare their jurisdiction, and only courts have independent powers to rule on it.[1083] Relevant to this discussion, it was also claimed that the application of *kompetenz-kompetenz* is more complicated in arbitration than in litigation.[1084] In this regard, it has been suggested that negative *kompetenz-kompetenz* could be adopted based on firm judicial cooperation.[1085] Yet, similar to arbitration, the chosen courts might not have exclusive competence to rule on their jurisdiction.[1086] This complexity leaves detrimental impacts on party autonomy and doubts over whether their chosen forum will be resolved.

Negative effects of an arbitration agreement are manifested in the mandatory referral of the parties to the designated arbitral tribunal by the courts.[1087] Like the HCCCA, the NYC lacks sufficient safeguards to this end and does not indicate available measures against the court proceedings.[1088] Further, similar to the HCCCA, the NYC also specifies validity as a precondition for the dismissal of the court proceedings in favour of an arbitration agreement. The court of a Contracting State, when seised of action in a matter that has been subjected to arbitration, shall, at the request of one of the

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tribunal's decision on its jurisdiction and had to conduct an independent investigation on the facts. Therefore, the ICC award in that case was enforceable in France but not in England. Similarly, in Excalibur Ventures LLC v Texas Keystone Inc and others [2016] EWCA Civ 1144, the court had jurisdiction to decide whether there was an arbitration agreement at all. See: *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2010] 2 Lloyd's Rep 691; [2011] 1 AC 763, [84] and [95]-[98]. See also: *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"*[2020] 2 Lloyd's Rep. 233[2020] Lloyd's Rep Plus 77, [53]; The London Steam-Ship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain (The "Prestige") (No 3) – QBD (Comm Ct) (Henshaw J) [2020] EWHC 1582 (Comm), [39]; *Al-Naimi (t/a Buildmaster Construction Services) v Islamic Press Agency* Inc [2000] 1 Lloyd's Rep. 522, [2000] 1 WLUK 734; *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647, [2012] 1 W.L.R. 920, [2011] 5 WLUK 826, [40] per Lord Mance.

[1083] See: Mayer, Pierre, "L'autonomie de l'arbitre international dans l'appréciation de sa propre compétence (Volume 217)", in: Collected Courses of the Hague Academy of International Law. Consulted online on 27 November 2021.

[1084] Tang (n 1064) 83.

[1085] For more discussions see: ibid, 76-83.

[1086] As discussed earlier, the HCCCA does not preclude the non-chosen court from deciding on the validity of the jurisdiction clause. The chosen court shall have jurisdiction to decide the validity of the agreement under its own law, including conflicts of laws. On the other hand, the HCCCA does not give absolute competence to only the exclusively chosen court, rather any court that is seised or addressed to recognise or enforce a judgment may also decide on the validity of the arbitration agreement. Similarly, as presented before, neither the Brussels I Regulation nor the Recast Regulation practically ensured exclusive jurisdiction of the chosen court. Despite the fact that the Recast Regulation reversed the *Gasser* ruling and authorised the chosen court to decide on its jurisdiction, the provision is applicable only if the court has been designated exclusively and already seised.

[1087] NYC, Article II (1) and II (3).

[1088] HCCCA does not refer to anti-suit injunctions to be granted when an exclusive jurisdiction agreement is breached leaving the matter to the national laws and discretion of the domestic courts.

parties, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed.[1089]

6.4.2 Arbitration agreements: Formal validity

"Writing" within the meaning of the NYC includes an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.[1090] It has been argued that such a bold rigidity fails to address the needs of international business practitioners, which might also leave tacit agreements unenforceable.[1091] Unlike the HCCCA and BRR[1092], the NYC disregards oral agreements by a firm requirement of a signature. It also lacks any provision presenting electronic communications as the means to conclude agreements, therefore, does not comply with the expectations of global trade and modern technological developments. On the other hand, oral agreements might be hard to evidence the real consent, and a 'meeting of the minds' and a judge might not refer the parties to arbitration.[1093] In this sense, the writing requirement safeguards the effects of an arbitration agreement. Unlike the NYC, the UNCITRAL Model Law is not mandatory in nature but might be considered by domestic courts. Many national laws are flexible enough to acknowledge oral agreements that are evidenced in writing without a signature.[1094]

[1089] NYC, Article II (3). Similarly, the HCCCA in Article 6 determines that the court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless the agreement is null and void under the law of the State of the chosen court. Further, according to Article 5(1) of the HCCCA, the exclusively designated court or courts of a Contracting State shall have jurisdiction unless the agreement is null and void under the law of the chosen court.
[1090] NYC, Article II (2).
[1091] Graffi (n 1062), 691-692; Neil Kaplan, "Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?" [1996] 12 Arbitration International 27, 29; Tang (n 1064) 47. See also: *Domenico Di Pietro* and *Martin Platte*, *Enforcement of international arbitration awards: the New York Convention of 1958* (1st edn, Cameron, 2001) 22.
[1092] The HCCCA is also flexible about the form requirements enabling a jurisdiction clause to be concluded by any other means of communication which renders information accessible so as to be usable for subsequent reference and not requiring a signature for an agreement to be valid. Further, the Recast Regulation shows an exhaustive approach to the writing condition and besides a form which accords with the parties' practices and usages of international trade or commerce, expressly indicates any communication by electronic means providing a durable record of the agreement as an equivalent to 'writing'. See: The HCCCA, Article 3(c). Explanatory Report para 110 and 112. In contrast, the Recast Regulation requires an agreement to be signed for getting formally valid. Recast Regulation, Article 25. For more discussion see: Chapter 5.
[1093] A Van den Berg (n 1056).
[1094] UNCITRAL Model Law, Article 7; English Arbitration Act 1996, Section 5.

Inconsistencies between the NYC model law and national laws necessitate adjustments to the expectations of modern global commerce.

The pro-enforcement ambit and liberal approach of the NYC establish the maximum standard for assessing the form, which does not preclude application of the more favourable national or international rules to get arbitration agreements as well as arbitral awards recognised and enforced:

> 'The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards….'[1095]

Regardless of mentioning only awards, support has been given to its exhaustive interpretation as to cover arbitration agreements.[1096] In this sense, NYC supersedes national law unless the latter is more favourable.[1097] The national courts might interpret and apply the NYC liberally regarding the liberal approach of the Model Law. Nevertheless, it is still obscure if the pro-enforcement bias of the instrument would bring the agreements and awards that are enforceable under the national laws within the scope of NYC. It has been suggested that 'recent developments have created an environment that is ripe for changes', which would be attained by judicial adoption of an expansive understanding of the writing requirement of the NYC.[1098] However, consistency can be achieved only upon a mandatory uniform interpretation at the international level.

The NYC similar to the HCCCA[1099] and BRR[1100], does not provide any express ruling on incorporation by reference except referring to an arbitral clause in a contract.[1101] On another note, the BRR recognises agreements in a form which accords with practices which the parties have established between themselves or in international trade or commerce, in a form which accords with a usage of which the parties are or

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[1095] NYC, Article VII(1).
[1096] UNCITRAL's Recommendation of 7 July 2006 Annex III; ICCA Guide to NYC, 44.
[1097] ibid, ICCA Guide.
[1098] See: Stacie I. Strong, "What Constitutes an "Agreement in Writing" in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act" [2012] 48 Stanford Journal of International Law 47.
[1099] HCCCA, Article 3(c)(ii).
[1100] BRR, Article 25.1(b) and 25.1(c).
[1101] NYC, Article II(3). HCCCA 3(d) also recognises the validity of an exclusive choice of court agreement that forms part of a contract. See also: Chapter 5.

ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.[1102] The HCCCA deals with the matter in a general way by stating that "an exclusive choice of court agreement must be concluded or documented by any other means of communication which renders information accessible so as to be usable for subsequent reference.[1103] In this sense, incorporation of jurisdiction agreements would be defined the commercial parties' commonly known trade practice and such information would be accessible for subsequent reference.

Besides falling under the umbrella of formal validity, the issue has strong links with the separability doctrine[1104] and recognition and enforcement of the awards. It is because the tribunal's award might be considered invalid under the law to which the parties have subjected it or, in the absence of such an indication, under the law of the arbitral seat.[1105] Although there is general acceptance[1106], international and national practices differ.[1107] It is suggested that "commercial certainty would be better satisfied if the position was clear that general words of incorporation can never incorporate an

[1102] BRR, Article

[1103] HCCCA, Article 3(c)(ii).

[1104] Discussed below, see: 6.4.3.

[1105] NYC, Article V.1.

[1106] UNCITRAL Model Law, Article 7(6) states that "The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract".

[1107] For more on the divergent approaches see: ICCA Guide on NYC, 46-47. For instance, the English practice has varied at different stages; while the earlier cases show a more restrictive approach to incorporation, the courts' have not been so rigid in the recent cases. In cases such as *TW Thomas & Co. v. Portsea Steamship Company 1* [1912] A.C. 1 and *Aughton Limited v. MF Kent Services Limited* [1991] 57 B.L.R. 1, it was decided that a general reference to another contract was not sufficient to incorporate an arbitration clause. A strict approach has also been shown in maritime cases related the arbitration clauses incorporated from charterparties into bill of ladings. See: *Simon Allison* and *Kanaga Dharmananda,* "Incorporating Arbitration Clauses: The Sacrifice of Consistency at the Altar of Experience" [2004], 30(2) Arbitration International, 2004, 265; Paul Todd, 'Incorporation of arbitration clauses into bills of lading' [1997] 9 Journal of Business Law 331. In the later cases, like *Walter Llewellyn & Sons Ltd v Excel Brickwork Ltd* [2010] EWHC 3415 (TCC), *Habas Sinai v Sometal [*2010] EWHC 29 Comm, *TTMI SARL v Statoil* [2011] EWHC 1150 (Comm) and *Barrier Ltd v Redhall Marine Ltd* [2016] EWHC 381 (QB) it was concluded that unlike the contracts between two parties, where a contract is made between different parties to the subcontract, there must be an express and precise statement of the parties to incorporate the arbitration clause. Most likely, it is related to the 'amiable' language and pro-enforcement nature of the English Arbitration Act 1996. The English Arbitration Act 1996 in Article 6(2) provides that "The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement". Article 5(3) accepts oral reference as well, stating that "where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing".

arbitration clause since otherwise, these issues will continue to be litigated."[1108] To avoid any risks arising from the various laws, it is always advisable for the parties to have an express statement about incorporating an arbitration clause from another contract or standard terms and conditions. Uniform judicial interpretation of the matter and an express provision in the NYC (most likely through additional protocols) would contribute to party autonomy and commercial certainty.

6.4.3 Arbitration agreements: Substantive validity and separability

The NYC embodies substantive or material validity as part of the derogative effect of arbitration agreements.[1109] While it obliges the seised court to refer parties to arbitration, it can deny doing so if the deal is null and void, inoperative, or incapable of being performed.[1110] Nevertheless, there is no express provision in the NYC indicating the law under which that court would decide the validity of the arbitration agreement. The provision on the law determining the validity of an agreement is presented regarding the recognition and enforcement of awards. An award may be refused to be given effect if the agreement is not valid under the law to which the parties subjected it or in the absence of such an indication by the law of the seat where the award is made.[1111] As part of validity, incapacity is ruled under the law applicable to the parties.[1112] Furthermore, the validity of an agreement might be considered only upon a request of one of the parties, which means that without any such request, an invalid agreement might still be operative.

It is believed that the important reason behind the NYC's success is the uniform international rules governing the recognition of international arbitration agreements and awards.[1113] On the other hand, it is also asserted that the NYC has no mechanism for the uniform interpretation depending on the interpretation given by the national courts.[1114] In this regard, defining the NYC as a self-executing instrument prevents divergencies in its understanding and application.[1115] National laws can supplement

[1108] Todd (n 1092) 347.
[1109] It was mentioned above as the negative effect of an arbitration agreement.
[1110] NYC, Article II(3).
[1111] NYC, Article V.1(a).
[1112] NYC, Article V.1(a).
[1113] Gary B. Born, "The New York Convention: A Self-Executing Treaty", Michigan Journal of International Law 40(1), 2018, 115.
[1114] ibid.
[1115] ibid.

the NYC if the latter does not have any ruling on a particular issue, or where the NYC refers to domestic law, it can be applied to the extent permitted by it.[1116] However, significant differences between national practices and domestic laws leave many incompatibilities upon the lack of guidance on substantive validity and uniform interpretation of the fundamental notions. It has been suggested that applying the same law by the seised court and court addressed to recognise and enforce an award might contribute to consistency.[1117] Consistency would be achieved if the law chosen by the parties would govern the validity of an agreement and the recognition and enforcement of an award. If the parties make no choice and there are no uniform provisions on validity in the text of the NYC itself, reaching consistent decisions would not yet be realistic. While the court to which recognition and enforcement have been addressed would apply the law of the seat, the court seised might apply *lex fori* since there is no indication of the applicable law in Article II (3) of the NYC.

A similar problem arises under the HCCCA.[1118] Both Conventions fall short of any uniform mandatory rule applicable to the substantive validity of forum selection agreements. While it is potentially hard to achieve revisions of the instruments soon, additional protocols as part of the Conventions might help to avoid inconsistencies arising from applying the various national laws and case law.

The separability doctrine provides additional protection for the parties' arbitration agreements and against fraudulent claims or tactics of those who intend to attain tactical advantages by arguing about the nullity or voidance of the agreement because of the invalidity of the main contract. An arbitration clause as an independent agreement is not affected by the main contract in which it is found. When issues related to validity and existence arise, they are considered separately regarding each agreement. As stated, 'When the parties to an agreement containing an arbitration clause enter into that agreement, they conclude not one but two agreements, the arbitral twin of which survives any birth defect or acquired disability of the principal agreement'.[1119] Separability protects party autonomy and recognises the arbitral

[1116] See: ICCA Guide on NYC.

[1117] Tang (n 1064) 28; See also: John B. Tieder, "Factors to Consider in the Choice of Procedural and Substantive Law in International Arbitration" [2003], 20 Journal of International Arbitration 393.

[1118] Regardless of specifying the substantive validity rule, the HCCCA does not prevent application of the diverse domestic rules to the same matter depending (the law of the chosen court, seised court or court that is requested to recognise or enforce the resulting judgment).

[1119] Stephen M. Schwebel, *The Severability of the Arbitration Agreement in International Arbitration: Three Salient Problems*, (Grotius Publication Limited, 1987) 1, 5; Anthony Daimsis, "How Heuristics Misshape Reasoning and lead to increased Costs in Arbitration" in Sherlin Tung, Fabricio Fortese and

tribunal's jurisdiction founded on the parties' wills.[1120] The importance of the doctrine rests upon the validity, existence or effectiveness, and determination of the applicable law. Accordingly, it presents that the law applicable to the main contract does not necessarily bring the application of the same law to the arbitration agreement; the law applicable to an arbitration agreement is chosen by parties or upon the absence of any choice, determined by the judge based on the close connection.[1121]

Unlike the HCCCA and BRR[1122], the NYC does not expressly state the separability of the arbitration agreement in its text. At the same time, the doctrine is commonly accepted in theory and practice and codified in many national and international arbitration rules.[1123] English law also expressly states the separability of an arbitration agreement.[1124] As ruled by the judge, there should be 'something more', showing misrepresentation, fraud, undue influence, or bribery in forming the arbitration agreement.[1125] Furthermore, separability does not render the arbitration agreement valid upon the illegality of the main contract. At the same time, the English courts have frequently ruled that the illegality of the main contract did not impeach the dispute

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Crina Baltag (eds.), *Finances in International Arbitration: Liber Amicorum Patricia Shaughnessy* (Wolters Kluwer, 2019).

[1120] The English authorities often refer to separability while severability is used as its alternative in America. French law on the other hand acknowledges independence of the agreement. See: Kleefeld, John C. et al., *Dispute Resolution: Readings and Case Studies* (4th edn, Emond Publishing, 2016) 523.

[1121] *Fiona Trust and Holding Corporation and Others v Yuri Privalov and Others* [2007] UKHL 40; *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWHC 42 (Comm); *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2013] 2 All ER 1 (*Arsanovia*); *Habas Sinai Ve Tibbi Gazlar Istihsal Andustrisi AS and VSC Steel Company Ltd* [2013] EWHC 4071 (Comm); In *Kabab-Ji S.A.L (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6, the Court of Appeal concluded that in the absence of any indication that the arbitration agreement was to be governed separately from the rest of the contract, the contract should be counted as a whole and the express choice of law in the contract should apply to all as an entire object. This can be considered as an escape from the existing separability doctrine.

[1122] See: HCCCA, Article 3(d); Recast Regulation Article 25(5), See also: *Benincasa v Dentalkit Srl* (C-269/95) (1997) ECR I-3767. For more discussions see: Chapter 3 and 5.

[1123] See: LCIA Rules 2014, Article 23.2; ICC Rules 2017, Article 6(9) (ICC was the first arbitral institution recognising separability of the arbitration agreement in 1955); UNCITRAL Arbitration Rules 1976, Article 21(2); UNCITRAL Model Law on International Commercial Arbitration 1985, Article 16(1). For more discussions see: Born (n 208).

[1124] See: Arbitration Act 1996, Section 7 states that an arbitration agreement "shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective and it shall for that purpose be treated as a distinct agreement". See also: In England, the separability doctrine was firstly established in *Heyman v Darwins Ltd* [1942] App Cas 356 contrary to the previous ruling in the Hirji Mulji case which concluded invalidity of the arbitration clause upon frustration in regard to the main contract. The doctrine was later developed by the significant amount of case law, see also: *Fiona Trust & Holding Corp v. Privalov* [2007] UKHL 40; *Deutsche Bank AG v Asia Pacific Broadband Wireless Communications Inc* [2008] EWCA Civ 1091; *Sea Master Shipping Inc V Arab Bank (Switzerland) Ltd* [2018] EWHC 1902 (Comm).

[1125] *Fiona Trust & Holding Corp v. Privalov* [2007] UKHL 40; For more discussions see: Nicholas Pengelley, "Separability Revisited: Arbitration Clauses and Bribery. *Fiona Trust & Holding Corporation V Privalov*" [2007] 24 Journal of International Arbitration 445.

resolution clause.[1126] The NYC does not expressly indicate the position where an arbitration agreement is illegal except the provision on the refusal to recognise and enforce an award upon the invalidity of an arbitration clause or contrariness of an award to public policy where recognition and enforcement are sought.[1127] The latter is linked to the discussion on the tribunal's competence and the court's power over the tribunal's rulings.

Scepticism about the impossibility of applying the doctrine in theory rather than in practice might be relevant. In other words, failure to conclude a valid agreement would bring invalidity of the jurisdiction or arbitration clause.[1128] The latter is because the policy applicable to the effect of a jurisdiction agreement is also analogically applied to an arbitration agreement.[1129]

6.4.4 Material scope of the NYC

The NYC does not contain any express ruling directly presenting its material scope except implicit provisions. The NYC defines a mandatory obligation of the Contracting States to recognise an arbitration agreement concerning a subject matter capable of settlement by arbitration.[1130] A court may refuse recognition and enforcement of an arbitral award if the subject matter of the difference is not capable of settlement by arbitration under the law of that country or it would be contrary to public policy. While there is no list of the matters that fall in or out of the scope of the NYC, it presents the notion of arbitrability, which is instantly associated with the substantive scope. In other words, the NYC applies regarding arbitrable matters. However, it neither defines the meaning of arbitrability nor any uniform rule on the applicable law interpreting this notion. Regarding political, social, and economic policies, states specify matters that arbitration may or may not resolve.[1131] Courts at the earlier stage may apply the same law like the one determining the validity of the arbitration agreement. They may also

[1126] *Fiona Trust & Holding Corp v. Privalov* [2007] UKHL 40; *Beijing Jianlong Heavy Industry Group v Golden Ocean Group* and *Beijing Jianlong Heavy Industry Group v Ship Finance International Ltd* [2013] EWHC 1063.
[1127] NYC, Article V.1(a) and V.2.
[1128] Tang (n 1064) 74.
[1129] *IFR Limited v Federal Trade SPA,* [2001] EWHC 519 (Comm). See also: *Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd* [1999] 1 All ER (Comm) 261, 280; *Mackender v Feldia AG* [1967] 2 QB 590 (CA).
[1130] NYC, Article II.1.
[1131] ICCA Guide, 63.

opt-out of *lex fori*, the law of the arbitral seat, or the law of the enforcement place.[1132] Moreover, courts might refer to public policy while deciding on the non-arbitrability of the subject matter of any dispute. Similar problems may arise due to the shortage of any uniform definition given to public policy, and varieties arising from the domestic laws bring the inconsistent application of the instrument and lack of harmony. This disharmony might leave parties without confidence about the resolution of their disputes at their chosen forum. In this sense, an additional protocol containing guidance might contribute to certainty. Meantime, parties should seek proper legal advice before choosing the arbitral seat and applicable laws to the agreement and proceedings.

While comparing the instruments, both the NYC and HCCCA apply to civil or commercial matters. Unlike NYC, the HCCCA delivers a specific list of issues excluded from its scope.[1133] Regarding these exclusions, it has been frequently argued that the HCCCA has a narrower scope than the NYC[1134] , and those matters may fall into the scope of the NYC and be arbitrated.[1135] In this regard, the liberal trends towards the growing acceptance of arbitration have also been underlined to highlight the broader application of NYC.[1136] It is further claimed that "arbitrators could now stretch their arms to the areas that were traditionally non-arbitrable including certain issues relating to bribery, corruption, competition and IP rights."[1137] State policies that prevent specific matters from being referred to the foreign courts due to exclusive jurisdiction do not bring non-arbitrability.[1138] Nevertheless, when it comes to the enforcement of an award, the national laws apply; therefore, domestic courts would most probably refuse to recognise or enforce an award given on, i.e., an immovable property located in its territory.

[1132] ICCA Guide on NYC, 62.
[1133] HCCCA, Article 1-2. For more discussions see: 4.2.4.
[1134] Tang (n 1064) 246-247, see also: Rachel Elliott, "The Hague Convention on Choice of Court Agreements - Will it be a Game Changer for International Litigation?", available at: https://www.european-law-firm.com/news/the-hague-convention-on-choice-of-court-agreements-will-it-be-a-game-changer-for-international-litigation.
[1135] R.Brand, P.Herrup at 218-219.
[1136] Tang (n 1064) 247; ICCA Guide, 63.
[1137] ibid, 108.
[1138] See: ibid, 108-109, see also: HCCCA, Article 2(2) and 2(4); Recast Regulation, Article 1.2(d) and 24.

6.4.5 Parallel proceedings

Unlike the BRR[1139], the NYC, same as the HCCCA, does not have any specific article regulating parallel proceedings at different arbitral tribunals or a tribunal and courts. Concurrent proceedings might result from either forum shopping tactics and evasive manoeuvres or the fact that parties might not be well-informed of the procedural issues or not consulted with a lawyer. Such jurisdictional conflicts would bring delays, waste of time, and legal expenses.[1140] These would directly impede the effectiveness of the arbitration agreement and convenience of the parties and lead to inconsistent awards and judgments.

While the NYC lacks such provisions, negative effects of an arbitration agreement would be relevant, and the ruling putting a mandatory obligation on the Contracting States to recognise and enforce a valid arbitration agreement shall operate if there is any other tribunal or court that is seised of the same dispute.[1141] Similarly, the HCCCA obliges the chosen court to decide on the matter, and any other court not chosen but seised shall stay or dismiss the proceedings.[1142] These provisions could help in a relevant situation; however, they cannot become an entire solution.[1143]

Since national laws implement the ruling in Article II (3) of the NYC as a statutory requirement, it has been argued that there is no need for adopting *lis pendens* rules for tackling parallel court and arbitration proceedings.[1144] Nevertheless, concurrent proceedings might become unavoidable upon validity matters; and there is no absolute *kompetenz* of the tribunal to decide on the validity of an arbitration agreement and its jurisdiction.[1145] Application of the provision of the NYC, which defines an obligation of a court to refer the parties to arbitration, is not very straightforward; a roadmap presenting certain conditions shall have been met. Moreover, domestic laws differ.[1146]

[1139] Although the BRR is not entirely successful. See: Chapter 5.

[1140] Campbell McLachlan, "Lis Pendens in International Litigation", in 336 Collected Courses of the Hague Academy of International Law (2008), 216.

[1141] NYC, Article II.3.

[1142] HCCCA, Articles 5 and 6.

[1143] For the discussion of the fundamental rules of the HCCCA see: 3.3.4.

[1144] Tang (n 1064) 152; McLachlan (n 1125).

[1145] For the discussion of the related matters see: 6.4.3.

[1146] For instance, under English law a party may apply for a stay of the legal proceedings brought in respect of a matter that is subject to the arbitration agreement, and similar to the NYC, the court shall stay the proceedings unless the agreement is null or void, inoperative or incapable of being performed. On the other hand, if the court refuses to stay, any provision in the arbitration agreement which determines that an award is a condition precedent to the legal proceedings is of no effect. See: English Arbitration Act, Section 9(5).

Even if the parties would negotiate to restrict the court's power over the arbitral process, the legal proceedings might not be prevented; further, a judgment on the invalidity of an arbitration agreement and continuation of litigation might not be questioned, particularly considering arbitral awards are subject to judicial supervision and enforcement.[1147] According to the NYC, the court seised should examine if an arbitration agreement exists, if it falls within the scope of the NYC, if it is formally and substantively valid and binding, whether there is a dispute at all, and if a dispute arises out of the parties' legal relationship, as well as if the dispute is arbitrable.[1148] The absence of uniform rule on the applicable law to the agreement and its existence, lack of the uniform validity rules and arbitrability concept, the potential application of various national laws, and non-harmonised domestic definitions leave unanswered questions. Further, for the rule to apply, there should be a request of at least one of the parties, which means if there is no request to the court at all, the court would most probably continue with the proceedings and decide on the dispute. Upon dishonest strategies of the parties, there might be arbitral proceedings or other court proceedings elsewhere, resulting in inconsistent awards and judgments. Provided the courts apply their national laws to the recognition and enforcement, irreconcilable decisions might become effective in different countries. These bring undesirable outcomes for the parties' choices and the fate of their disputes.

In addition, there might be parallel proceedings at another tribunal. One might argue that this is not expected provided arbitration is based on the parties' agreement. However, a fraudulent party might present a replicated agreement for delaying the proceedings. The NYC does not contain any ruling to regulate such scenarios. An additional protocol, as suggested before, might also cover the related issues.

6.4.6 Consequences of the breach of arbitration agreements in a nutshell

As presented above, NYC provides a ruling on the stay of the court proceedings upon a breach of an arbitration agreement. While there is no mention of possible remedies, anti-suit injunctions and damages would usually accompany such a stay to safeguard

[1147] In another note, the Chinese Arbitration law allows validity claims to be brought before either the court or tribunal and court's ruling prevails if there are conflicting decisions. See: Arbitration Law of the People's Republic of China, Article 20; For the related discussions see also: Tang (n 1064) 153.
[1148] ICCA Guide, 42.

parties' autonomy.[1149] Fentiman's scrutiny of the significance of an injunction to restrain foreign proceedings would be applicable also upon breaching an arbitration agreement.[1150] Similar to the cases where a jurisdiction agreement is breached, there might be *forum non conveniens* allegations by the abusive party; parallel pre-emptive proceedings might not be considered abusive; there might be significant delays in objecting to the court proceedings; public policy grounds or overriding mandatory rules could be referred; whereas such injunctions could save the party from tactical strategies, as well as a waste of time and expenses.[1151] Therefore, together with a request for a stay or dismissal, anti-suit injunctions become incumbent for restraining the proceedings, breaching an arbitration agreement, and abstaining from any forum shopping tactics to the detriment of party autonomy.

Similar to the HCCCA, the NYC does not contain any express provision on anti-suit injunctions. Either instrument does not prohibit such measures. The ruling of the NYC on the mandatory obligation of the Contracting States to enforce an arbitration agreement manifests the positive effect of an arbitration agreement; in contrast, mandatory referral by the courts to the designated tribunal demonstrates its negative effect.[1152] These effects of an arbitration agreement would be practically achieved by granting injunctions. Upon the request whether to issue a remedy, the court acts in accordance with the purpose of the NYC and internationally established practices.[1153] The matter mainly depends on the domestic laws, national policies, and local practices of each state. In other words, the court evaluates whether certain conditions are met, and the decision depends on whether the court has jurisdiction to grant it, if there is any ground for relief and if the court decides to use its discretion for preventing injustice.[1154]

[1149] Raphael (n 667) [7.07], [14.41]-[14.42]; *The London Steam-Ship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain (The "Prestige"*) (No 3) – QBD (Comm Ct) (Henshaw J) [2020] EWHC 1582 (Comm), at 210-211.

[1150] Fentiman (n 3), paras 16.01-16.03; See: Thesis, 4.2.6 and 5.4.7.

[1151] ibid.

[1152] NYC, Article II.1 and II.3. As already shown, the HCCCA guarantees both positive and negative effects of the exclusive jurisdiction agreements. See: HCCCA, Article 5-6. For the detailed discussions see: Thesis, 4.2.1.

[1153] ICCA Guide, 37.

[1154] For more discussions see: Fentiman (n 3), paras 16.27]-[16.59; see also: *Airbus Industrie GIE v Patel* [1999] 1 AC 119, 133 (HL).

Courts have usually shown willingness to enforce parties' agreements using an anti-suit injunction provided an arbitration agreement produced enforceable rights.[1155] Such measures have 'ordinarily' been granted without 'strong reasons' not to do so, putting the burden of proof on the party in breach of the arbitration agreement.[1156] While an injunction has often been granted upon vexatious or oppressive foreign proceedings[1157], courts based on their discretionary powers issued such measures also where a claimant demonstrated the existence of a binding arbitration clause which would have been breached unless a respondent did not show good reasons not to exercise such discretion.[1158] Upon such circumstances, the courts generally assessed whether the matter was arbitrable and fell into the scope of the arbitration agreement.[1159] There have been some uncertainties regarding whether such measures could be granted if there were no proceedings in the foot, while the case law advocates that the parties' rights lie in agreement but not in pending proceedings.[1160]

If the proceedings are brought at the courts of the NYC Contracting States, which are also the EU Member States, the European policy applies.[1161] Although the Brussels regime excludes arbitration from its scope, the seised court's authority to rule on its jurisdiction upon a breach of an arbitration agreement could be affected by the

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[1155] Fentiman (n 3), para 16.53. See also: *Welex AG v Rosa Maritime Ltd (The Epsilon Rosa) (No 2)* [2003] EWCA Civ 938, at [40]; *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, at [61]-[63]; an illustrative case is *Ecom Agroindustrial Corp Ltd v Mosharaf Composite Textile Mill Ltd* [2013] EWHC 1276 (Comm).

[1156] Fentiman (n 3), para 16.53. See also: *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87, 96; *Donohue v Armco Inc* [2002] 1 Lloyd's Rep 425 (HL), [24], [53]. This inclination was also witnessed in Lord Millet's statement: "There is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them."

[1157] See: *Joint Stock Asset Management Company "Ingosstrakh Investments" v BNP Paribas SA [2012] EWCA Civ 644*; *BNP Paribas SA v Joint Stock Company Russian Machines and another [2011] EWHC 308 (Comm)*; *Evison Holdings Ltd v International Co Finvision Holdings and another [2019] EWHC 3057 (Comm)*.

[1158] *The Angelic Grace, Toepfer International v Societe Cargill France* [1998] 1 Lloyd's Rep 379), per Millett LJ, [96].

[1159] See: *SRS Middle East FZE v Chemie Tech DMCC* [2020] EWHC 2904 (Comm); *Riverrock Securities Ltd v International Bank of St Petersburg (Joint Stock Company)* [2020] EWHC 2483 (Comm).

[1160] Fentiman (n 3), para 16.54. See also: Senior Courts Act 1981, Section 37. To this end, Lord Mance stated that the immunity from a suit is "a right enforceable independently of the existence or imminence of any arbitral proceedings". See: *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [28].

[1161] As discussed earlier, anti-suit injunctions issued by the Member State courts to restrain the proceedings at another Member State court have been prohibited on the basis of mutual trust. See: *Turner v Grovit* Case C-159/02 [2004] 1 Lloyd's Rep. 216. For the related discussions see: Thesis, 5.4.7.

European policy.[1162] Therefore, if there is an ICC arbitration clause between the parties and upon seisure of the Italian court, a party requests the French court to issue an anti-suit injunction in support of the arbitration agreement, it is likely that no such relief would be granted. The practice will likely reverse post-Brexit because of the changed status of the United Kingdom.[1163] On the other hand, the ICC arbitral tribunal might grant an anti-suit injunction restraining the Italian proceedings. The same practice can be exercised under NYC. Instead of seeking an anti-suit injunction from the court, the defendant might wish to appoint an arbitrator to seek an anti-suit injunction.[1164] One of the parties commenced Lithuanian court proceedings against the agreement providing for the Stockholm arbitration. The other party obtained an anti-suit injunction in the form of an arbitral award from the arbitrators; it sought to enforce that award in Lithuania under the NYC.[1165] It is suggested that the Brussels-Lugano regime imposes no barriers on arbitrators granting such relief. As the English arbitrators have powers to grant such injunctions, it would be odd to remove such an authority upon the competing proceedings in the Brussels-Lugano zone.[1166] Nevertheless, considering an arbitral anti-suit injunction is obtained in the form of an arbitral award, and such an award needs to be recognised and enforced by the courts under the NYC, such an injunction might not always be granted or enforced due to the court examination over the process. National courts might still refuse to give effect to awards referring to their public policies and considering the European values in the case of the Member States. In this relevance, Advocate General Wathelet submitted that an award that includes an anti-suit injunction is not sufficient for the refusal of recognition and enforcement on public policy grounds.[1167] Against these uncertainties, Fentiman remarks as follows:

[1162] See: *Allianz SpA (formerly Riunione Adriatica di Sicurta SpA*) *v West Tankers Inc* (Case C-185/07) [2009] AC 1138; See also: BRR, Article 1.2(d). BIR also has the same exclusion in Article 1.2(d). English courts granted anti-suit injunctions where the court proceedings non-Brussels and non-Lugano states breached arbitration agreements. See: *Shashoua and others v Sharma [2009] EWHC 957 (Comm)Mobile Telecommunications Company Ltd v HRH Al Saud (t/a Saudi Plastic Factory)* [2018] EWHC 1469 (Comm).

[1163] *Nori Holding and others v Public Joint-Stock Company Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm) (*Nori Holdings*).

[1164] The *London Steam-Ship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain (The "Prestige") (No 3)* – QBD (Comm Ct) [2020] EWHC 1582 (Comm), [76] per Justice Henshow.

[1165] *Gazprom OAO v Republic of Lithuania,* Case C-536/13 [2015] WLR (D) 212.

[1166] English Arbitration Act 1996, Section 48(5); McLachlan (n 1125) 12.52; see also: *The London Steam-Ship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain (The "Prestige") (No 3)* – QBD (Comm Ct) (Henshaw J) [2020] EWHC 1582 (Comm), [186].

[1167] However, the final decision of the ECJ is silent about this point which might leave the doors open for the courts to refuse enforcing arbitral anti-suit injunctions.

> ‘It would indeed be puzzling if the Convention, an instrument intended to strengthen arbitration agreements, were interpreted to weaken them by prohibiting an expeditious and effective means of enforcement.’[1168]

Against this gap similar to the HCCCA, it would be very useful if the NYC had a particular provision addressing the measures granted in support of arbitration agreements. Some suggest ‘a joint consideration by the European Union and UNCITRAL of the relevant issues’ for achieving ‘the better law’.[1169] This option may indeed be comprehensive for the benefit of the parties to international arbitration and arbitration-related litigation; nevertheless, it does not seem attainable in the nearest future. While reforming the NYC is challenging due to consensus and time, additional protocols proposed above could be more likely to be reached.

6.4.7 Recognition and enforcement of awards

It should be noted that the NYC, as of its title, was drafted to regulate precisely the recognition and enforcement of arbitral awards.[1170] At the same time, it gives effect to arbitration agreements that satisfy its requirements.[1171] To enhance the effectiveness of parties’ choices, the NYC outlaws more onerous conditions or higher fees on recognition or enforcement of arbitral awards than those which apply to domestic recognition or enforcement.[1172] The HJC shows such a liberal approach; the requested court shall not refuse recognition or enforcement of a judgment on the ground that recognition or enforcement should be sought in another State.[1173] The HCCCA does not contain any similar provision.

[1168] Fentiman further states that English courts have denied such puzzling effects of the NYC by granting anti-suit injunctions in support of arbitration. See: Fentiman (n 3), para 16.58.
[1169] For the discussion see: Guido Carducci, “Arbitration, Anti-suit Injunctions and *Lis Pendens* under the European Jurisdiction Regulation and the New York Convention: *Notes on West Tankers, the Revision of the Regulation and Perhaps of the Convention”* [2011] *27(2) Arbitration International* 171.
[1170] Similar to the provisions of the HCCCA on the recognition and enforcement of judgments rendered by the exclusively designated courts of the Contracting States, arbitral awards shall be recognized and enforced under the NYC. See: HCCCA, Article 8.1; NYC, Article III.
[1171] NYC, Article II.
[1172] NYC, Article III. Such a liberal approach is shown by the Hague Judgments Convention 2019; according to Article 13.2, the requested court shall not refuse recognition or enforcement of a judgment on the ground that recognition or enforcement should be sought in another State. The HCCCA does not contain any similar provision.
[1173] HJC, Article 13.2,

The NYC presents seven refusal grounds, and based on its pro-enforcement ambit, the burden of proof is on the party resisting recognition and enforcement.[1174] Besides the shift of the burden of proving the refusal grounds, the pro-enforcement bias has been applauded due to the narrow interpretation.[1175] It implies that if there are multiple options for interpretation, courts should opt for the one favouring recognition and enforcement.[1176] Another key feature of NYC is the elimination of any review of the merits of an award. The latter is in line with the HCCCA. Both of the instruments bring an assumption that if there is any error of judges or arbitrators, the court shall give effect to the decision unless the resistant party proves the existence of any refusal ground or the court *ex officio* refuses to the award referring to a non-arbitrable subject matter or public policy ground.[1177]

It is claimed that more of the refusal grounds in NYC are explicitly based on parties' autonomy shows more respect to the principle.[1178] Specific grounds are linked to party autonomy, i.e., if an arbitration agreement is invalid, an award deals with matters beyond the scope of the agreement, or the tribunal's composition is not under the agreement. However, it does not sound reasonable to measure the extent of effectiveness given to party autonomy by the NYC compared to the HCCCA having regard to the mentioned point; indeed, the latter also contains similar grounds except those relating to the composition of the tribunal since the courts are public bodies not founded based on the parties' private agreements.

Under NYC, validity as a ground for the refusal is a matter of the chosen law or the law of the arbitral seat in the absence of such an agreement. At the same time, the HCCCA subjects it to the law of the chosen court.[1179] Indeed, consideration of the parties' choice of law manifests pro-autonomy targets of the NYC. Most likely, the matter would be resolved under the domestic laws within the ambit of the HCCCA. On the other hand, as discussed above, the NYC does not indicate under which law the seised court decides the validity.[1180] A report shows that a Chinese court recently rejected a US company's application to enforce an arbitral award on the alleged breaches of a contract due to the contract was not signed with the right party; although

[1174] NYC, Article V.1.
[1175] ICCA Guide, III.4.
[1176] ibid.
[1177] NYC, Article V.2.
[1178] Tang (n 1064) 252.
[1179] HCCCA, Article 9(a); NYC, Article V.1(a).
[1180] NYC, II(3).

the arbitral award was obtained validly, the court has taken a relatively stern test while assessing the validity.[1181] The case shows that the pro-enforcement bias of the NYC does not always help if there is a serious defect regarding the agreement as well as procedure.[1182]

Both Conventions determine incapacity as a ground for refusing recognition and enforcement of final decisions. Under the NYC, incapacity is decided by the law applicable to parties, while the HCCCA leaves the matter to the law of the requested state and law of the court seised at the earlier stage.[1183] The NYC's position favours party autonomy based on the assumption that the incapacity of the parties would be unaffected by the country where recognition and enforcement are sought. On the other hand, since capacity forms a specific ground of validity, the laws governing the validity of the agreements under both Conventions would also apply to capacity.[1184] It brings further uncertainties for the operation of the Conventions and effective provision of party autonomy, mainly due to inconsistencies between national laws.

Both Conventions list factors composing procedural irregularity as the grounds for refusal.[1185] Unlike the HCCCA[1186], NYC does not mention "fraud" as a separate ground for the refusal. Besides, the HCCCA includes procedural fairness into the scope of the public policy ground, showing a rigorous approach to the conduct of the judicial process.[1187] Regardless of no mention of the item in the text of the NYC, fraud and illegality are usually regarded as strong public policy reasons not to give effect to the final awards.[1188]

Furthermore, both Conventions determine public policy as a refusal ground while lacking any uniform definition of the notion. On the one hand, the absence of a precise understanding of public policy gives more discretion to both judges and arbitrators as

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[1181] Apostolos Anthimos, "Chinese court refuses enforcement of an IFTA arbitration award", 6 August 2020. <https://conflictoflaws.net/2020/chinese-court-refuses-enforcement-of-an-ifta-arbitration-award/> accessed 28 November 2021.

[1182] Another important point deserving a special attention in this case is the duration of the proceedings: the application was filed in March 2018 and the final judgment refusing to recognise and enforcement the award was given in May 2020. This shows that speed is not always "an advantage" of the arbitral process as often argued.

[1183] HCCCA, Article 6(b), 9(b); NYC, Article V.1(a)

[1184] Hartley and Dogauchi Report, para 184.

[1185] NYC Article V.1(b) and V.1(d); HCCCA 9(c).

[1186] HCCCA, Article 9(d).

[1187] HCCCA, Article 9(e).

[1188] See: *Soleimany v. Soleimany* [1999] QB 785; *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 All E.R. (Comm) 146; *Westacre Investments Inc v. Jugoimport-SPDR Holding Co Ltd* [2000] QB 288; *HJ Heinz Co Ltd v EFL Inc* [2010] EWHC 1203 (Comm); *Alexander Brothers Ltd (Hong Kong SAR) v Alstom Transport SA* [2020] EWHC 1584 (Comm).

well as considers particularities of the domestic laws; on the other hand, it brings inconsistencies and diversities to the uniform application of the treaties and effectiveness of party autonomy. In this regard, unlike the NYC, the HCCCA necessitates manifest incompatibility of the recognition and enforcement with the public policy of the requested State. That would indeed prevent the domestic courts from applying their mandates excessively while refusing to recognise and enforce the judgments.

While the HCCCA sets the existence of inconsistent judgments as a refusal ground, there is no similar provision in the NYC. Taking into account the fact that there is no uniform definition given to public policy in either Conventions, the existence of inconsistent decisions, particularly upon parallel judicial proceedings on the issues such as validity, capacity, or substantive jurisdiction of the tribunal, might be included into the public policy ground within the ambits of the NYC.

Under both Conventions, the finality of the decisions is regarded as a condition for recognition and enforcement.[1189] According to the NYC, an award can be referred for recognition and enforcement only if binding.[1190] Furthermore, the Convention eliminated "double exequatur," which was characteristic to the Geneva Convention necessitating the finality of an award to be declared at the arbitral seat before being recognised abroad.[1191]

If compared to the HCCCA as already discussed, a judgment shall be recognised if it has effect in the State of origin and shall be enforced if it is enforceable in the State of origin; nevertheless, this provision does not entirely guarantee recognition and enforcement as there might still be grounds for refusal.[1192] Even if the approach of the NYC not requiring any exequatur in the state of origin has been appreciated as a step forward,[1193] it should be stressed that there is no uniform guidance on the binding nature of an award. While the court shall recognise and enforce an award under the procedural rules of the territory where the award is relied upon, understanding of "binding" differ from one state to another. An award might also be subject to review and appealed at the seat, whereas another party might have referred to it for

[1189] HCCCA, Article 8(3); NYC, Article V.1(d).
[1190] NYC, Article III.
[1191] 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, Article 1(d), 4(2); ICC Guide, IV.5(1).
[1192] HCCCA, Article 8.3.
[1193] See: Born (n 1098); U.N. Conference on International Commercial Arbitration, Summary Record of the Twenty-Fifth Meeting, at 2, U.N. Doc. E/CONF.26/SR.25 (Sept. 12, 1958).

recognition and enforcement based on its "binding" quality. The absence of any uniform interpretation would condition the operation of the NYC to domestic diversities and jeopardise parties' autonomous choices. In comparison, as discussed earlier, under the HCCCA, recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of the origin or if the time limit for seeking ordinary review has not expired.[1194]

Questions arise: how effectively would the recognising court apply the law applicable to parties to decide incapacity?[1195] How precisely would capacity be determined if different sets of rules apply to validity as a broader term? Would the addressed court have the expert knowledge to decide the invalidity of an agreement under any law that the parties have subjected it to or the law of the arbitral seat?[1196] On what basis can an award qualify binding?[1197] On the other hand, the court could *ex officio* refuse recognition and enforcement if it considers that doing so would be contrary to its public policy and the subject matter is not arbitrable; yet, the lack of interpretations given to the fundamental notions such as 'public policy,' 'arbitrability,' as well as 'incapacity,' 'validity/invalidity' and 'binding' results in inconsistencies, non-uniform application of the NYC and ineffectiveness of party autonomy. Indeed, these points would also cast a shadow on the 'pro-enforcement' mission of the NYC, which is not always the case, and bring more delays as experienced in the recent case.[1198] Similar problems arise under the HCCCA.[1199]

6.5 Conclusion

Parties based on their autonomy are free to negotiate choice of court or arbitration agreements. While choosing between the two dispute resolution tools, one might concentrate on the benefits of arbitration together with the recognition and enforceability of arbitration agreements and awards, which were not characteristics provided in international litigation previously. In the absence of a global framework

[1194] HCCCA, Article 8.4; nonetheless, such a refusal does not prevent a subsequent application for recognition or enforcement of the judgment.
[1195] NYC, Article V.1(a).
[1196] NYC, Article V.1(a).
[1197] NYC, Article V.1(e).
[1198] Anthimos (n 1166).
[1199] Likewise, absence of the uniform definitions given to the fundamental notions by the NYC also leads to inconsistencies which is also the case under the HCCCA. See: Thesis, Chapter 4.

applicable to jurisdiction agreements and judgments, arbitration might have been more attractive because of the protection given by the NYC. Nevertheless, international litigation no more lacks worldwide enforceability. If one asks what the HCCCA means for international dispute resolution and arbitration, it should be noted that it establishes 'a viable alternative' to the NYC. Indeed, by eliminating enforceability concerns, the HCCCA has brought a real alternative for parties to consider the nature, inherent benefits, and disadvantages of litigation and arbitration and make a sound choice for their resolution.[1200] Moreover, together with the HJC, they level the playing field and redress the balance favouring parties' alternatives.

Both the NYC and HCCCA aim at the provision of party autonomy, commercial certainty, and predictability. However, regardless of the overlaps and mutual goals, there are many differences between the instruments defining the boundaries of the provision of party autonomy. If one would argue about the more restrictive nature of the HCCCA compared to NYC, the status of the courts as the state bodies and jurisdiction driven from the government instead of private parties should be underlined. Further claims might relate to the more advanced status of the NYC than the HCCCA, but this idea should also be avoided provided the timeline since the adoption of the treaties. Once the HCCCA has been ratified and implemented by more states, it would become much firmer and more operative. Indeed, the Conventions complement each other within the entire landscape of international dispute resolution and PIL; and similar judicial practices might fill gaps in arbitration.

In another sense, both instruments are not free from shortages, notably lacking uniform interpretations given to the fundamental concepts and mostly being dependant on the national laws and domestic courts' practice. In this sense, joint consideration of the HCCH, EU Commission, and UNCITRAL would contribute to harmonisation, consistency in applying the mechanisms and the uniform provision of party autonomy. While negotiating dispute resolution clauses and referring to either litigation or arbitration, parties should be aware of the local law and practices of the seat and potential place where recognition and enforcement would be sought. They should also consider if the relevant states are part of the HCCCA or NYC. If the HCCCA did not apply to the case as of its material, temporal and territorial scope, commercial parties

[1200] Brand, (n 394), 23-24; See also: Ronald A. Brand, "Arbitration or Litigation? Private Choice as a Political Matter" [2006] 8 Yearbook on Arbitration and Mediation 20, 38.

would be recommended to consider arbitration regarding the enforcement perspectives provided by the NYC; special attention should also be paid to the domestic laws which would come into application. On the other hand, while drafting their agreement, parties should also consider the Brexit implications. While NYC is unaffected by the UK's withdrawal, the HCCCA might not apply in all cases.[1201]

[1201] For the related discussions see thesis, Chapter 7.

Chapter 7 VISIONS FOR THE FUTURE: BREXIT IMPLICATIONS AND RATIFICATION PERSPECTIVES OF THE HCCCA

7.1 Introduction

On **23 June 2016,** the UK referendum on membership of the European Union resulted in a majority - 52% of the electorate voting for leaving the Union. Upon lengthy negotiations, the UK and the EU agreed on the Withdrawal Agreement and a revised version of the Political Declaration on 17 October 2019. The UK officially left the Union on 31 January 2020, and from 1 February 2020, became the third country after 47 years of membership.

In a few areas of law, European harmonisation has been as successful as in PIL.[1202] The Brussels regime had harmonised recognition and enforcement of English jurisdiction agreements and resulting judgments in the Member States and vice versa. Brexit casts considerable uncertainties over conflict of laws, including civil judicial cooperation. In the absence of uniform regulation, the UK needs to tackle the post-Brexit legal landscape problems. Among the possible routes, the UK might rely on the unilateral application of the common law, national laws, or multilateral instruments – international treaties relevant to the field. Furthermore, a bilateral agreement between the UK and the EU seems an optimal way out, involving considerable challenges to achieve.

Among other multilateral options, the HCCCA promises a level playing field for providing parties' autonomous choices post-Brexit. Once the EU law seised to apply in and to the UK, leaving the effectiveness of the English jurisdiction agreements under question, the HCCCA becomes more realistic. As already explained, the EU acceded to the HCCCA on 1 October 2015, which brought the UK a Contracting State under its EU membership. The UK's instrument of accession to the treaty, which was deposited on 28 September 2020, provides continuous application of the HCCCA from 1 January 2021.[1203] The HCCCA and the complementary HJC, which the UK and EU aim to ratify, would provide certainty in international litigation post-Brexit. The EU's consistent policy

[1202] Briggs (n 765), preface.
[1203] For the further discussion of the application of the HCCCA post-Brexit see below: Thesis, 7.4.

concerning third countries is “to promote cooperation within the multilateral Hague Conventions” framework.[1204] Since the UK has become “a third country without a special link to the internal market,”[1205] the same approach of multilateralism applies to the relations between the EU and UK.

On the other hand, the HCCCA is not an entire solution in its current form. Moreover, there are varying views of the UK and EU on the applicability perspectives of the HCCCA after Brexit. This chapter gives an overview of the post-Brexit era expanding on the UK’s alternative way-outs to recognise and enforce parties’ choice of court agreements and resulting judgments. Following, application horizons of the HCCCA are examined, and potential challenges which would threaten party autonomy and necessitate parallel solutions are identified. The discussions are bottomed on the findings of the previous chapters regarding the provision of party autonomy by the BRR and NYC. It is revealed that the effectiveness of the HCCCA in ensuring parties’ autonomy post-Brexit would depend on resolving the shortcomings of the current text, which are detected in the previous chapters. At the same time, drawing from these determinations, suggestions are made on how to enshrine the application horizons of the HCCCA and enhance its effectiveness in the provision of party autonomy in the new era. It has been shown that cooperation between the states and more accessions would bring a truly global instrument ensuring party autonomy and certainty as aimed by the HCCH at the outset.

7.2 Brexit and choice of court agreements

Regardless of the UK’s withdrawal from the EU, many European citizens live, work in or travel to the UK and vice versa. Likewise, international companies and businesses from both sides continue their commercial relations. It means that civil and commercial disputes between citizens and businesses will still be inevitable; parties will still be negotiating jurisdiction agreements to resolve their disputes. It is proposed that ‘…parties will no longer be able to trust that choice of law and forum clauses will do

[1204] Communication from the Commission to the European Parliament and the Council, "Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention", COM (2021) 222 final.
[1205] ibid. See also: United Kingdom Internal Market Act 2020.

their job and create legal certainty.[1206] Such an assumption roots from the change of the UK's status, bringing considerable shifts in applicable normative instruments.

Most importantly, there is no clarity regarding which legal norms will enforce the English jurisdiction agreements and resulting judgments in the EU Member States and vice versa. As discussed earlier, Article 25 of the BRR gives effect to jurisdiction agreements within the Union; Article 31.2 determines a priority rule in favour of the exclusively designated court when there are parallel proceedings, and Chapter III defines the recognition and enforcement rules.

The UK left the EU civil justice area on 31 January 2020.[1207] During the transition, which lasted till the end of 2020, the UK no longer participated in the Union's decision-making or was not represented in the EU institutions, EU agencies, offices, or other Union bodies. Nevertheless, the UK was still bound by the EU law, and the Brussels and Lugano regimes applied to and in the UK under its European membership.[1208] From 1 January 2021, the EU laws applicable to the English choice of court agreements and resulting judgments have been terminated; and there are no longer any mutual or automatic recognition and enforcement of judicial tools between the UK and EU.

It should also be noted that, as a response to the UK's withdrawal from the EU, Member States are taking innovative measures for attracting international businesses to their jurisdictions. Specialised commercial courts are established by the states such as France, Belgium, Netherlands, and Germany. Particular features of the courts are the appointment of judges who are experienced in PIL and English law and English language usage. Regarding these attributes, the UK's departure from the EU has been seen as an "opportunity" for stimulating the interest, as the English judgments would become harder to enforce in the EU Member States.[1209] Similarly, some claim the

[1206] See: Ruhl (n 1013) 117.

[1207] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Getting ready for changes Communication on readiness at the end of the transition period between the EU and UK", COM (2020) 324, F2.

[1208] Withdrawal Agreement [2019] OJ EU C384 I/01, Articles 67-69, 126-127; European Union (Withdrawal) Act 2020, Part I; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Getting ready for changes Communication on readiness at the end of the transition period between the EU and UK", COM (2020) 324.

[1209] For Belgium's Prime Minister Charles Michel's and President of the Frankfurt District Court Wilhelm Wolf's statements see: "Brexit 'crunch time' for City of London" 21 September 2017, <https://www.bbc.co.uk/news/business-41343153> accessed 28 November 2021.

termination of London's status as the world's commercial law centre and replacing its attractiveness by the European jurisdictions.[1210] Nevertheless, the commercial courts should not be seen as rivals of the English courts. Indeed, they should build judicial cooperation and effective partnership to provide access to justice and fair trial as the sole ambit.[1211] As presented by Sir Geoffrey Vos, no justice system is superior; common and civil law judges have more in common, which necessitates collaboration and cooperation and exchanging ideas and information for achieving a just outcome in a reasonable timescale at a proportionate cost.[1212]

Regardless of the opposing debates about the negative impacts of Brexit on the UK's legal service and industry[1213], England will not lose its significance as a global dispute resolution centre; and commercial parties will still be negotiating English law and choice of court agreements as a reputable combination. England and Wales as a jurisdiction offer many benefits for resolving disputes, whether through the court system or London arbitration, which will continue to exist notwithstanding the UK's departure from the Union. The UK's worldwide reputation as a universally renowned dispute resolution hub stems from the high quality, commercial expertise, and pragmatic approaches of judges, the rule of law, transparency, independence, and efficiency and reliability of the judicial system.[1214] Empirical findings also evidence the pervasiveness of the UK's jurisdiction.[1215]

[1210] For the French justice minister Nicole Belloubet's and Head of the Paris Bar, Marie-Aimee Peyron's statements see: Tom Moseley, "Why English courts are opening in the EU", 28 February 2018, <https://www.bbc.co.uk/news/uk-politics-42979920> accessed 28 November 2021.

[1211] The author of this thesis presented these arguments in her poster: Aygun Mammadzada, "Business courts in Europe: effective cooperation with the English courts post-Brexit", seminar Innovating International Business Courts: A European Outlook organised by the Erasmus School of law, Rotterdam, the Netherlands, 10 July 2018.

[1212] See: Sir Geoffrey Vos, "A View from the Business and Property Courts in London" [2019], 12(1) Erasmus Law Review 10, 14 and 30. See also: Xandra E. Kramer and John Sorabji, "International Business Courts in Europe and Beyond: A Global Competition for Justice?" [2019] 12(1) Erasmus Law Review 1.

[1213] According to the The City UK chief executive Miles Celic, Brexit brings crunch time for City of London, as "Many firms are already moving parts of their operations out of the UK and Europe. When they've gone, it's hard to see them coming back". See: "Brexit 'crunch time' for City of London" 21 September 2017, <https://www.bbc.co.uk/news/business-41343153> accessed 28 November 2021.

[1214] See: Report published by the Law Society, *England and Wales: A World Jurisdiction of Choice*, 2019. See also: World Justice Project Rule of Law Index 2019; the UK was ranked the 12th out of 126 countries and jurisdictions.

[1215] Data suggested that in 2018 the UK was the largest legal services market in Europe (valued at approximately £35 bn in 2018). 75% of over 800 claims which were issued at the Admiralty and Commercial Court involved at least one foreign party and in 53% of the cases all parties were international. In 2019, 77% of over 600 such claims were international in nature whilst in half of the cases all parties were international. In a similar vein, between December 2018 and March 2019, among the total number of 841, there were 631 international cases at the Commercial Court, 336 of which were entirely international. For the Data sourced from: Civil Justice statistics quarterly: January 2018 to March

While the English judgments would not be automatically given effect in the EU and require exequatur, the worldwide quality renders them highly respected, stimulating recognition and enforcement. Additionally, giving effect to the English jurisdiction clauses and judgments would be in the interests of the states that are global trading partners and aim to expand international business. As stated by Sir Geoffrey Vos, 'It is generally in the interests of all nations to enter into reciprocal enforcement mechanisms.'[1216] Therefore, the English judgments would still be recognised and enforced under the national laws and comity principle unless any other international treaty applies. These factors indicate that there would hardly be an identical alternative to London Commercial Court as a global leader in international dispute resolution.[1217] Further, while negotiating a forum for resolving their disputes, parties would consider London a first-rate centre for arbitration. They might also reconsider their jurisdiction agreements and include arbitration clauses into their contracts. According to the survey, 29% of the respondents considered arbitration instead of litigation, 43% of

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2019, see: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/806899/BPC_Infographic1.pdf> accessed 28 November 2021. See also: Report published by TheCityUK, *Legal excellence, internationally renowned*, 2019, <https://www.thecityuk.com/assets/2019/Report-PDFs/294e2be784/Legal-excellence-internationally-renowned-UK-legal-services-2019.pdf> accessed 28 November 2021. See also: Mammadzada, (n 864).

According to the statistics of 2020, 55 per cent of the 808 litigants using the London Commercial Courts were non-UK residents. While there was a decline in the number of the EU litigants at the London Commercial Courts in 2019-2020 compared to the timeline between 2018-2019, still attractiveness of the courts cannot be underestimated. According to the Report issued by Portland, litigants from Europe counted 544 and 564 in 2019-2020 and 2018-2019 accordingly. Compared to 2017-2018, there was an increase in the numbers in 2019-2020 from 456 to 564. See: Commercial Courts Report 2020, <https://portland-communications.com/wp-content/uploads/2020/05/Commercial-Courts-Report-2020.pdf?utm_medium=email&utm_campaign=Send%20Report&utm_content=Send%20Report+&utm_source=Email%20marketing%20software&utm_term=here> accessed 28 November 2021.

[1216] 'The Future for the UK's jurisdiction and English law after Brexit', Munich, 13 May 2019, at 4 and 9. See also: Anna Pertoldi and Maura McIntosh, "Enforcement of judgments between the UK and the EU post-Brexit: where are we now?" 20 January 2020, <http://disputeresolutionblog.practicallaw.com/enforcement-of-judgments-between-the-uk-and-the-eu-post-brexit-where-are-we-now/> accessed 28 November 2021.

[1217] See: Giesela Rühl, "Building Competence in Commercial Law in the Member States", Study for the JURI Committee, PE 604.980, September 2018 ; Giesela Rühl, "Settlement of international commercial disputes post-Brexit, or: united we stand taller" in Jörn Axel Kämmerer and Hans-Bernd Schäfer (eds), *Brexit: Legal and Economic Aspects of a Political Divorce* (Edward Elgar, 2021); Kramer and Sorabji (n 1197); Erlis Themeli, *Civil Justice System Competition in the European Union: The Great Race of Courts* (Eleven International Publishing, 2018); Marta Requejo Isidro, "International Commercial Courts in the Litigation Market" [2019] Max Planck Institute Luxembourg for Procedural Law, Research Paper Series, N° 2019(2).

whom favoured arbitration remained in England.[1218] London arbitration is reputable for the judicial expertise of world-class arbitrators and arbitral bodies and the quality and stability of English law. Notably, Brexit does not affect the NYC, which recognises and enforces the English awards in 168 jurisdictions and vice versa. As explained by Lord Justice Gross, 'London arbitration ought to be wholly unaffected by Brexit'.[1219] Additionally, London will remain a global financial and commercial hub post-Brexit, ensuring its popularity as a neutral dispute resolution venue in both litigation and arbitration.

7.3 Brief overview of the civil judicial cooperation routes of the UK post-Brexit[1220]

While London continues to be a worldwide dispute resolution and litigation hub, without any harmonised legal normative framework applicable to jurisdiction and recognition and enforcement of judgments in cross-border civil and commercial cases, parties might feel insecure about bringing their commercial relations to the UK and reconsider their contracts containing English jurisdiction agreements.

The Withdrawal Agreement provided some rules applicable during and post-transition, but it is not comprehensive enough to cover all the details. One of the key questions remaining in the area was whether parties' choices would be enforced and how. Although both the UK and the EU had expressed their objective to negotiate "a new ambitious partnership," no deal was achieved before 31 December 2020. Legal uncertainty might be enhanced by the absence of any binding act for the Member States concerning the English jurisdiction agreements negotiated during the transitional period and the lack of the ECJ's interpretation on this concern.[1221] Further,

[1218] Thomson Reuters Practical Law Dispute Resolution, The Impact of Brexit on Dispute Resolution Clauses: Revised Survey, November 2018, < https://uk.practicallaw.thomsonreuters.com/w-017-7792?transitionType=Default&contextData=%28sc.Default%29> accessed 28 November 2021.

[1219] Speech by Lord Justice Gross: London Common Law & Commercial Bar Association Annual Lecture, "The Civil Justice System in a time of change", January 2019, 15, <https://www.judiciary.uk/wp-content/uploads/2019/01/lclcba-lecture-jan-2019-2.pdf> accessed 28 November 2021.

[1220] Relevant to this discussion, the author presented on "Choice of court agreements post-Brexit: Unification or mystification?" at the Society of Legal Scholars' Conference in September 2020.

[1221] Lenka Valkova, "Choice of court agreements in the EU and Brexit" in *Maria Caterina Baruffi* and *Matteo Ortino* (eds.), *Trending topics In international and EU law: legal and economic perspectives* (Edizioni Scientifiche Italiane, 2019), 268-269.

the recent Internal Market Act[1222] brought many uncertainties and doubts over the future relationship and smooth continuation of commercial cooperation. Even if any legal framework were reached, it would not include PIL rules.[1223] Among others, non-continuous judicial cooperation would diminish the effective provision of the party autonomy principle.

According to the Government's recent guidance[1224], the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 came into force at the end of the transition period and revoked the Brussels Recast Regulation and its predecessors as they applied in the UK; furthermore, the effect of the Lugano Convention 2007 and the EU-Denmark Agreement extinguished. This means that, unlike the English choice of law clauses which are enforced under the Rome I and Rome II Regulations[1225], the BRR (or BIR) ceased to apply to the English jurisdiction clauses and resulting judgments, except where the proceedings were instituted, and judgments were rendered before the end of the transition period, or proceedings were instituted, and judgments were rendered after the end of the transition period, but based on a jurisdiction clause which was concluded before 31 December 2020. In the recent case, Trower J and Waksman J also considered these outcomes of the end of the transition.[1226] During the transitional period, English jurisdiction agreements and judgments were swiftly enforceable in the EU. Since the Union rules facilitating cross-border recognition and enforcement no longer apply after 31 December 2020, judgments need to get an *exequatur* or a declaration of enforceability from 1 January 2021 onwards.[1227]

[1222] See: UK Internal Market Act 2020. The proceedings on the Bill were ongoing while there were some considerations of reaching a deal between the EU and the UK.

[1223] UK Government Guidance, *Cross-border civil and commercial legal cases: guidance for legal professionals from 1 January 2021*, 30 December 2020.

[1224] ibid.

[1225] The Regulations same as the Rome Convention have universal character and they apply without requiring the chosen law to have a link with Member States. See: *Convention* on the Law Applicable to Contractual Obligations 1980, Article 2; Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Article 3. In regard to the choice of law rules, transposition model of the cooperation is suggested. See: *Zheng Sophia Tang*, "UK-EU Civil Judicial Co-operation after Brexit: Five Models" [2018], 43(5) European Law Review 648.

[1226] See: *Lecta Paper* [*2020*] *EWHC 382 (Ch),* at 41; *Crossley & Ors v Volkswagen Aktiengesellschaft & Ors* [2020] EWFC 28, at 12.

[1227] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Getting ready for changes Communication on readiness at the end of the transition period between the EU and UK", COM (2020) 324, F2. Against this, in *Bournemouth, Christchurch and Poole Council v KC et al* [2020] EWFC 20, at 64, referring to the EC Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules in the

According to the EU Commission's updated Notice to Stakeholders, the Recast Regulation applied to recognition and enforcement of judgments given in the legal proceedings instituted and to the authentic instruments (judgments) formally drawn up or registered before the end of the transition.[1228] The provision covers the cases where a judicial procedure was instituted in the UK or an EU Member State, but the judgment was handed down only after the end of the transition period; a judgment was handed down by a court in the UK or an EU Member State before the end of the transition period but was not enforced in an EU Member State or the UK respectively before the end of the transition, and a judgment of a UK or EU Member State court was declared enforceable in an EU Member State or the UK respectively before the end of the transition.[1229] Accordingly, the EU rules do not apply to recognising and enforcing judgments where the original judicial proceedings are instituted after the transition.[1230] Upon non-application of the Union laws, the proceedings should be governed, and judgments should get recognised and enforced under the international conventions if applicable, otherwise common law or national laws of the Member States in which the recognition and enforcement are sought.[1231]

At the time of uncertainty arising out of Brexit, maintaining social order and the rule of law while preserving and promoting international commerce and parties' autonomy necessitates filling normative and practical gaps by flexible and dynamic tools. After the end of the transitional period, recognition and enforcement of jurisdiction agreements and English judgments might be achieved by the following routes:

a) The BRR: The BRR applied during the transition period and is applicable afterwards if the proceedings and judgments are related to those instituted before the UK's exit from the EU. In the recent case, the Commercial court highlighted that the

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Field of Civil Justice and Private International Law dated 18 January 2019, heading 2.2-2.3, Dancey J suggested that, unless a judgment of a UK court has been exequatured before the withdrawal date, the EU rules on recognition and enforcement of such judgments of the UK would not apply to a judgment of a UK court that has not been enforced before the withdrawal date. The Notice (REV1)was replaced by European Commission's Notice to stakeholders: Withdrawal of the United Kingdom and EU rules in the field of civil justice and private international law 27 August 2020 (REV2).

[1228] See: European Commission's Notice to stakeholders: Withdrawal of the United Kingdom and EU rules in the field of civil justice and private international law 27 August 2020 (REV2) [3.1]. Withdrawal Agreement, Articles 67(2)(a)-67(2)(c) also refer to the "institution of proceedings".

[1229] European Commission's Notice to stakeholders: Withdrawal of the United Kingdom and EU rules in the field of civil justice and private international law 27 August 2020 (REV2) [3.2].

[1230] ibid.

[1231] See: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Getting ready for changes Communication on readiness at the end of the transition period between the EU and UK", COM (2020) 324, F2.

English court is bound to exercise its jurisdiction based on Article 25 of the BRR, and it remains the case after the UK's withdrawal regarding the claims initiated before 11 pm on 31 December 2020.[1232] Furthermore, Article 33-34 may apply to parallel proceedings grounded on the English choice of court agreements after changing the UK's status to a third state. Nevertheless, the discretionary provisions do not provide real solutions to uncertainties.[1233]

b) Bilateral agreements between the UK and the other Member States: Even though bilateral negotiations between the UK and individual Member States would have ensured the continuation of civil judicial cooperation, the EU has competence in the field that does not authorise the states to act on their own.[1234] The Brussels regime replaced the six bilateral treaties on recognition and enforcement of judgments concluded in the 20th century with Austria, Belgium, France, Germany, Italy, and the Netherlands and to which the UK was a party.[1235] Nevertheless, they have never been formally abandoned, leaving many discussions about their revival after Brexit.[1236] Notably, the UK and Norway concluded a new agreement to achieve the continuing application of the previous bilateral agreement between them pending the UK's request to re-join the Lugano Convention, and it justifies to assume that those bilateral agreements neither automatically become applicable nor fill the gap arising out the termination of the Brussels regime.[1237] Provided there is an overlap between the scopes of application and the absence of any intention to revive the old treaties when the Brussels regime came into force, it is reasonable to conclude that the treaties were

[1232] See: *Axis Corporate Capital UK Ltd & Ors v Absa Group Ltd & Ors* [2021] EWHC 225 (Comm), [28].
[1233] For the detailed discussions see: Thesis, 5.4.6.
[1234] The EU acquired competence to legislate in the civil judicial cooperation field on the basis of the 1997 Treaty of Amsterdam, Article 65 of the Treaty Establishing the European Community (TEC) and Article 81 of the 2009 Treaty of Lisbon (the Treaty on the Functioning of the European Union (TFEU)). See also: Government's guidance on the Review of the Balance of Competences between the United Kingdom and the European Union in Civil Judicial Cooperation 2014, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/279228/civil-judicial-cooperation-report-review-of-balance-of-competences.pdf> accessed 28 November 2021.
[1235] BIR, Article 69.
[1236] See: Burkhard Hess, "Back to the Past: Brexit und das europäische internationale Privat- und Verfahrensrecht" [2016] 36(5) Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 409, 413; Eva Lein, "Unchartered Territory? A few Thoughts on Private International Law post Brexit," [2015] 17 Yearbook of Private International Law 33, 40. See also: Andrew Dickinson, "Realignment of the Planets – Brexit and European Private International Law" [2021], 41(3) Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 213, 217-218.
[1237] ibid.

terminated between the contracting states.[1238] Yet, their force might be significant when recognition and enforcement of judgments become into question.[1239]

c) The Lugano Convention 2007: The Convention applied to the UK by 31 January 2020 as of its EU membership and during the transitional period between 31 January 2020 and 31 December 2020. Perceiving its importance for the provision of certainty and continuation of justice, the UK deposited an instrument of accession to the Lugano Convention on 8 April 2020. The Convention mirrors the BIR without containing the reversed *lis pendens* rulings, therefore not ensuring the same degree of respect to party autonomy and choice of court agreements provided by the BRR. In the recent case, Mr Justice Walksman restated differences between the regimes leaving suspicions on the success of the Lugano Convention as an "oven-ready" option for the UK post-Brexit.[1240] Yet, accession of the UK to the treaty would bring "a broader capacity for the enforcement of judgments in Europe."[1241]

The Convention is open to accession by other countries. However, the experience offers that other countries have "little appetite to join Lugano."[1242] Without becoming an EFTA state, for the Convention to enter into force in the UK, there should be unanimous consent of all the contracting parties (EU and EFTA states).[1243] While the EFTA states have expressed their support for the UK's membership, the EU Commission has refused the UK's request "…based on its assessment of the Lugano Convention's nature as meant for States with a close regulatory integration with the EU

[1238] See: Ruhl (n 1013) 115.

[1239] See: ibid. See also: Communication from M. **Louis d'Avout** "The resurgence of the Franco-British convention of January 18, 1934 for the 'execution of foreign judgments' of October 8, 2021, <https://eapil.org/2021/11/24/davout-on-the-resurgence-of-the-1934-franco-british-convention-on-foreign-judgments/> accessed 28 November 2021. Louis d'Avout argues that the bilateral 1934 Franco-British Convention on the Enforcement of Foreign Judgments is still in force. For the paper in French see: <http://www.cfdip.fr/offres/file_inline_src/717/717_pj_081121_161022.pdf> accessed 28 November 2021.

[1240] See: *Mastermelt Ltd v Siegfried Evionnaz SA* [2020] EWHC 927 (QB); See also: Mammadzada, (n 864). See also: Briggs (n 501) 375; Joseph (n 463) para 10.83; Burkhard Hess, "The Unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the UK and the EU after Brexit" [2018] Max Planck Institute Luxembourg for Procedural Law Research Paper Series, N° 2018 (2).

[1241] Reid Mortensen, "Brexit and private international law in the Commonwealth" [2021], 17(1) Journal of Private International Law 18, 25.

[1242] The proposals for acceding the Convention by Australia and New Zealand disappeared after the Trans-Tasman Working Party advised against adopting any scheme modelled on the Brussels I Regulation. See: ibid, 50.

[1243] Lugano Convention, Articles 70 and 72.3.

and its view that the Hague Conventions should be used for relations between the EU and third States".[1244]

The EU has not touched upon the Lugano Convention in its latest Notice to Stakeholders either, which indeed signalled its unwillingness to give consent to the UK's membership to the instrument.[1245] On the other hand, as stated by the Commission, the Lugano Convention is "a flanking measure of the internal market", which is linked to the EU-EFTA/EEA context.[1246] As a third country, the UK does not have a special link to the internal market of the Union and this detachment is further reinforced in the Internal Market Act.[1247] Against the refusal, the coalition of the NGOs and legal scholars has issued an open letter encouraging the EU to reverse that conclusion since a full return to the common-law rules and *forum non conveniens* doctrine might hinder access to the UK courts in cases of corporate human-rights abuses.[1248] While non-ratification of the Lugano Convention by the UK opens doors for anti-suit injunctions, recently, the EU courts have also granted counter-injunctions.[1249] In the recent briefing, European Parliamentary Research Service restated the Commission's decision to block UK accession to the Lugano Convention due to the UK not being part of the internal market.

Further, it was argued that the Lugano Convention is not dedicated to economic integration, rather judicial cooperation.[1250] While this argument has some back, undeniably, judicial and legal relations are often intrinsically linked. However, it should also be noted that, indeed, i.e. Switzerland is not part of the European internal market;

[1244] See: Communication from the Commission to the European Parliament and the Council, "Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention", COM(2021) 222 final. See also: Thalia Kruger, "UK & Lugano: no" 6 May, 2021, <https://conflictoflaws.net/2021/uk-lugano-no/> accessed 28 November 2021.

[1245] European Commission's Notice to stakeholders: Withdrawal of the United Kingdom and EU rules in the field of civil justice and private international law 27 August 2020 (REV2).

[1246] Communication from the Commission to the European Parliament and the Council, "Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention", COM(2021) 222 final.

[1247] United Kingdom Internal Market Act 2020.

[1248] European Coalition for Corporate Justice, "NGOs and legal experts call on the EU to allow UK accession to Lugano Convention on access to justice grounds" 13 May 2021 <https://corporatejustice.org/news/ngos-and-legal-experts-call-on-eu-to-allow-uk-accession-to-lugano-convention/> accessed 28 November 2021. See also: *Vedanta v Lungowe* [2019] UKSC 20 and *Okpabi v Shell* [2021] UKSC 3.

[1249] Trevor C Hartley, "Arbitration and the Brussels I Regulation – Before and After Brexit" [2021] 17(1) Journal of Private International Law 53, 61.

[1250] See: Matthias Lehmann's comment on Gilles Cuniberti European Parliament Briefing, "The UK's possible re-joining of the Lugano Convention",<https://eapil.org/2021/11/19/eu-parliament-briefing-on-the-uks-possible-re-joining-of-the-lugano-convention/> accessed 28 November 2021.

however, it is part of the Lugano Convention. Presumably, the EU's opposition to the UK's accession request is contingent on public policy.

d) The Hague Convention on Choice of Court Agreements 2005 (coupled with the complementary Hague Judgments Convention 2019): The Convention has applied to and in the UK by virtue of its EU membership since 1 October 2015. The UK deposited its instrument of accession on 28 September 2020 to ensure the continued application of the HCCCA from 1 January 2021.[1251] In this sense, Brexit and non-accession to the Lugano Convention strengthen functionality, regulatory power, and effective application of the Hague Conventions. Similarly, the Hague Conventions would enhance the legal security of trade and commerce as "the most promising broad-based means" and give legal effect to economic opportunities brought by Brexit.[1252] The latest Communication also indicated the EU's approach to relying on multilateralism, particularly the Hague treaties, concerning third countries.[1253]

e) A new agreement between the UK and the EU: Where all other multilateral treaties and national laws lack comprehensive solutions to the issues arising out of Brexit, a bilateral agreement between the UK and EU covering civil judicial matters as well as recognition and enforcement of jurisdiction agreements and resulting judgments would become essential for the provision of access to justice and continuation of civil judicial cooperation. As sought by the Government, such an agreement – as an "optimum outcome for both sides" would also favour litigation of cross-border civil and commercial cases.[1254] The Union also reiterated its wish to have the UK as its close partner in the future.[1255] Whilst the continuation of the mutually-beneficial cooperation without any binding authority has been applauded as an ideal solution[1256], negotiating a bilateral agreement between the EU and UK would not be straightforward; if one

[1251] For the further discussion of the application of the HCCCA post-Brexit see below: Thesis, 7.4.
[1252] Mortensen (n 1226) 52.
[1253] Communication from the Commission to the European Parliament and the Council, "Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention", COM(2021) 222 final.
[1254] HM Government, "Providing a cross-border civil judicial cooperation framework: A Future Partnership Paper", 22 August 2017, [18],<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639271/Providing_a_cross-border_civil_judicial_cooperation_framework.pdf> accessed 28 November 2021.
[1255] European Council (Art. 50) guidelines for Brexit negotiations, 29 April 2017, <https://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/> accessed 28 November 2021.
[1256] Marta Requejo Isidro, "Brexit and PIL, Over and Over", 23 March 2017, <http://conflictoflaws.net/2017/brexit-and-pil-over-and-over/> accessed 28 November 2021.

would consider the duration of the previous negotiations, reaching a bilateral treaty would be not only time-consuming but also extremely challenging due to inevitable differences between the common and continental legal systems. Furthermore, the EU would not be ready to compromise reciprocity in favour of the UK. In other words, inadequacy would be evident in the Union's non-willingness to grant "all-embracing blind reciprocal trust" regarding the UK in the absence of any integration ambits after leaving the European and CJEU jurisdiction.[1257] The EU's consent might be contingent on the UK's commitment to the fundamental values of the Union, which is still uncertain.[1258]

f) National laws: Domestic conflicts of law or private international law rules apply in the absence of any agreement or where international conventions do not cover the subject matter of a jurisdiction clause and judgment. Likewise, traditional English common law will govern issues arising out of Brexit. Diversities between national laws and non-familiarity of different parties and judges with the non-uniform domestic laws might jeopardise predictability and certainty. On the other hand, as expressed by Fentiman and Merret, common law rules as a reciprocal solution would fill the space immediately post-Brexit, while in the mid to longer-term, having a reciprocal solution based on or reflecting the existing European regime would be optimal.[1259] In this regard, it has been suggested that a transposition model would provide continuity, maintain the current practice and reduce uncertainty.[1260] It should also be stressed that either of the options would not ensure complete solutions for the remaining issues on their own unless coupled with other options such as bilateral and international agreements. Likewise, whilst the common law rules would apply effectively based on the quality of the English law, unilateral regulation of judicial matters would bring irregularities and divergences in the long run.

g) Soft law principles: Globalisation, integration between different systems and expansion of cross-border commerce have encouraged flexible approaches to regulatory processes. A growing body of soft law instruments has been established by

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[1257] ibid.
[1258] Ruhl (n 1013) 119.
[1259] House of Lords, Select Committee on the European Union, Justice Sub-Committee, "Corrected oral evidence: Brexit: civil justice cooperation and the CJEU", 6 December 2016,<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-civil-justice-cooperation/oral/44259.html> accessed 28 November 2021.
[1260] See: *Tang* (n 1210).

international and regional organisations working towards the unification and harmonisation of PIL.[1261] English judges have traditionally shown their sympathy for the 'soft' conceptualizations of common law such as "business common sense"[1262], "commercial common sense"[1263], "rational businessmen".[1264] Transnational soft law tools which are consistent with domestic law and public interests are often applied in English practice.[1265] Similarly, guides and standards are used in judicial practice and dispute resolution for facilitating effective application and interpretation of the binding norms – legislative acts or international treaties. Brexit had brought new horizons to reassess soft regulation when the EU *acquis* ceased to apply to the UK. The supplementary role of soft concepts to fill the gaps arising out of the absence of hard law is also recognised by the Withdrawal Agreement, which refers to mutual respect, good faith and sincere cooperation. It signals that, where no negotiation has been achieved, internationally recognised standards may be applied for avoiding uncertainties. Among others, access to a fair trial, good faith and comity may be regarded as soft law principles for giving effect to parties' autonomous choices.

It should also be noted that, while the UK's withdrawal from the EU brings many uncertainties and significant ambiguities, there are also silver linings of the clouds. This departure stimulates new perspectives for modified cooperation which might indeed enhance certainty and effectiveness of party autonomy by returning to anti-suit injunctions. At the same time, flexibility would be provided by *forum non conveniens* in contrast to its prohibition by the Brussels regime. Therefore, Brexit opens up the possibility "…to review, simplify and update the UK's PIL infrastructure" and "the case for reform will grow if the UK's application to rejoin the Lugano Convention does not bear fruit".[1266]

7.4 Application perspectives of the HCCCA as a way-out post-Brexit

[1261] For instance, the Hague Principles on Choice of Law 2015, UNIDROIT Principles of International Commercial Contracts 2016, ELI-UNIDROIT joint Project 'From Transnational Principles to European Rules of Civil Procedure' 2020.
[1262] *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [21].
[1263] *Arnold v Britton* [2015] UKSC 36, [15].
[1264] *Premium Nafta Products Ltd v Fili Shipping Company* [2007] UKHL 40, [13].
[1265] In *Proforce Rugby Group Ltd v ProForce Recruit Ltd* [2006] EWCA Civ 69, [57], Arden LJ referred to the UNIDROIT Principles while interpreting the parties' contract.
[1266] Dickinson (n 1221) 218.

In the absence of any other international mechanism or bilateral treaty between the UK and the EU, the HCCCA contributes to certainty in the post-Brexit legal landscape by complementing common law.[1267] In other words, while common law is the default regime applicable to the English judicial instruments, the HCCCA adds to effectiveness in combination with the domestic rules. Further, the complementary instrument of the HCCCA – the HJC, which would most likely be ratified by both the UK and the EU soon will bring more guarantees for international litigation and recognition and enforcement of judgments.[1268]

Post-Brexit, the HCCCA gives effect to, i.e., the exclusive English jurisdiction agreement negotiated by the French and English companies. The judgment rendered by the English court is recognised and enforced in France or any other European counties, as well as Ukraine, Mexico, Montenegro, Singapore, Denmark, which are the Contracting States.[1269] Therefore, the territorial scope of the HCCCA indeed ensures wider horizons of effectiveness for the English choice of court agreements and judgments compared to the Brussels regime.

Before the UK's departure and end of the transition, Articles 25 and 31(2) of the BRR were unaffected by the HCCCA regarding exclusive jurisdiction agreements designating either English or Member State courts where the parties resided exclusively within the EU Member States and where recognition or enforcement of a judgment by an EU court was sought within the EU unless the HCCCA prevailed due to incompatibilities between the two mechanisms.[1270] Let's suppose there was an exclusive English jurisdiction agreement concluded between the English and German parties before 1 January 2021. As both parties resided exclusively in the EU Member States, the BRR prevailed, and the agreement was given effect under the Regulation. Similarly, the judgment rendered by the chosen English court would be recognised and enforced within the Union under the BRR. If a German party had brought torpedo proceedings in Germany or Italy, Article 31(2) of the BRR would have applied, and any other court would have stayed in favour of the exclusively chosen English court. Nevertheless, the English court would not have been able to issue an anti-suit

[1267] As noted above, the UK deposited its new instrument of accession to the HCCCA on 28 September 2020 which ensured its continued application in and to the UK from 1 January 2021. The Convention provides recognition and enforcement of the exclusive English jurisdiction agreements and resulting judgments in the EU and vice versa.
[1268] For the related discussions: Thesis, 3.3.5.
[1269] HCCCA, Article 8.
[1270] HCCCA, Article 26(6).

injunction against the German or Italian court due to the priority of the mutual trust principle within the Union.

In another example, parties domiciled in England and Brazil negotiated an exclusive English jurisdiction agreement before Brexit. Both the BRR and HCCCA could have applied without incompatibilities in giving effect to parties' choice of court agreement.[1271] If the Brazilian party had brought torpedo proceedings in Italy, the Italian court would have stayed the proceedings in favour of the exclusively chosen English court based on either Article 31(2) of the BRR or Article 6 of the HCCCA. On the other hand, even though the HCCCA does not prohibit anti-suit injunctions, there are reasonable arguments to assume that the English court would not be able to issue such a remedy against the Italian court in this case.[1272]

Supposing the same scenarios would have occurred after Brexit. Both the Brazilian or German parties would have begun Italian proceedings in breach of the English choice of court agreement, the Italian court would have to stay the proceedings under Article 6 of the HCCCA; furthermore, the English court would most likely issue an anti-suit injunction against the Italian court and damages would be awarded.

Following the UK Government's Guidance and EU Commission's Notice to Stakeholders, if an exclusive choice of court agreement was entered into after the end of the transition, provided all other conditions are met, it is given effect under the HCCCA. Likewise, from 1 January 2021, judgments resulting from such exclusive jurisdiction agreements are recognised and enforced under the HCCCA as implemented by the Private International Law Act.[1273] All other judgments in cross-border disputes will be recognised and enforced under the common law unless the HJC comes into force for both the UK and EU and judgments fall into its material scope.

The points mentioned above express consistency in the reiteration of Article 67 of the Withdrawal Agreement by both the UK and the EU, while considerable varieties in the interpretation of the material and temporal scopes of the HCCCA lead to potential

[1271] Article 25 of the BRR does not necessitate domicile of the parties while giving effect to choice of Member State courts.

[1272] The interface between the EU law and international conventions has been defined by the ECJ where it held that any such convention cannot compromise the principles underlying judicial co-operation in civil and commercial matters in the Union which also include mutual trust. See: *Nipponkoa Insurance Co (Europe) Ltd v Interzuid Transport BV* [2014] Case C-452/12 EU: C:2013:858, [36]. A similar reasoning was reached in *Gazprom* [2015] Case C-536/13 EU:C:2015:316 which prevented the Member State courts from restraining pre-emptive proceedings brought before another Member State courts in breach of an arbitration agreement. For the related discussions see: Ahmed and Beaumont (n 406).

[1273] Private International Law (Implementation of Agreements) Act 2020.

disagreements between the practices. Furthermore, the HCCCA is not a comprehensive solution to the gaps arising out of the withdrawal of the UK from the EU due to its application to only exclusive jurisdiction agreements in cross-border civil and commercial matters.

7.4.1 Issues with the material scope of the HCCCA

As discussed earlier, not all the issues which are commercial in nature fall into the ambit of the HCCCA.[1274] Furthermore, a declaration option given to the states not to apply the HCCCA to specific matters might further shrink its application width. On the other hand, the same option might also benefit the status of the HCCCA by encouraging the states to accede subject to particular exceptions that would be desirable for them.

Another facet of the HCCCA regarding application to only exclusive jurisdiction agreements might bring extra uncertainties post-Brexit. As discussed earlier, both the HCCCA and BRR presume exclusivity of jurisdiction agreements unless the parties expressly state otherwise.[1275] While the BRR gives effect to jurisdiction agreements notwithstanding exclusivity, only an exclusively designated court is exempt from the general *lis pendens* rules and has priority as the court seized based on an exclusive jurisdiction clause.[1276] Where parties expressly indicate that they have negotiated a non-exclusive, e.g. asymmetrical jurisdiction agreement, the BRR would enforce it under Article 25(1). Still, the same agreement would not be covered by Article 31(2), which would leave a risk of torpedo actions.

Unlike the BRR, the HCCCA gives effect to only exclusive jurisdiction agreements. Post-Brexit, while the HCCCA is the applicable regime to jurisdiction agreements related to the UK and the EU Member States, there might be a lack of certainty due to the opposing approaches to the interpretation of exclusivity. The English judges have constantly enforced asymmetrical jurisdiction agreements and proposed that they could qualify ‘exclusive’ within the meaning of the HCCCA.[1277] While the different EU

[1274] Article 2 of the HCCCA excludes several matters from its scope. For the related discussions see: Thesis, 4.2.4.
[1275] See: Thesis, 4.2.3 and 5.4.3.
[1276] BRR, Articles 25(1) and 31(2).
[1277] *Etihad Airways PJSC v Flother* [2019] EWHC 3107; *Etihad Airways PJSC v Flother* [2020] EWCA Civ 1707; *Commerzbank v Liquimar* [2017] EWHC 161 (Comm). For the discussion see: Thesis, 5.4.1.

Member States might have different views on enforceability and exclusivity of asymmetrical jurisdiction agreements, there is no unilateral interpretation given by the ECJ. Let's suppose an English bank and a French borrower negotiated an asymmetrical jurisdiction clause on 17 November 2020, and the lender–bank brought proceedings in England on 7 February 2021. The BRR will not apply to this scenario since the proceedings were instituted after the end of the transition. On the other hand, while the application of the HCCCA might come into view provided all other conditions are met, the UK's and EU's positions might oppose each other. The English court would likely enforce the jurisdiction agreement and resulting judgment, further, based on the case law, interpret the HCCCA as an applicable regime. Unlikely, the French court might interpret the HCCCA as excluding asymmetrical jurisdiction agreements and disregard such an agreement based on public policy. There is not any CJEU judgment rendering asymmetrical jurisdiction agreements exclusive in the meaning of the BRR, which indicates a likelihood of the EU courts' approach to consider them non-exclusive. The English courts might still apply the HCCCA to asymmetrical jurisdiction agreements following the case law holding them exclusive within the meaning of the BRR; further, they might suggest enforceability of asymmetrical clauses under the HCCCA. When it comes to the EU Member States, the manners of the courts would depend on their domestic laws unless the CJEU builds relevant case law. Still, even if the EU courts might not apply the HCCCA to asymmetrical clauses, recognition and enforcement of judgments might not be as challenging since the English judgments have gained global credibility. Additionally, once both the EU and the UK have acceded to the HJC, judgments given by non-exclusively chosen courts would get recognised and enforced in the Contracting States.

This uncertainty arising out of exclusivity and enforceability of asymmetrical jurisdiction agreements under the HCCCA might be resolved only if there is sufficient case law which would most likely expand in the post-Brexit era. Moreover, the HCCH might set up a Special Commission to study the questions regarding the applicability of the HCCCA; joint expert/working groups might be instituted together with the HCCH, EU Commission and UNIDROIT for achieving harmonisation; moreover, an additional protocol might be reached which would be freely available for the Contracting States to join. Against these uncertainties and the lack of case law and interpretations, parties should get proper legal advice on the application of the HCCCA and particular local laws for ensuring their agreement would be given effect.

7.4.2 Issues with the temporal scope of the HCCCA

The HCCCA determines two key points of reference as to the timeline of its application. It applies to exclusive choice of court agreements concluded after entering into force for the State of the chosen court.[1278] Further, it does not apply to proceedings instituted before it entered into force for the State of the court seised.[1279] Despite the clear language of this provision, the temporal scope of the HCCCA brings extra disagreements between the UK and EU post-Brexit.[1280] According to the Government, the HCCCA continues to apply to the UK without interruption from 1 October 2015 and is given force in domestic law from 1 January 2021 by the Private International Law Act 2020[1281], which also amends the Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018 (SI 2018/1124). After the transition, exclusive jurisdiction agreements concluded from 1 October 2015 designating courts of the UK or EU Member States are governed by the HCCCA. On the other hand, the Commission states that the HCCCA applies between the EU and UK to exclusive jurisdiction agreements concluded after the UK became a party in its own right.

Let's suppose a dispute arises between an English seller and a German buyer who negotiated an exclusive English choice of court agreement on 6 March 2016 – before Brexit. If the legal proceedings were instituted on 11 October 2016 – before Brexit, the brr was an applicable regime. In the second scenario, where the proceedings were instituted on 3 September 2020 – during the transition period, the brr would still be applicable.[1282] In another scenario, if an English jurisdiction agreement was concluded on 6 March 2016 between a seller who is resident in Israel and a German buyer and the proceedings were instituted on 3 September 2020 – again during the transition period, the English court would apply the HCCCA provided all other conditions are

[1278] HCCCA Article 16(1).
[1279] HCCCA Article 16(2).
[1280] The notes that were published by the UK Government and the EU Commission evidence controversial positions.
[1281] Private International Law (Implementation of Agreements) Act 2020. The Act was given Royal Assent on 14 December 2020.
[1282] Withdrawal Agreement. See also: HCCCA, Article 26(6) which states that the Convention shall not affect the application of the rules of the REIO that is a Party to this Convention – the BRR in this case.

met.[1283] In contrast, the German court (i.e. the seised court) or any other court of another Member State might not apply the HCCCA to these proceedings and resulting judgment since the jurisdiction agreement was concluded before the date when the UK re-joined the Convention in its own right. In the latter case, the EU Member State courts would apply the national laws to recognise and enforce the jurisdiction agreement and resulting judgment. While the Commission's position would justify Member States' courts not applying the HCCCA to the proceedings instituted after the transition period ends and based on an exclusive jurisdiction agreement concluded between 1 October 2015 and 1 January 2021, reasonable arguments are repelling it:

- Divergences between the two positions and judicial practice might be overcome by interpreting the HCCCA based on soft law principles, particularly good faith, universally recognised in the Vienna Convention on the Law of Treaties.[1284] The HCCCA aims at creating a legal regime that would provide certainty and ensure the effectiveness of exclusive choice of court agreements.[1285] Only continuing application of the HCCCA would bring certainty and effectiveness.
- In line with international law, unless the treaty otherwise provides or parties otherwise agree, termination of a treaty does not affect any right, obligation or legal situation of parties created through the treaty's execution before its termination.[1286] Article 33 of the HCCCA does not provide otherwise. This provision brings the conclusion that, when the transition period ends and the HCCCA terminates regarding the UK by its change of status, the outcomes of the execution of the HCCCA do not disappear. Coupled with the interpretation of the HCCCA based on good faith, these provisions provide further justifications for the continuing application of the HCCCA from 1 October 2015.
- As restated in the Instrument of Accession presented to the Depository, whilst acknowledging that the Instrument takes effect at 00:00 CET on 1 January 2021, the UK considers that the HCCCA entered into force for the UK on 1 October 2015. From that date, the UK has been a Contracting State without

[1283] According to HCCCA, Article 26(6)(a), if one of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation the Convention shall override the rules of a Regional Economic Integration Organisation that is a Party to this Convention.
[1284] Accordingly, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. See: Vienna Convention on the Law of Treaties 1969, Article 31.
[1285] HCCCA, Preamble.
[1286] Vienna Convention on the Law of Treaties 1969, Article 70.

interruption. Likely, while the ratification date of the HCCCA by the UK is 28 September 2020, the date of the entry into force of the HCCCA for the UK is still shown as 1 October 2015 in the Status table, which is regularly updated by the HCCH.[1287]

It should also be stressed that the Commission's Notice to Stakeholders contains guiding notes which are not mandatory but advisory in nature; therefore, the interpretation of Article 16(1) of the HCCCA would depend on domestic courts. Furthermore, the case law established by the English or other national courts, similarly by the ECJ, particularly on the issues arising out of the temporal scope of the HCCCA, would contribute to resolving uncertainties. A Special Commission of the HCCH[1288] and joint working/expert groups established by the HCCH, Commission, and UNIDROIT would also contribute to the clarification of these concerns. Furthermore, if the Hague Court would be established, all the questions, including the ones related to the material and temporal scope of the HCCCA, could have been referred to it by the courts of the Contracting States.

Given ambiguities, unless there is any uniform interpretation or sufficient case law on these issues, parties should seek proper legal advice and get familiar with the domestic laws of particular EU Member States where prospective recognition and enforcement might take place. Whereas they could initiate legal proceedings before the end of the transition for being covered by the BRR, after 1 January 2021, the most optimal way to secure the effectiveness of their jurisdictional choices and judgments would be to renegotiate and restate respective clauses. The Commission also urges businesses to be aware that judgments handed down by a UK court might no longer be swiftly enforceable in the EU, therefore, to consider the situation while assessing their contractual choices of jurisdiction.[1289]

[1287] HCCCA status table: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> accessed 28 November 2021.
[1288] As suggested above, regarding the material scope of the Convention.
[1289] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Getting ready for changes Communication on readiness at the end of the transition period between the EU and UK", COM (2020) 324, F2. Particular attention should be put on the language of the text which is optional rather than mandatory and evidences that there might be different interpretation and discretion of the courts while applying the legal framework to particular cases.

7.5 Ratification status of the HCCCA and prospective accessions: effective cooperation and contentions; ways and solutions

7.5.1 HCCCA: now and expected future

The HCCCA provides rules for enforcing parties' autonomous choice of court agreements and resulting judgments aiming at certainty and promoting trade and investment through enhanced judicial cooperation.[1290] It is an important tool for ensuring predictability in global commercial relations and dispute resolution, yet not entirely flawless, with many inconsistencies in the text leading to non-uniformity and practical uncertainties.[1291] Incontestably, the HCCCA could become more successful if the remaining gaps had been filled and if the Hague court had been established to provide a uniform interpretation of the treaty. The latter draws a strong connection with the study's objective: How effective is the HCCCA at the provision of party autonomy? While the query has theoretical roots to measure the degree of effectiveness[1292], it can be answered only upon speculation of the practical application of the HCCCA. This angle of the study necessitates the determination of the Contracting States' rationales in joining the HCCCA and examining the possible background leading the others to avoid or postpone becoming part of the framework. The practical significance of the HCCCA can be measured by its ratification status. To date, the HCCCA has been acceded by the EU[1293], Denmark[1294], Singapore[1295], Mexico[1296], Montenegro[1297] and UK[1298] , while the US[1299], Ukraine[1300], China[1301], North Macedonia[1302] and Israel[1303] have signed it without any ratification. Notably, all of the Contracting States are prominent global importers and exporters of world trade. The HCCCA is a safeguard

[1290] HCCCA, Preamble.
[1291] See: For the detailed discussion of the HCCCA and its inconsistencies see: Thesis, Chapter 4.
[1292] ibid.
[1293] Ratification on 11 June 2015, entry into force on 1 October 2015.
[1294] Ratification on 30 May 2018, entry into force on 1 September 2018.
[1295] Ratification on 2 June 2016, entry into force on 1 October 2016.
[1296] Ratification on 26 September 2007, entry into force on 1 October 2015. See also: Emilio Gonzalez, "The Hague Convention on Choice of Court Agreements of June 30, 2005: A Mexican View" [2006] 13 Southwestern Journal of Law and Trade in the Americas 37.
[1297] Ratification on 18 April 2018, entry into force on 1 August 2018.
[1298] Ratification in its own right on 28 September 2020, continued application since 1 October 2015.
[1299] Signed on 19 January 2009.
[1300] Signed on 21 March 2016.
[1301] Signed on 12 September 2017.
[1302] Signed on 9 December 2019.
[1303] Signed on 3 March 2021.

to the smooth functioning of international businesses and the successful conduct of commercial relations. Considering the Contracting States are the ones that are in strong trade cooperation, it is logical to assume that, ratification status of the treaty correlates with the positions of the states in the global economic landscape. The EU, Denmark, Mexico, UK, US, and China are among the G20 that bring together the world's major and emerging economies.[1304] Further, the EU, UK, Serbia, China and North Macedonia are the main trade partners of Montenegro. Russian Federation, Serbia and Costa Rico actively consider ratification. The Joint Standing Committee on Treaties of the Parliament of Australia encouraged accession to the HCCCA and recommended taking a binding treaty action.[1305] Australia's accession is not as

[1304] "The EU in the world", Eurostat, 2020, <https://ec.europa.eu/eurostat/documents/3217494/10934584/KS-EX-20-001-EN-N.pdf/8ac3b640-0c7e-65e2-9f79-d03f00169e17?t=1590936683000> accessed 28 November 2021.

[1305] The Joint Standing Committee on Treaties of the Parliament of Australia supported accession to the HCCCA and encouraged the Government to take a binding treaty action. According to the National Interest Analysis, the Convention seeks to promote party autonomy in international business, providing uniform rules on jurisdiction and recognition and enforcement of foreign judgments in civil and commercial matters, therefore, there is a strong belief in expansion of international trade and investment as a result, Joint Standing Committee on Treaties, Parliament of Australia, Report No 166, November 2016, [3.21], <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Airworthiness-USA/Report_166/section?id=committees%2Freportjnt%2F024013%2F24043#footnote1target> accessed 28 November 2021. The Government considers implementing the HCCCA in the International Civil Law Act which will also bring the Hague Choice of Law Principles in force. See: National Interest Analysis: Australia's Accession to the Convention on Choice of Court Agreements [2016] ATNIA 7, [21] e. It is claimed that, accession to the HCCCA would necessitate modification of the common law and removal of this discretion. See: Brooke Adele Marshall and Mary Keyes, "Australia's Accession to the *Hague Convention on Choice of Court Agreements*" [2017], 41(1) Melbourne University Law Review 10. While application of *forum non conveniens* might be justified in some cases, the Convention defines several gateways which might be used for declining jurisdiction agreements and among them, public policy is an important ground. Indeed, ratification of the HCCCA and presumption of exclusivity would bring more certainty and enforcement perspectives to parties by widening the scope of the enforceable agreements and deeming ambiguous clauses as exclusive unless there is any express statement about non-exclusivity. Additionally, as a traditional common law system English law has an old heritage of exercising *forum non conveniens* while the UK has become a Contracting State to the HCCCA. Similarly, the Brussels regime which was applicable to and in the UK did not permit the use of the doctrine. Hence, ratification of the HCCCA should create significant problems neither for the common law of Australia.
When it comes to the public policy exception, according to Competition and Consumer (Industry Codes — Franchising) Regulation 2014, Section 21(2), a jurisdiction clause in a franchising agreement requiring a party to bring an action or proceedings in relation to a dispute in any State or Territory outside that in which the franchised business is based or in any jurisdiction outside Australia is not valid. Similarly, Insurance Contracts Act 1984 (Cth), Section 52 prohibits "contracting out" and foreign jurisdiction clauses. Referring to the Insurance Contracts Act 1984 (Cth), the High Court ousted a choice of English court and English law on the ground of the protection of the vulnerable parties to insurance contracts. See: *Akai Pty Ltd v Peoples Insurance Co Limited*, at 24. It is claimed that, if Australia does not make any declaration in regard to insurance contracts, courts might potentially follow the *Akai* orthodoxy, and invoke the public policy exception in Article 6(c) of the HCCCA, see: Michael Douglas, "Will Australia Accede to the Hague Convention on Choice of Court Agreements?", 17 Macquarie Law Journal 147, 150.

operative as it would be desired, but this might be usual for the HCCH before Australia realises the full potential of the HCCCA.[1306] As noted by Chair of the Joint Standing Committee on Treaties, Parliament of Australia, Hon Stuart Robert MP, 'It seems like it is moving at the speed of an asthmatic ant with a heavy load of shopping'.[1307]

This might bring consideration to making an Article 21 declaration. Singapore is the first jurisdiction in the Asia Pacific region to ratify the HCCCA. By doing so, it aimed to develop its legal industry, ensure global recognition of the Singapore International Commercial Court (SICC), and become a worldwide commercial litigation hub.[1308] The case in which the Singapore High Court recognised and enforced the English judgment became the first case under the HCCCA.[1309]

The HCCH gives particular attention to the expansion of membership of the countries in the Asia Pacific Region.[1310] The formation of the world's largest trade bloc – Regional Comprehensive Economic Partnership by the Asia Pacific countries and influence of the HCCH in the region would most likely bring more ratifications to the HCCCA for the benefit of the businesses. Provided the substantial growth in

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Public policy grounds might also be applied regarding jurisdiction clauses in consumer and small business contracts if they are qualified as unfair terms. See: Securities and Investments Commission Act 2001 (Cth), Section 12BF. Apart from the refusal of foreign jurisdiction agreements applying referring to the public policy exception and mandatory rules, Australia might make relevant declarations for excluding those matters from the material scope of the HCCCA.[1305] Such a declaration would prevent double litigation on the preliminary issues and excessive costs. Similar practices of the Contracting States might be considered and strong interests in not applying the HCCCA to specific matters which are no broader than necessary might be precisely shown. The Australian government has also suggested to make a relevant express statement in the International Civil Law Act. See: Parliament of Australia, Report 166.3, "Choice of Court Agreements – Accession", <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Airworthiness-USA/Report_166/section?id=committees%2Freportjnt%2F024013%2F24043#footnote1target> accessed 28 November 2021.

[1306] Douglas (n 1291) *151.*

[1307] Evidence to Joint Standing Committee on Treaties, Parliament of Australia, Report 166, 10 October 2016, 6 (Hon Stuart Robert MP).

[1308] For the discussion see: Kenny Chng, "The impact of the Singapore International Commercial Court and Hague Convention on Choice of Court Agreements on Singapore's private international law" [2018], 37(1), Civil Justice Quarterly 124; Adeline Chong and Man Yip, "Singapore as a centre for international commercial litigation: party autonomy to the fore" [2019] 15(1) Journal of Private International Law 97.

[1309] *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018] SGHCR 8.

[1310] The Conference opened the Asia Pacific Regional Office in Hong Kong in 2012. At the Conference on International Litigation in the Asia Pacific Region which was dedicated to the HCCCA and Hague Judgments Project at that time, the steady growth of commerce in the region was highlighted and despite the success of arbitration, "…importance of a great need and desire for complementary instruments regulating international litigation…" was emphasised. See: Justin Gleeson SC Solicitor-General of the Commonwealth of Australia, "*An Australian Perspective on International Commercial Litigation: The Challenges and Opportunities"*, Conference on International Litigation in the Asia Pacific Region Wuhan University, People's Republic of China, 23-24 September 2013, <https://www.hcch.net/pt/publications-and-studies/details4/?pid=6001&dtid=55> accessed 28 November 2021.

commercial relations between Australian and Asian businesses and underrepresentation of Asia at the HCCH, the Committee stimulated Australia's consistent efforts to enhance the Asian countries for strengthening their ties with the organisation.[1311] Representatives of the Attorney-General's Department delivered that, '… the Convention is generating momentum for increased membership, and that more countries are likely to adopt the Convention in the near future'.[1312] The latter would also promote more countries, particularly those with strong commercial relations with the Contracting States, to consider ratifying the HCCCA to ensure the effectiveness of dispute resolution clauses.

Uniform Law Conference of Canada has assessed adoption perspectives of the HCCCA and its relation to common law provinces and the territories as well as Canadian federal law suggesting that the instrument should be ratified since there is no other multilateral treaty on this subject and the HCCCA generally does not clash with the Canadian law.[1313] It should also be noted that the laws of the different provinces might be distinct from federal law.[1314]

The HCCCA is not binding on the states that have signed but not yet ratified it; nevertheless, they are obliged to refrain from those acts that would defeat the treaty's object and purpose.[1315] It means that the signature states – the US, Ukraine, China, Republic of North Macedonia and Israel would act in good faith and give effect to exclusive jurisdiction agreements and resulting judgments unless there is any reason not to. The HCCCA is subject to ratification, acceptance or approval by the signatory States. The potential reasons behind the intention to ratify the HCCCA at a later date would be to analyse its compatibility with the peculiarities of the national laws and public policy and explore possibilities of implementing legislation or adopting declarations to avoid backlashes. Whereas common grounds of non-ratification would be found in the text, differences between the legal systems, national interests, and

[1311] Evidence (n 1293).

[1312] Mr Andrew Walter, Assistant Secretary, Civil Law Unit, Attorney-General's Department (AGD), *Committee Hansard,* Canberra, 10 October 2016, 6, See: <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Airworthiness-USA/Report_166/section?id=committees%2Freportjnt%2F024013%2F24043#footnote1target> accessed 28 November 2021.

[1313] See: Vaughan Black, "Hague Choice of Court Agreement Convention and the Common Law 2007", Annual Proceedings of the Uniform Law Conference of Canada, 1 September 2007.

[1314] For instance, British Columbia does not recognise foreign judgments "given for loss or injury that arises out of exposure to or the use of asbestos that has been mined in British Columbia". See: Court Order Enforcement Act, RSBC 1996, c 78, section 40; see also: Garnett (n 201) 179.

[1315] Vienna Convention on the Law of Treaties 1969, Articles 10 and 18; HCCCA, Article 27.

public policy, economic and cultural reasons would also influence states' decisions whether to accede to the framework. Examination of these characteristics would also facilitate making predictions about the viable routes to achieve more ratifications and suggest the ways to enhance the effectiveness of the provision of its core principle – party autonomy.

Among others, provided the EU and UK have paramount importance in world trade, it is most likely that Brexit will encourage trading partners of those two to ratify the HCCCA. In other words, to secure the continuation of business relations and promote international trade with the EU and English partners, it is most likely that the HCCCA will gain more importance, and its territorial scope will widen by virtue of more ratifications post-Brexit.[1316] Furthermore, as the HJC is a complementary instrument to the HCCCA and would facilitate international dispute resolution by filling the gaps post-Brexit, it is foreseeable that states joining the HJC would also become part of the HCCCA and vice versa.[1317] The effectiveness of the mechanism is congruent with consistent cooperation between states and could be envisioned by more accessions. Global acceptance of the treaty would lead to the realisation of its fundamental aims and enhance the effectiveness of the HCCCA as a global instrument.

7.5.2 HCCCA and United States of America

'As a full partner in the venture, the United States has a stake in the success of the HCCH'.[1318] In 2006, the American Bar Association urged the US government to promptly sign, ratify and implement the HCCCA highlighting its survey among the practitioners, over 98 per cent of whom indicated that a choice-of-court convention 'would be useful for their practice' and over 70% of whom delivered that 'a convention would make them more willing to designate litigation instead of arbitration in their contracts'.[1319] Adoption of the HCCCA would support the main purpose of the US at the negotiations, ensure enforceability of the US judgments abroad, and provide

[1316] See: Newing Neil and Webster Lucy, "Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post-Brexit? And What Would This Mean for International Arbitration?" [2016] 26(2) Dispute Resolution International 105.
[1317] For the related discussions see: Thesis, 3.3.5.
[1318] Kurt H. Nadelmann, "The United States Joins the Hague Conference on Private International Law: A History with Comments" [1965], 30 Law and Contemporary Problemss 291, 322.
[1319] Garnett (n 201) 169.

greater certainty for commercial transactions; furthermore, it would also bring a viable alternative to arbitration.[1320]

The US signed the HCCCA on 12 September 2009 but has not ratified it. As discussed earlier[1321], the Judgments Proposal, which ended up with a choice of court convention, was initially proposed by the US; therefore, non-ratification of the treaty by the US might cast doubts on its success. Most Member States of the HCCH that participated in the negotiations might have observed if and when the US ratifies the HCCCA before they also do so.[1322]

It has been suggested that the self-executing language of the HCCCA did not necessitate a specific federal implementing law; yet, the US State Department preferred implementing the instrument by federal law.[1323] Upon the request of the State Department, a Working Group on Implementation of the HCCCA was established by the American Society of International Law, which drafted a federal implementing Act on 24 April 2012.[1324] Regardless of the serious consideration and formulation of a federal act to this effect, the ratification process has been held up due to several reasons.

First of all, the US federalism creates an extra burden on the usual implementation process and the consent of the different states to the provisions of the HCCCA. During the drafting process, cooperative federalism was agreed to be the way to achieve implementation of the HCCCA at the federal and state levels. Nevertheless, the discussions replaced cooperative federalism with a "one track" federal method as contained in a draft bill intended for Congressional consideration.[1325] The federal act

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[1320] ibid.

[1321] For the discussions on the historical background see: Thesis, 3.3.1. The project was derived from the proposal of Edwin Williamson who was the Legal Adviser at the United States Department of State to the Secretary General of The Hague Conference on Private International Law in May 1992, to negotiate a multilateral convention on the recognition and enforcement of judgments throughout the world, which brought up the United States' initiative. See: Letter of May 5, 1992 from Edwin D. Williamson, Legal Adviser, U.S Department of State to Georges Droz, Secretary General, The Hague Conference on Private International Law (May 5, 1992), see: Brand and Herrup (n 276) 6; Schulz (n 274) 244-246.

[1322] Matthew H. Adler and Michele Crimaldi Zarychta, "The Hague Convention on Choice of Court Agreements: The United States Joins the Judgment Enforcement Band" [2006], 27 Northwestern Journal of International Law and Business 1, 36.

[1323] Stefan Falge, Helena Franceschi, and Daniel H.R. Laguardia, "The Hague Convention on Choice and Court Agreements A Discussion of Foreign and Domestic Points" [2012] 80 US Law Week 1803 (June 26, 2012).

[1324] Draft federal implementing legislation, 2013, <https://2009-2017.state.gov/s/l/releases/2013/211156.htm> accessed 28 November 2021.

[1325] ibid.

enables the states to implement the HCCCA by enacting the Uniform Act and opt out of the federal act so long as there is no substantive deviation from the text of the Uniform Act and so long as the interpretation of the state enactment does not lead to a different result regarding a particular issue from that which would be obtained under the federal Act.[1326] In principle, the provision presents the priority of the federal act aiming at uniformity. To this end, federalism might provide certainty for businesses and litigants. However, disagreements between the languages used in the uniform acts of the states and interpretation of enactment would hamper uniform application and implementation of the HCCCA in the US. In this way, federalism might not achieve uniformity targets of the HCCCA due to the potential territorial requirements regarding the choice of court agreements such as validity and nature.

While the US courts have usually enforced forum selection clauses, historically, state law has governed issues related to interpretation and validity.[1327] Whereas the HCCCA presumes exclusivity, states do not have any uniform presumption rule on exclusivity. Determination of the nature of jurisdiction agreements depends on the discretion of the state courts, which is restricted by the HCCCA and implementing the federal act. In this regard, it was commented that 'US parties and counsel may be caught unaware by this change in legal presumptions, and may inadvertently draft choice of court agreements that they believe to be non-exclusive (as they would be under the US law), but which are deemed to be exclusive under the Convention'.[1328] To avoid such risks, the US might make a declaration for the recognition and enforcement of judgments given by the courts of the other Contracting States designated in a non-exclusive choice of court agreement.[1329]

Regarding the scope, some argue that applying the HCCCA only to civil and commercial matters is a shortcoming since the benefits in unifying the US standard and ensuring reciprocity would not apply to all cases.[1330] Considering the complexity

[1326] Draft federal implementing legislation, 2013, Section 405.

[1327] See: Walter W. Heiser, "The Hague Convention on Choice of Court Agreements: The Impact on Forum non Conveniens, Transfer of Venue, Removal, and Recognition of Judgments in United States Courts", 31 University of Pennsylvania Journal of International Law 1013, 1014.

[1328] Report of the Committee on International Commercial Disputes of the New York City Bar on The Hague Convention On Choice Of Court Agreements (2006); see also: Stefan Falge, Helena Franceschi, and Daniel H.R. Laguardia (1309).

[1329] HCCCA, Article 22; Draft federal implementing legislation 2013, Section 312. The ABA also recommended to the US government to opt such a declaration. See also: Garnett (n 201)

[1330] Matthew B. Berlin, "Hague Convention on Choice of Court Agreements: Creating an International Framework for Recognising Foreign Judgments" [2006] 3 International Law and Management Review 43, 66.

in achieving a larger scale mechanism and certainty in international trade by giving effect to parties' autonomous choices, the scope of the HCCCA should not be qualified as a weakness. While there is a consensus regarding the compatibility of the HCCCA with the US law and its implementation, criticism has been expressed towards the coverage and exclusion of the forum selection clauses in franchise contracts and mass-market agreements.[1331] While manifest injustice or public policy might be referred to for refusing giving effect to the relevant jurisdiction agreements, those grounds are applied only in exceptional cases; therefore, a blanket exclusion of whole classes of contracts might be achieved by a declaration.[1332] It is suggested that such a declaration is important for the success of the HCCCA and would be seen by the other countries '…as a less hypocritical and more transparent position than simply ratifying the Convention without modification and leaving the enforcement of such agreements to the US courts'.[1333] It would inform other countries about the US position in advance and witness "American commitment and "leadership" concerning the HCCCA and encourage more accessions.[1334]

Another challenge in the US ratification might result from the *forum non conveniens* doctrine. In line with the HCCCA, the federal act also determines the duty of the chosen court to exercise jurisdiction except for the narrow grounds regarding nullity or voidance of a jurisdiction agreement, subject matter, internal allocation of jurisdiction and transfer of a case within the US.[1335] Considering justification given to *forum non convenience*, the US might opt for a declaration to limit jurisdiction under Article 19 of the HCCCA; accordingly, the US courts might refuse to determine disputes to which an exclusive choice of court agreement applies, if except for the location of the chosen court, there is no connection between that state of other territorial unit and parties or the dispute.[1336] Moreover, under the draft uniform state act implementing the HCCCA, a state may choose to decline all unrelated cases, accept them on a discretionary basis, or accept all of them – perhaps subject to certain conditions. In each case, the

[1331] Woodward (n 698).
[1332] Pursuant to Article 21 of the HCCCA. See also: Woodward (n 698) 707–708; Garnett (n 201) 177-178.
[1333] Garnett (n 201) 177-178.
[1334] Woodward (n 698) 663; Garnett (n 201) 177-178.
[1335] HCCCA, Article 5; Draft federal implementing legislation 2013, Section 201.
[1336] Draft federal implementing legislation 2013, Section 202.

state would notify the Secretary of State of the rule it adopts, and the State Department would inform the HCCH.[1337]

A further challenge with the US ratification would relate to the US damages awards. The HCCCA determines a limitation on such awards by refusing to give effect to non-compensatory damages.[1338] It was contended that such a superfluous provision in the convention witnesses 'how much foreign countries fear US damage awards'.[1339] Moreover, it enables parties to securely litigate in the US courts '…without the fear of an excessive damage award'.[1340] According to the several statutes in the US, treble damages are mandatory for all violations[1341]; in contrast, some states permit such damages to be awarded only if the violation was wilful, for instance, wilful patent infringement. Moreover, in some cases, compensatory damages awarded on personal injury claims must be paid on multiple amounts of treble damages.[1342] Thus, where compensatory damages are 100 dollars, the awarded sum would be multiplied, counting 300 dollars. The judgment on exemplary or punitive damages that do not compensate the plaintiff for the actual loss (considering costs and expenses in the proceedings[1343]) or exceed the actual harm suffered might be refused to be given effect under the HCCCA.[1344] The federal act does not indicate any expectation to make a declaration regarding damages award, which would in principle benefit the litigants; on the other hand, due to the confrontation of the states, this might be another reason for non-ratification.

The next issue relates to recognition and enforcement of judgments which was crucial when the US made its initial proposal. In the US, recognition and enforcement of state judgments are governed by the Full Faith and Credit Clause[1345], while foreign

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[1337] ibid.
[1338] HCCCA, Article 11.
[1339] See: Adler and Zarychta (n 1316) 25.
[1340] Ibid.
[1341] Clayton Antitrust Act 1914 and Racketeer Influenced and Corrupt Organizations Act (RICO) 1970.
[1342] *Commissioner v. Glenshaw Glass Co.* 348 U.S. 426.
[1343] *HCCCA,* Article 11(2).
[1344] *HCCCA,* Article 11(1).
[1345] According to the Full Faith and Credit Clause, a judgment of a sister state would get recognized and enforced despite it is contrary to the public policy of the state of the recognizing or enforcing state. Similarly, the US Supreme Court also held that "our decisions support no roving 'public policy exception' to the full faith and credit due judgments". This facet of the US law would not clash with the HCCCA, foreign judgments are not in the scope of the Full Faith and Credit Clause. Therefore, declining public policy consideration would not cause any problem in regard to the accession to the Convention as long as the judgments are that of sister states. See: Restatement (Second) Judgments (1972), paras 70, 98 and 102, comment g (1971); *Baker by Thomas v General Motors Corp.* [2002] 522 U.S. 222, 2333. For more on the recognition and enforcement of the state and foreign judgments in the U.S see: Born and Rutledge (n 731).

judgments are not. The American Law Institute has proposed a federal statute for imposing uniform standards on recognising and enforcing foreign judgments in the US courts, which has not been approved yet. Notwithstanding the absence of such a uniform federal or state law instrument regulating those issues, American courts are used to recognise and enforce foreign judgments based upon the authorities confirming common law comity doctrine.[1346] Based on Joseph Beale's "vested rights" doctrine, the Restatement (First) of Conflict of Laws adopted presumptive recognition theory. The Restatement (Two) of Conflict of Laws also followed this position, particularly highlighting that "the public interest requires that there be an end of litigation". Further, more than 30 states have adopted the Uniform Foreign Money Judgments Recognition Act, a codification of the common law principles, whereas around 18 states follow *Hilton*'s common law principles.[1347]

When the trade was mainly continental, the Full Faith and Credit Clause was sufficient; however, by the development of the US as a global trader, difficulties arising out of non-enforcement brought uncertainties for businesses.[1348] While the US has presented a liberal approach to the recognition and enforcement of foreign judgments, the US judgments lack the same treatment in other states, leaving their effectiveness totally onto the domestic laws unless there is another applicable instrument.

One of the reasons behind the HCCCA fell short of the initial proposal of the US might be linked to the low bargaining power between the US and other states: '…since litigants from most developed countries have no substantial difficulties enforcing judgments in the United States, their governments believe they have substantial negotiating leverage over us'.[1349] As explained by Justice Grey:

> 'Where there has been an opportunity for a full and fair trial abroad before a court of a competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of

[1346] In *Hilton*, the U.S Supreme Court approved that the recognition of foreign judgments is a matter of international law and international comity*. See: Hilton v. Guyot*, [1885] 159 U.S. 1885), [202]-[203].

[1347] For more on the relevant issues see: *The Restatement (First) Conflict of Laws* at para 429, 430, 434; *Johnson v Compagnie Generale Transatlantique*, 152 N.E. 121 (N.Y. 126); *The Restatement (Two) Conflict of Laws* (1934), para 98; The Foreign Judgments Recognition and Enforcement Act 2005. See also: Born and Rutledge (n 731). See also: Patrick Doris, *Enforcement of Foreign Judgments*, (Gideon Roberton, 2005).

[1348] Adler and Zarychta (n 1316) 3.

[1349] Statement of Jeffrey Kovar, Assistant Legal Advisor for PIL, US. Department of State; Adler and Zarychta (n 1316) 6.

> jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact'.[1350]

Regarding foreign judgments, more states have affirmed the court's conclusion in the case mentioned above, whereas some states such as Arizona and New York have not favoured that approach.[1351] In contrast, not all jurisdictions, particularly civil law states, accept comity doctrine, which necessitates the existence of bilateral and multilateral agreements for obtaining certainty for American litigants by mutual recognition and enforcement of judgments. To this end, the Constitution gives Congress power to regulate commerce with foreign nations and among the several States and with the Indian Tribes. Either statute or treaty achieves regulation of international trade; joining the HCCCA brings the latter.[1352] In addition, the Constitution recognises the supremacy of those treaties and judges are bound by them as federal statutes.[1353] The US is not a party to any relevant international agreement, and the NYC partly fills this gap regarding arbitral awards.[1354] Further, efforts to achieve a global enforcement mechanism by the Hague Judgments Convention 1971 and attempts for concluding reciprocal agreements for mutual recognition of judgments failed (such as a bilateral agreement between the US and the UK in the 1970s).[1355] Even though state laws permit courts to review merits of the jurisdiction of the origin court, which is not

[1350] *Hilton v. Guyot* [1885] 159 U.S. 113, per Justice Grey, [205]-[206].
[1351] *Rotary Club v. Chaprales Ramos de Pena* [1989] 160 Ariz. 362, 364; *Johnston v. Compagnie Generale Transatlantique* [1926] 242 N.Y. 381; Fastiff (n 265) 471.
[1352] US. Constitution, Article II.2.2; For more discussions see: Fastiff (n 265) 472.
[1353] US. Constitution, Article VI.2.
[1354] The US became party to the NYC in 1970.
[1355] See: North, "The Draft UK/US. Judgments Convention: A British Viewpoint" [1979] 1 Northwestern Journal of International Law and Business. 219; Hans Smit, "The Proposed United States-United Kingdom Convention on Recognition and Enforcement of Judgments: A Prototype for the Future?" [1977] 17 Virginia Journall of International Law, 443. It was also shown that, the main reason of the failure was the concerns of the London insurance market about the US damages awards, see: Adler and Zarychta (n 1316) 19; see also: Russell J. Weintraub, "Symposium Article: How Substantialis our Needfor a Judgments-Recognition Convention and What Should We Bargain Away to Get It?", 24 Brooklyn Journal of International Law 167, 169.

compatible with the HCCCA[1356], and public policy and manifest injustice grounds might be interpreted diversely. Much more widely, adoption of the HCCCA would bring certainty for international businesses and litigants by giving effect to their autonomous choices, furthermore, ensure the uniform recognition and enforcement of foreign judgments. Some called it "a national standard"[1357] of the US for recognition and enforcement, which does not sound reasonable; indeed, by ratifying the HCCCA, the US would be part of the global standards for international litigation.

7.5.3 HCCCA and China

The People's Republic of China signed the HCCCA on 12 September 2017 but has not ratified it yet. According to the Ministry of Foreign Affairs of China, approval of the HCCCA would be studied as a priority for making the treaty effective in China as soon as possible.[1358] It is most likely that the reasons behind non-ratification have both political and legal orientations. Since China consists of the four different legal regions - Mainland China, Hong Kong, Macao and Taiwan, ratification of an international treaty would necessitate a reasonable balance between those legal traditions and political interests.

Unlike the liberal approach of the HCCCA, '…Chinese law has established extra and, sometimes, unnecessary restrictions on party autonomy...'[1359] When the 2012 reforms removed differentiated provisions of the previous version of the Chinese Procedure Law regarding the choice of court agreements in domestic and international disputes,

[1356] The US judicial practice regarding the New York Convention and Uniform Foreign Money-Judgments Recognition Act suggests that the courts may refuse to recognise and enforce a judgment due to the court's lack of jurisdiction over the parties. See: Caroline Edsall, "Implementing the Hague Convention on Choice of Court Agreements in the United States: An Opportunity To Clarify Recognition and Enforcement Practice" [2010] 120 Yale Law Journal (2010) 398. Nevertheless, according to the Draft federal implementing legislation, Section 301, the court addressed would be bound by the origin court's findings of fact.

[1357] See: Berlin (n 1316).

[1358] "PRC signs the Hague Convention on Choice of Court Agreements: a step forward in the resolution of cross-border litigation", 28 September 2017, <https://hsfnotes.com/asiadisputes/2017/09/28/prc-signs-the-hague-convention-on-choice-of-court-agreements-a-step-forward-in-the-resolution-of-cross-border-litigation/>.

[1359] Zheng Sophia Tang, "Effectiveness of Exclusive Jurisdiction Clauses in the Chinese Courts—A Pragmatic Study" [2012], 61 International and Comparative Law Quarterly 459, 462.

the amendments prepared China to adopt the HCCCA.[1360] Yet, Chinese law has important dissimilarities compared to the HCCCA.

China shows a unique approach to jurisdiction agreements by the rigid provisions determining a list of courts that parties can choose. Accordingly, parties may subject their disputes to the jurisdiction of the people's court at the place having a connection with the dispute, such as where the defendant is domiciled, where the contract is performed, where the contract is signed, where the plaintiff is domiciled or where the subject matter is located, etc.[1361] Apart from the practice regarding 'actual connection' (*shiji lianxi)*, the limited options of the parties are subject to the exclusive jurisdiction of courts in the cases involving disputes related to immovable property, port operations or an inheritance.[1362] The Chinese court refused to enforce an English exclusive jurisdiction agreement based on the absence of actual connection.[1363] Furthermore, while the HCCCA has a presumption rule on exclusivity, Chinese law deems jurisdiction agreements non-exclusive unless parties have expressed otherwise. It should also be noted that Chinese law permits courts to use *forum non conveniens* and dismiss a case if there is no connection with China.[1364] This feature would enable China to make a declaration to this effect which impliedly brings the application of *forum non conveniens* under the HCCCA.[1365]

In contrast to the HCCCA, which determines the validity of jurisdiction agreements under the law of the State of the chosen court, Chinese courts have applied either *lex causae,* which is also in contrast with the severability principle or *lex fori* as a dominant approach.[1366]

It is also usual for the Chinese courts to take jurisdiction in breach of a valid exclusive choice of court agreement due to the unenforceability of the resulting foreign judgment

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[1360] Jie (Jeanne) Huang, "The Partially Modernised Chinese Conflicts System: Achievements and Challenges: Review of Zheng Sophia Tang, Yongping Xiao, and Zhengxin Huo, Conflict of Laws in the People's Republic of China" [2017], 13(3) Journal of Private International Law 633, 646.

[1361] Civil Procedure Law of the People's Republic of China, Article 34.

[1362] Civil Procedure Law of the People's Republic of China, Article 33.

[1363] *Hin-Pro International Logistics Ltd v Compania Sud Americana De Vapores S.A.*[2015] EWCA Civ 401 (this case was concerned to a bill of lading which is not covered by the HCCCA).

[1364] 2015 Interpretation of the Supreme People's Court on the Law on Civil Procedure, Article 532; See also: *Grace Young International Ltd. v. Seoil Agency Co. Ltd.* Case No. [2017] Lu Min Zhong No. 577

[1365] HCCCA, Article 19 allows a State to declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.

[1366] See HCCCA, Articles 5(1), 6 (a) and 9(a). See also *The Sumitomo Bank Ltd v Xinhua Estate*, Supreme People's Court, [1999] No 194, Shandong Jufeng v MGame; Supreme People's Court, 'Annual Report of Intellectual Property Cases in the Supreme People's Court (2009)', [2010] No 173, case 44 as referred by Tang (n 1347) 462-464.

in the absence of judicial cooperation.[1367] Such a strong inclination to sovereignty and conditioning parties' autonomous choices on possible ineffectiveness of judgments are against global respect given to parties' choices and does not comply with the Hague perspective. While some contend that it is "… unrealistic to argue that the Chinese courts are certainly 'wrong' or 'unreasonable' to take jurisdiction irrespective of a valid foreign jurisdiction clause"[1368], such practice restricts parties' autonomous wills and prevents their access to justice. Chinese law would generally recognise and enforce a judgment given by a foreign court only if there is an international treaty, ratified or acceded to by both the foreign country and China or based on the principle of reciprocity if there is no such international treaty; moreover, even if any of these requirements is met, courts can still refuse to recognise and enforce a judgment based on public policy.[1369] Ratification of the HCCCA would justify recognition and enforcement of judgments based on an existing international treaty.

Accession to the HCCCA would also benefit Chinese commercial interests as the creator of the Belt and Road Initiative for enhancing economic growth across the Asia Pacific area, Africa and Central and Eastern Europe.[1370] Considering Singapore and the EU States are among the participants of the initiative and Contracting States, China's accession to the HCCCA would serve to international trade by providing certainty for businesses, resolution of their disputes and recognition and enforcement of judgments. Against the restrictive practice established by Chinese courts, China's Supreme People's Court, in its "Opinions on Further Providing Judicial Services and Safeguards for the Construction of the 'Belt and Road' by People's Courts" of 2015 and 2019, urged the courts to facilitate recognition and enforcement of foreign judgments, additionally to apply the principle of presumptive reciprocity concerning the courts of the BRI countries.[1371]

[1367] See: Tang (n 1347) 473-476. A similar scenario happened in the case *Japan Nippon Kanzai Co., Ltd. v. Beijing Zhuangsheng Real Estate Co Ltd* where the Chinese court took the jurisdiction without recognising the judgment of the Hong Kong court which was designated by the parties. See: Beijing Municipal High People's Court (2008) No 919.

[1368] Tang (n 1347) 480.

[1369] PRC Civil Procedure Law, Article 281-282.

[1370] "The Belt and Road Initiative in the global trade, investment and finance landscape", in *OECD Business and Finance Outlook*, (OECD Publishing, 2018).

[1371] Yuan Yanchao, "What's China's Supreme Court's Next Big Move for the Belt and Road Initiative?", 23 May 2020, <https://www.chinajusticeobserver.com/a/whats-chinas-supreme-courts-next-big-move-for-the-belt-and-road-initiative%C2%A0> accessed 28 November 2021. See also: Lin Haibin, "Who Shall Prove Reciprocity in Cases of Recognition and Enforcement of Foreign Judgments?", 4 August 2019, <https://www.chinajusticeobserver.com/a/who-shall-prove-reciprocity-in-cases-of-recognition-and-enforcement-of-foreign-judgment> accessed 28 November 2021.

Also, the Chinese judicial practice has recently shown an inclination to voluntary relaxation of the law.[1372] Regardless of the HCCCA not being in force in China and even when the treaty was not signed, China has shown compassion towards the HCCCA, which is evident from the fact that the Shanghai High Court applied it to presume exclusivity of the choice of court agreement and declined jurisdiction in favour the designated court.[1373] Hence, the divergence between the HCCCA and Chinese law on preliminary issues should not establish a fundamental barrier to ratification.[1374] A survey based on the key points of the HCCCA and Chinese law has evidenced no unresolvable issues between them; China can and should accede to the HCCCA.[1375] Nevertheless, considering the slow motion of the reform process of Chinese law, it might take longer to adjust the existing law to the HCCCA instead of ratifying subject to specific declarations. Looking at the accession of China to the Hague Convention on Protection of Children 1993, it took five years between the dates of signature to ratification of the treaty in 2005 due to studying pros and cons, furthermore, defining the provisions on which reservations were made.[1376] It seems China may ratify the HCCCA soon by making a declaration to maintain some characteristics of national law, particularly the established practice concerning 'actual connection' (*shiji lianxi)* of the chosen court with the dispute and exclusive Chinese jurisdiction.[1377]

Compared with the NYC, China's membership in the treaty has stimulated the use of arbitration to resolve commercial disputes by growing international trade and investment.[1378] In contrast to foreign judgments, arbitral awards have been recognised and enforced more straightforwardly in China under the NYC. Findings have presented an overall average enforcement rate of 68%, with rapidly growing rates in recent years.[1379] The HCCCA does not create more risk to the Chinese judiciary than the

[1372] See: Lai v ABN AMRO Bank NV [2010], HCA407/2012, referred in Tang (n 1347) 482.
[1373] Zheng Sophia Tang, "Chinese courts made decision taking into account of the Hague Choice of Court Convention", 14 November 2017, <https://conflictoflaws.net/2017/chinese-courts-made-decision-taking-into-account-of-the-hague-choice-of-court-convention/> accessed 28 November 2021.
[1374] Tang (n 1347) 482.
[1375] Tu (n 725) 365.
[1376] Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.
[1377] For more see: Article 34 of the Civil Procedure Law of the People's Republic of China; Vivienne (n 725) 1-3; Tu (n 725); *Hin-Pro International Logistics Ltd v Compania Sud Americana De Vapores S.A.* [2015] EWCA Civ 401.
[1378] See: Fan Yang, ''How Long Have You Got?': Towards a Transparent and Streamlined System for Enforcing Foreign Arbitral Awards in China" [2017], 34(3) Journal of International Arbitration 489.
[1379] Meg Utterback, Li Ronghui and Holly Blackwell, "Enforcing foreign arbitral awards in China – a review of the past twenty years", 15 September 2016,

New York Convention.[1380] Similarly, ratifying the HCCCA would bring credibility to the Chinese International Commercial Court ("CICC"), similar to the Singaporean experience with the International Commercial Court.[1381]Chinese ratification will, in turn, encourage further ratifications. It is also argued that China might ratify the Convention when the US does so.[1382] As pointed out by Justice Song Jianli, '…it's only a matter of time'.[1383]

7.6 Conclusion

The HCCCA is an inevitable instrument for providing the parties' autonomy and certainty for international businesses and commerce in the post-Brexit era. Parties to international transactions need to be confident about the expected faith of their relations, resolution of their potential disputes and assurance of their determined rights, remedies and obligations. While the HCCCA might not be an ideal solution to the issues arising out of Brexit, its benefits at the age of global trade and investment cannot be underestimated. The HCCCA provides uniformity regarding jurisdiction of the exclusively chosen court and recognition and enforcement of resulting judgments. It has also been shown that success may be achieved only if the UK associates other means of judicial cooperation together with the HCCCA. The HJC, as a complementary instrument to the HCCCA, would address the gaps left by the withdrawal of the UK from the EU and the recession of the application of the Brussels regime to and in the UK. Further success of the HCCCA necessitates enhanced judicial cooperation, which is often congruent with trade and economic relations. In this regard, trade partners should stimulate each other for acceding to the HCCCA, and the HCCH should deepen its communication with the national authorities. A Special Commission established by the HCCH, institution of joint expert/working groups with the BRR and UNIDOIT for addressing questions arising out of the application of the HCCCA as well as the establishment of a Hague court which would give a uniform interpretation of the treaty and its contrasting provisions would be

<https://www.kwm.com/en/knowledge/insights/enforcing-foreign-arbitral-awards-in-china-20160915> accessed 28 November 2021.

[1380] Tang (n 1347) 482.

[1381] See: Kenny (n 1299).

[1382] Jiwen Wang, "Discussion on Timing of Ratifying The 2005 Hague Convention on Choice of Court Agreements" [2018], 2 Wuhan University International Law Review 105.

[1383] Ibid.

essential for achieving effectiveness. This fact would, in turn, encourage more states to become part of the treaty and only upon the sufficient amount of the ratifications, the HCCCA would become a truly global instrument and an alternative to the NYC as aimed in the initial negotiations.

Chapter 8 CONCLUSIONS

8.1 Party autonomy and HCCCA

The party autonomy principle has not developed spontaneously but through an evolutionary process that involved a mix of theoretical assumptions. The most straightforward moral understanding of a person's self-governing character advanced into a more sophisticated legal principle shaped by the elements of individualism, liberalism, and paternalism. As an important and globally accepted principle of modern PIL, party autonomy was influenced by the related concepts and transformed from a nationwide conceptualisation into a worldwide value.

The HCCCA is the first multilateral treaty enforcing parties' autonomy by giving effect to their choice of court agreements and resulting judgments at an international level. The three fundamental rules of the HCCCA reflect theoretical elements of party autonomy: the rule giving effect to parties' choices and resulting judgments adopts individualism; public enforcement of parties' choices and stay of any other proceedings evidence liberalistic components; further, public policy and overriding mandatory rules imposing restrictions over parties' wills mirror paternalistic elements. It is also revealed that the two layers of the legal principle, including choice of a court (forum) and choice of law, evolved in combination and existed congruent with each other. The fact that parties often choose, i.e., the English court and English law and vice versa, witnesses this evolution. Similarly, courts usually imply parties' choice of law based on the designated forum and vice versa.

The assessment of the historical origins and earlier treaties that the HCCH drafted uncovers that the Hague perspective of party autonomy has been a progressive development encompassing more attempts than the HCCCA only. The earlier treaties were merely initial attempts and enabled the HCCH to learn lessons from the failures. Such experience facilitated reaching the HCCCA and contributed to drafting the complementary HJC later, which levels the playing field for international litigation. Moreover, the examination of the negotiations at the HCCH detects that the original project, which was broader in scope, shrank to only the exclusive ground of jurisdiction – choice of court agreements. Such aftermath was due to the states' concerns of territorial sovereignty and public policy. In contrast, there was an established

consensus on the importance of party autonomy for PIL and international trade and commercial relations. Therefore, the HCCCA authorised the Contracting States to opt out of the treaty by declaring its limited or differentiated application.

Indeed, the declaration options given to the states might enhance the flexibility and ratification status of the HCCCA. States might exclude certain matters from the application scope unless that declaration is not broader than necessary, or they can recognise and enforce judgments given by non-exclusively chosen courts under the HCCCA.[1384] On the other hand, declarations limiting jurisdiction or recognition and enforcement might restrict the functionality of the HCCCA and its effectiveness and, based on the connecting factors with the location of the court, bring *forum non convenience* grounds which the HCCCA indeed prohibits.[1385] In this sense, the study proposes removing Articles 19 and 22, especially considering the fact that not any Contracting state has made such declarations. Overcoming these inconsistencies would enhance the rules of the HCCCA and contribute to uniformity which would ultimately promote judicial cooperation and international trade by the widespread accessions and implementation by the states.

Moreover, while the HCCCA is the first-ever global instrument aiming at the uniform provision of the recognition and enforcement of parties' choice of court agreements and resulting judgments, the rules are still not harmonised, often contingent on the application of the national laws. This fact jeopardises the effectiveness of party autonomy. This risk is mainly reflected in the provisions subjecting validity of choice of court agreements to different sets of the national laws, absence of any definition given to public policy, and application of the diverse overriding mandatory rules. Contrasts also arise from the fact that the HCCCA contains no uniform procedural rules; further, the provisions on the recognition and enforcement of judgments often give discretion to courts rather than mandatory obligations.

Confirming the inconsistencies and drawbacks of the HCCCA, the study incentivises the Hague Conference and Contracting States to take relevant measures for enhancing party autonomy. In this sense, determining the gaps in the HCCCA brings favourable prospects for enhancing party autonomy and effectiveness by reforming the instrument and taking adequate measures. The need to address the weaknesses

[1384] HCCCA, Article 21-22.
[1385] HCCCA, Article 19-20.

also paves the way for expanding judicial cooperation, strengthening economic and political ties between the states and fostering collaborative efforts of the key actors in the field, including the HCCH, EU Commission and UNIDROIT, which would, in turn, promote ratifications and ultimately bring the true success of the HCCCA.

8.2 Comparative assessment of the HCCCA, Brussels Recast Regulation, and New York Arbitration Convention in the context of the provision of party autonomy

The HCCCA was drafted as an instrument drawing the lessons from the already existing successful BRR and NYC in providing party autonomy. In light of this aim of the HCCH and to explore ways to enhance party autonomy and effectiveness, the study compared and associated the equivalent perspectives of the three instruments. The primary components of the comparative evaluations consisted of the effects and validity of forum selection clauses, including formal and substantive validity as well as separability doctrine, the material scope of the instruments, the way of handling with parallel proceedings, recognition and enforcement of final decisions and a brief overview of the consequences of the breach of forum selection agreements. The assessments revealed overlapping patterns and similarities of the legal regimes for providing party autonomy, certainty, predictability, and smooth operation of international trade and commerce. On the other hand, the instruments do not mirror each other, and significant differences influence the effectiveness of the provision of the principle. Based on the distinct characteristics and disparities of the instruments, the thesis made recommendations for achieving the true success of the HCCCA and facilitating uniformity and harmonisation.

A- Material scope

All the three instruments apply to civil and commercial cases; yet, diversities exist. While the HCCCA and NYC apply to international cases, the BRR is regional and applies only if an issue relates to the Union. The BRR also contains a list of the excluded matters, which mostly aligns with the HCCCA. On the other hand, the BRR might be broader in its material scope as it applies to consumer and employment contracts, carriage of passengers and goods, maritime issues, competition matters,

claims for personal injury brought by or on behalf of natural persons, tort or delict claims, tenancies or rights in rem in immovable property, intellectual property rights, the validity of entries in public registers.

Moreover, the BRR determines exclusive jurisdiction over immovable property, intellectual property rights, the validity of entries in public registers, which overrides parties' autonomous choices. The reason behind the more exclusions from the scope of the HCCCA might be related to the fact that it rules on only one jurisdictional ground – exclusive jurisdiction agreements. In contrast, the BRR contains provisions on general jurisdiction, special jurisdiction, exclusive jurisdiction, prorogation of jurisdiction through submission, and protective rules applicable to weaker parties. Indeed, not all commercial matters can be subject to an exclusive jurisdiction agreement. Therefore, the HCCCA includes rulings on the internal allocation of jurisdiction and subject matter jurisdiction, which are not affected by the rules on the obligation of the chosen court to take the jurisdiction. Furthermore, while Article 21 declarations restrict the coverage of the HCCCA by excluding specific matters, they expand the ratification status of the treaty. While the HCCCA is considered narrower in its material scope than NYC, this judgement might not always be accurate. Indeed, NYC lacks any list of the matters covered or excluded from the coverage and the uniform definition of arbitrability and application of the various national laws to the notion.

B- Effects of forum selection clauses

Both the HCCCA and BRR rule on choice of court agreements, while the former applies only to exclusive variations. Unlike the BRR, which admits the mandatory jurisdiction of an exclusively or non-exclusively chosen court, non-exclusive jurisdiction agreements are excluded from the scope of the HCCCA unless a state has made a declaration about enforcing judgments resulting from such designations. On the one hand, excluding all types of non-exclusive jurisdiction agreements might restrict party autonomy. On the other hand, they can lead to excessive delays, parallel proceedings, and inconsistent judgments, which would have necessitated the inclusion of the *lis pendens* rulings to the HCCCA. In this sense, by Article 22

declarations, the HCCCA attempts to balance its objectives and the party autonomy principle.[1386]

Presumption of exclusivity by both of the instruments in principle brings more agreements into their application scopes. Nevertheless, uncertainties about the exclusivity of asymmetrical jurisdiction agreements might be inevitable due to different approaches. The English courts have held their exclusive nature under the BRR, leading to a similar conclusion under the HCCCA. Unless courts give a uniform interpretation, there will still be a lack of certainty. Uniformity might be achieved if the Hague court is established, or additional protocols providing a commentary on the matter might be drafted by the HCCH.

The HCCCA guarantees both positive and negative effects of the exclusive jurisdiction agreements by the mandatory rules on the jurisdiction of the chosen court and stay of the proceedings. The BRR provides derogative effects of an exclusive jurisdiction agreement only if the reversed *lis pendens* rulings are applicable. The NYC reinforces the positive effects of an arbitration agreement by compelling the parties to commence arbitration proceedings and especially recognising the tribunal's power to rule on its jurisdiction. However, it is shown that the tribunal's competence might be insufficient and, indeed, often subject to the court's final decision. The NYC enhances the negative effects of an arbitration agreement by imposing a mandatory stay of the court proceedings and referral of the parties to the tribunal. However, there are no sufficient safeguards or possible remedies under the NYC; the rule applies only upon a party's request.

C- Formal and substantive validity

All three mechanisms unify form requirements; however, approaches differ. The HCCCA and BRR are characterised by liberal perspectives and flexibility about "writing," which encompasses electronic and other means of communication. In contrast, the text of the NYC is specified by rigidity, particularly regarding signatures which contrasts with the expectations of modern trade and commerce. Yet, the permissive language and pro-enforcement nature of NYC contribute to liberal

[1386] The thesis suggests removing Article 22 from the text of the HCCCA. For the related discussions see thesis, 4.3.3.

interpretations and adjustments to commercial developments. Moreover, while both the HCCCA and BRR contain provisions which would ensure the incorporation of jurisdiction clauses, the NYC is not explicit about this matter except a mention of an arbitral clause found in a contract.[1387] Accommodation of a specific ruling about incorporating an arbitration clause and its validity would have contributed to commercial certainty. Otherwise, it is recommended for the parties to have express statements in their contracts about incorporation. Likewise, the NYC does not expressly state the separability of arbitration agreements while both the HCCCA and BRR explicitly indicate it regarding the choice of court agreements. Upon the absence of the definitions of these fundamental notions, national laws and established practices fill the gap.

While the BRR adjusted itself to the HCCCA by the substantive validity rules, such an alignment also facilitated the EU's accession to the treaty. Principally all three regimes determine substantive validity. Nevertheless, the matter is subject to diverse sets of domestic rules that do not prevent uncertainties arising from the application of the various national laws and the possibility of *renvoi*. The latter brings a risk of inconsistencies as well as jeopardises party autonomy. Regardless of inevitable complexities, the optimal way for achieving certainty would be drafting uniform validity rules in the text of the instruments or additional protocols. The HCCH, EU Commission and UNCITRAL might establish joint working/expert groups and consult with national authorities to further enhance harmonisation and uniformity.

D- Parallel proceedings

While the BRR includes specific rules on *lis pendens*, neither the HCCCA nor NYC has such provisions regulating parallel proceedings. Further, the reversed *lis pendens* rules of the BRR were drafted by the influence of the HCCCA and eased the EU's accession to the Convention. In contrast, the HCCCA itself does not expressly rule on parallel proceedings. Yet, the *lis pendens* rules of the BRR are insufficient to prevent conflicts of jurisdiction and risks for party autonomy which necessitate further reforms and achievement of uniformity. In this regard, the new rules of the BRR applicable to

[1387] Though there is an established consensus in arbitration practice, model laws and national legislations.

ongoing proceedings in non-EU states bring more vulnerabilities to the jurisdiction clauses designating Non-Member State courts.

The Conventions contain rulings on the stay or dismissal of the proceedings. However, such provisions do not provide an entire solution. Particularly application only upon a party's request, non-uniformity concerning the applicable law to the agreement and its existence, lack of the uniform validity rules and arbitrability concept, the potential application of various national laws, and non-harmonised domestic definitions leave many uncertainties. Furthermore, in the EU, differences between national legislations lead to doubts over mutual trust. Therefore, including precise rules applicable to the scenarios involving parallel proceedings at different courts (as well as tribunals – in the case of the NYC) and defining possible remedies would have contributed to certainty and predictability, further, prevented the waste of time and legal expenses.

E- Consequences of breach

The HCCCA and NYC lack any express provision on remedies for the breach of jurisdiction and arbitration clauses. In this regard, the treaties leave this matter to the national laws, which would usually determine awarding damages together with a stay and anti-suit injunction. The Conventions rule on the stay of the proceedings. The HCCCA provides a ruling about recognition and enforcement of judgments on damages. None of the treaties prohibit anti-suit injunctions. Yet, enforcement of such measures might become problematic. Anti-suit measures are not considered a judgment within the meaning of the HCCCA. In contrast, an award containing an anti-suit injunction in favour of an arbitration agreement in most cases might not be given effect by a court on the grounds of public policy or mutual trust provided the issue is related to the Union's area. Unlike the HCCCA, the BRR characterises provisional and protective measures as judgments. On the other hand, granting anti-suit injunctions against the Member State courts is prohibited based on mutual trust, while anti-suit measures against non-Member State courts are not restrained.

Because the three regimes play a central role in providing party autonomy, the lack of express rules on the consequences of breaches of forum selection clauses and available remedies is not justified. While this matter might be left to national laws, non-uniform approaches bring further uncertainties. Additional protocols to the Conventions and reviewing the matter during the next reforms of the BRR would

enhance certainty and parties' autonomy. A joint consideration by the HCCCA, Commission and UNCITRAL would speed up the process and promote uniformity and harmonisation.

F- Recognition and enforcement of final decisions

The instruments ensure recognition and enforcement of final decisions and determine refusal grounds. However, the absence of the uniform definition given to the fundamental concepts such as "validity," "incapacity," "public policy," "finality," "binding," and "arbitrability," and application of various national laws lead to non-uniformity and inconsistencies. Moreover, although the instruments preclude the review of the jurisdiction or substance of the final decision, their languages may often necessitate such review of the merits or procedure. In the European Union, more anomalies appear due to mutual trust and the application of non-uniform rules of the Member States to the refusal grounds. While *exequatur* is prohibited on this ground, skipping a declaration of enforcement, a judgment might still be refused to be given effect at a later stage. Indeed, it might often duplicate the proceedings and waste time and expenses regardless of the possible grant of costs and damages.

Moreover, the wording and drafting techniques of the instruments regarding the refusal grounds drive for the discretion of the courts rather than mandatory obligations not to give effect to final decisions. Additionally, regardless of mutual trust between the Member States, there is no uniform procedural law in the Union that might facilitate access to justice and ensure legal certainty and uniformity.

The HCCH, UNCITRAL, and EU might establish joint expert groups to seek ways to achieve consistent definitions of the key concepts applicable in the three instruments. In the case of the EU, consultations might contribute to drafting uniform procedural law. Whereas it is hard to achieve global procedural law due to the peculiarities of the national rules and legal systems, HCCH and UNCITRAL might draft some model laws, standards, or principles of the procedure.[1388] Such attempts could contribute to global

[1388] As an analogy, the cooperative project of the European Law Institute (ELI) and the International Institute for the Unification of Private Law (UNIDROIT) deals with civil procedure law. The project began in February 2014, as a joint endeavour to adapt the American Law Institute/Unidroit Principles of Transnational Civil Procedure to the European legal environment, and ended in 2020 with the ELI-UNIDROIT Model European Rules of Civil Procedure.

uniformity and consistent application of the instruments and reshape the provision of party autonomy at the international level.

8.3 Some remarks about possible measures

In light of the foregoing discussions and comparative assessments of the three instruments, the study proceeded to suggest taking measures for enhancing the effectiveness of the party autonomy principle under the HCCCA:

- Legislative measures would include revising the HCCCA through intext reforms or supplementary protocols. Where achieving such reforms might get challenging, the HCCH might formulate model rules, standards, or principles independently or in collaboration with the EU Commission and UNCITRAL. Similar measures could also be taken for revising the BRR and NYC since these instruments experience common inherent inconsistencies.

- Institutional measures would reflect establishing a Special Commission, working groups by HCCH or joint expert groups that the HCCH, EU Commission and UNCITRAL might assemble for consulting, sharing experiences, mutual learning, taking normative steps for harmonisation, and forecasting. Establishing the proposed Hague Court would contribute to the effectiveness of the HCCCA and bring uniform interpretation and consistent application of the Hague Conventions.

- Practical measures would encompass organising events, conferences, and seminars with the national authorities to spread the knowledge about the HCCCA and promote its application, adoption, and implementation perspectives (also of the instruments). To this end, the HCCH, EU Commission and UNCITRAL might also organise training for judges and practitioners for educational and specialisation purposes.

- Political measures would be realised by broadening communications and relationships between the organisations and national authorities, which would,

in turn, widen the scope of ratifications to the HCCCA. While such cooperation and networking between the HCCH and UNCITRAL and Contracting States would be globally oriented and stimulate harmonisation at the multilateral level, the EU's contribution to the process would foster regional and international coherence. Public policy is an inevitable factor influencing judicial cooperation and the operation of the instruments. In this sense, as the mutual trust principle due to its political understanding might usually restrict party autonomy, collaborations of national authorities with the EU might bring further adjustments and contribute to consistency and more effectiveness.

8.4 Effectiveness of the HCCCA post-Brexit and ratification status

The thesis manifested that in the post-Brexit legal landscape, the HCCCA occupies a preeminent position. The previous regime, which provided reciprocal recognition and enforcement of choice of court agreements and resulting judgments, has been replaced by a new regime that is neither entirely certain nor straightforward. The effective solutions would be achieved if subsidiary way-outs and judicial cooperation means were combined by the UK post-Brexit and the HCCCA, national laws, other international and regional treaties, and soft law principles would be applied.

Among all other routes that the UK might take post-Brexit, the HCCCA is the sole global mechanism capable of the provision of continuation of judicial cooperation and parties' choices in international litigation. In this regard, the HJC complements the HCCCA and fills significant gaps brought by the recession of the Brussels regime to and in the UK (only upon a sufficient number of ratifications). Even though the HCCCA is not an ideal solution to all issues arising out of Brexit, mainly due to its application to only exclusive jurisdiction agreements and excluded subject matters, it provides uniformity regarding jurisdiction of the exclusively chosen court and recognition and enforcement of resulting judgments. On the other hand, there are remaining questions related to the material and temporal scope of the HCCCA.

In this sense, the study suggests that Brexit opens up possibilities for reforming the HCCCA, enhancing party autonomy, effectiveness, and expanding ratifications. The HCCH, as the major actor working for the progressive unification of the PIL rules, would lead the process and conduct the continuation of cross-border judicial cooperation in the changing legal world. To address the challenges, a Special

Commission or joint expert groups might be established for sharing experiences, mutual learning, forecasting and taking normative steps. Furthermore, the Hague court might be instituted, which would give a uniform interpretation of the treaty. These steps would, in turn, encourage more states to become part of the treaty. In light of these, Brexit also offers opportunities to promote cooperation between the HCCH, EU Commission, and UNCITRAL and develop conflict of laws and PIL rules of the UK and globally.

Further success of the HCCCA necessitates increased judicial cooperation, which is often congruent with trade and economic relations. Expanded collaborations between the HCCH, Contracting and all other states would promote accessions to the HCCCA, which would witness global respect to party autonomy and enhance the effective provision of the principle. To prompt the HCCCA as a truly global instrument and an alternative to the NYC, the study presented a genuine need for the trade partners to stimulate each other for acceding to the HCCCA and the HCCH to deepen its communication with national authorities.

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