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THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS – AN INTRODUCTION

I The Convention at a glance

1. The *Hague Convention of 30 June 2005 on Choice of Court agreements*[1]entered into force on 1 October 2015 between the European Union (EU) and Mexico. The Convention was previously signed by the United States of America (USA, US) (19 January 2009) and Singapore (25 March 2015), and subsequently by Ukraine (21 March 2016)[2]. Its purpose is to ensure the effectiveness of international commercial choice of court agreements. It aims at filling the governance gap that, in the absence of a uniform global legal regime, currently exists concerning the effect of choice of court agreements and the recognition and enforcement of judgments based on such agreements.

2. The existing differences between jurisdictions give rise to three main uncertainties, for which the Convention provides solutions:

Does the chosen court have jurisdiction?

Do other courts than the chosen courts have jurisdiction?

Will the judgment rendered by the chosen court be recognised and enforced abroad?

3. All three uncertainties reflect negatively on business, in particular on small and medium companies. They may discourage such parties from including a forum selection clause in their contract, and may, so to speak, force them into arbitration, for which a legal framework with an effective global reach *is* in place: the *New York Convention of 30 June 1958on the Recognition and Enforcement of Foreign Arbitral Awards*, concluded under the auspices of the United Nations, presently ratified

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1) The English and French authentic texts, the Explanatory Report by Trevor Hartley and Masato Dogauchi, and the full history of the genesis of the Convention, can be found in: Hague Conference on Private International Law, *Proceedings of the Twentieth Session, Tome III, Choice of Court*, The Hague, Intersentia, 2010.See also the "Choice of Court Home Page":https://www.hcch.net/en/instruments/specialised-sections/choice-of-court.

2) Current status at: https://www.hcch.net/en/instruments/conventions/status-table/?cid=98

by 156 States, including all States represented at this Regional Conference[3].

4. The Choice of Court Convention addresses these uncertainties. It creates a level playing field with international commercial arbitration, and ensures that litigation before ordinary civil courts becomes an effective option that parties may consider as an alternative to commercial arbitration.

5. The Convention's purpose is limited: it does *not* deal with jurisdiction and recognition and enforcement in *other* situations than where the parties have *agreed* on jurisdiction. That means that the Convention is really an instrument at the crossroads of the law of contracts and the law of procedure, and not only relevant when it comes to litigation but already at the drafting stage of the commercial contract. In this regard it may be compared not only to the 1958 New York Arbitration Convention, likewise based on contract principles, but also to the *Hague Principles of 19 March2015 on Choice of Law in International Commercial Contracts*, which provide a framework, in this case a non-binding framework, for party autonomy regarding *choice of law*[4].

6. Both Hague instruments – the Choice of Court Convention, and the Hague Principles – thus aim at removing obstacles to productive commercial relations, which are best served by party autonomy, at least in the relations between parties of more or less comparable economic bargaining power, and as long as strong public interests are respected. So you will find a certain number of similar limitations, exclusions from scope, and safeguards in the Choice of Court Convention and the Hague Principles.

II Background

7. The Choice of Court Convention is a product of the Hague Conference on Private International Law, which has always had a keen interest in issues of jurisdiction and recognition and enforcement of judg-

3) Text and current status at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en; see also: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

4) See Hague Conference on Private International Law, *Principles on Choice of Law in International Commercial Contracts*, The Hague, 2015. English text also at:https://www.hcch.net/en/instruments/conventions/full-text/?cid=135. Interestingly, a recent Australian governmental study proposes implementation of both the Choice of Court Convention and the Principles in a new International Civil Law Act; see *National Interest Analysis [2016] ATNIA 7 [2016] ATNIF 23, Australia's Accession to the Convention on Choice of Court Agreements*.

ments in civil and commercial matters. A first Convention on choice of court agreements for the sale of goods[5] saw the light in 1958, but never entered into force. In the 1960's the Conference produced both a Convention on Choice of Court (1964, first signed in 1965) and a Convention on the Recognition and Enforcement of Judgments (1966, first signed in 1971). The *Hague Convention of 25 November 1965 on the Choice of Court*[6]never came into force. The *Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*[7] did enter into force, but never became operational, because it was overtaken by the Brussels Convention of 1968, which became a Regulation in 2000, currently *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)*, hereinafter Brussels I (recast).

8. The 1968 Brussels Convention benefitted from the Hague Conventions[8] but went an important step further by providing in respect of all judgments not only for their recognition and enforcement abroad, but also, directly, for the jurisdiction of the court seized with a claim: it was a "double" Convention, contrary to the "single"1971 Hague Convention. The system of the Brussels Convention was extended to Norway, Switzerland and Iceland through the *Lugano Convention of 16 September of 30 October 2007on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*[9]. Other States may accede to the Lugano Convention, but only if all Contracting States agree. So far there have been no accessions.

9. In 1992 the USA proposed to the Hague Conference to try and negotiate at the global level a convention on jurisdiction and recognition and enforcement of judgments in civil and commercial matters halfway between a double and a single convention: the idea of a mixed Convention. Such an instrument should provide for a limited number of direct – *required* and *prohibited* – grounds of jurisdiction, leaving other

5) Convention of 15 April 1958 on the jurisdiction of the selected forum in the case of international sales of goods (translation of the authentic French text),see https://www.hcch.net/en/instruments/conventions/full-text/?cid=34

6) English text at https://www.hcch.net/en/instruments/conventions/full-text/?cid=77

7) English text at https://www.hcch.net/en/instruments/conventions/full-text/?cid=78

8) See the Jenard Report on the 1968 Brussels Convention Official Journal C 59/1-65, *passim*

9) Preceded by the *Lugano Convention of 16 September 1988 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*

direct grounds of jurisdiction – a grey area – to national law, and for the recognition and enforcement of judgments based on the required jurisdiction grounds, and refusal of recognition and enforcement of judgments based on the prohibited grounds. Following preparatory work, negotiations started in 1996, which in 1999 led to a preliminary draft and to an Interim Text at a diplomatic conference in 2001.

10. But at that point the negotiations got stuck for a number of reasons, including: different views regarding the implications of Internet and e-commerce, activity based jurisdiction as known in the USA, consumer and employment contracts, intellectual property rights, the relationship with the Brussels I Regulation, and the question of bi-lateralisation, i.e., whether States Parties should be allowed to choose their counterparts. These difficulties being seen as insurmountable at the time, the only possible way forward then was to limit the scope of the Convention to avoid these issues[10]. The solution was found by limiting the Convention to commercial choice of court agreements, which resulted in the 2005 Convention[11].

III Current Status

11. As was mentioned, on 1 October 2015 the 2005 Convention entered into force between two Parties: Mexico, first State to join the Convention in 2007, and the European Union. The Convention binds the EU itself, plus 27 of its 28 Member States. Denmark is not bound, due to its reservations under the Lisbon Treaty. But it is important to note that both the UK and Ireland, which recently declined to take part in Regulation No 650/2012 (the Successions Regulation), *are* bound by the Convention.

12. The fact that the UK and Ireland are on board is crucial, also for the Convention's future. It confirms the instrument's potential to bridge the divide between legal systems of the civil law and common law tra-

10) See Permanent Bureau, "Some reflections on the Present State of Negotiations on the Judgments Project in the context of the Future Work Programme of the Conference", in Hague Conference on Private International Law, *Proceedings of the Nineteenth Session, Tome I, Miscellaneous matters*, The Hague, Brill, 2008, 428-435.

11) Work is ongoing in The Hague on discussing the possibility of drawing up a convention on the recognition and enforcement of judgments in civil and commercial matters, possibly completed by rules on direct jurisdiction, see Prel. Doc. No 7A of November 2015 for the attention of the Council on General Affairs and Policy of the Hague Conference, *Report of the fifth meeting of the Working Group on the Judgments Project (26-31 October 2015) and proposed draft text resulting from the meeting*, https://assets.hcch.net/docs/06811e9c-dddf-4619-81af-71e8836c8d3e.pdf

ditions. There are additional indications that the Convention appeals to common law countries: the *Trans-Tasman Proceedings Arrangement* between Australia and New Zealand – two common law countries – which entered into force in 2013, is inspired by the Convention, and should pave the way for ratification at a later stage by these two countries; a recent Australian government study proposes the ratification of the Convention, together with the 2015 Hague Principles[12]. As already mentioned, Singapore – a common law jurisdiction – signed the Convention in March 2015, and a bill to implement the Convention was passed in Parliament on 14 April 2016. And the Convention's potential of bridging the civil and common law, is further illustrated by a bilateral agreement between Hong Kong and mainland China, which has also been inspired by the Convention, the *Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned*. And, as we shall see, the Convention has had a strong impact on the Brussels I Regulation (recast).

13. From a pan-European perspective, the developments in the USA regarding the Convention are of particular interest. Prof Ron Brand's paper describes and analyses the US position towards the ratification of the Convention. The reasons delaying the ratification process in the US have less to do with the Convention itself – which has been generally welcomed in the US – but more with the method of its implementation – at the federal or at the State level – a matter which the Convention, of course, leaves to national law, just as it expressly leaves it to national law to determine the internal allocation of jurisdiction (Article 5 (3)).

IV Relevance to South East European States

14. What, then, is the relevance of the Convention for South East Europe (SEE) – today and in future? Here we must make a distinction, between SEE countries that are Members of the EU, and those that are not – not yet.

A. SEE EU Member States

15. Regarding SEE EU Member States, Slovenia, Croatia, Romania, Bulgaria, Greece, the entry into force of the Convention has an immediate effect, but that effect is, for the moment, limited to the case where one party is based in the EU, and the other in Mexico. That follows

12) See *supra*, fn. 4.

from Article 26 (6) of the Convention which gives a specific rule for the relationship between the Convention and EU instruments.

16. According to Article 26(6)a), the Convention gives way to the Brussels I Regulation, not only if one of the parties is based in the EU, but also where none of the parties is based in the EU but resident in a third State, as long as that third State is not a Party to the Convention. And since there is, at the moment, only one State Party that is not a EU Member – Mexico – this means that in all other cases the Convention does not apply, and only Brussels I recast is applicable.

17. Moreover, according to Article 26 (6) b), even in the case where one of the parties is based in a State Party to the Convention, Brussels I recast applies to the recognition and enforcement of a judgment rendered under the Convention as between EU Member States.

18. So, for the time being, in relation to the SEE EU Member States, the Convention only applies when one of the parties to the choice of court agreement resides in Mexico, and the other in a EU Member State. To determine the residence of a company, the Convention offers four alternative criteria: that residence may be in the State of the statutory seat, the State under whose law it was incorporated, the State of the central administration, or the State of the principle place of business (Article 4 (2)). So a choice of court agreement between, say, an Albanian company whose principle place of business is in Mexico, and a company based in Spain will fall under the Convention. As more States join the Convention, its coverage will also increase.

B. SEE Non-EU Member States

19. Regarding SEE non-EU Member States, such as Bosnia-Herzegovina, Albania, Macedonia, Serbia, Montenegro, and Turkey, the entry into force of the Convention has no direct relevance. But the Convention's system, its philosophy, does have an *indirect* impact as it has inspired the revision of a number of Articles of the Brussels I Regulation (recast), which have brought those provisions in line with the Convention. Under VIII *infra* we will discuss this in more detail, but one aspect deserves to be mentioned right away, because it facilitates choice of court agreements designating a court in a EU Member State by two companies based in non-EU Member State.

20. This alignment concerns the removal of the requirement under the former Brussels I Regulation that in order for a forum selection

clause to be covered by the Regulation, at least one of the parties had to be based in an EU Member State. Under the previous text of Brussels I, the effects of a choice of court agreement, say, between a company in Sarajevo and a company in Skopje designating a court of an EU Member State – the courts of Vienna, Munich, Paris or London – would be determined, not by the Regulation, but by the *national law* of each EU Member State – Austrian, German, French, or English law (Art 23 Brussels I old).

21. But under the influence of the 2005 Hague Convention this residence requirement has been deleted from Brussels I (recast): its new Article 25 determines that if the parties, regardless of their domicile, have agreed that the court of an EU Member State has jurisdiction, that court shall have jurisdiction. No *forum non conveniens* doctrine and no *lis pendens* rule will interfere with that jurisdiction. This rule is a copy of one of the main rules of the Convention, Article 5 (1). So the companies in Sarajevo and in Skopje may now safely designate the High Court in London, knowing that that court will hear the case and that the judgment is enforceable throughout the European Union.

22. We will see (*infra* VIII) that the Brussels I (recast) regime on prorogation of jurisdiction is also in other respects, in essence, similar to the Convention's regime. This, of course, is helpful to companies in those cases where the chosen court is located in an EU Member State. If the chosen court is located in any *other* country, including any SEE country that is not an EU Member State, then jurisdiction and recognition and enforcement remain a matter for national law. Clearly, therefore, the way forward is…to join the Hague Choice of Court Convention.

V. Scope of the Convention

A. Limitations

23. The Convention's scope is limited in several respects, four of which should be mentioned here. The *first limitation* is in fact more apparent than real. According to Article 1, the choice of court provisions of the Convention, like the choice of law provisions of the Hague Principles, apply *"in international cases"*. Normally a treaty defines the conditions for internationality by imposing certain requirements, e.g. that the parties have their residence in different States. But the Convention, like the Hague Principles, takes the opposite perspective – *a transnational perspective*: a case is international *unless* the parties are

resident in the same Contracting State and all other elements of the dispute, apart from the choice of court agreement, are connected only with that State. So if two companies in Bosnia opt for jurisdiction of the court of Belgrade – assuming that both Bosnia and Serbia are Parties to the Convention – then the Convention applies, unless everything else is located in Bosnia.

24. The *second limitation* is that the Convention only applies to *exclusive* choice of court agreements. That means that it does not apply to so called asymmetric agreements, e.g., international loan agreements where banks often reserve for themselves the choice between the court of their own, the lender's, residence and the court of the borrower, while the borrower may only sue the lender before the court of the lender's residence. The main reason for the limitation to exclusive agreements is to avoid complexity. Inclusion of non-exclusive agreements would have made it necessary to include a *lis pendens* rule at the jurisdiction stage, which, however, is complicated. We will see later (infra No 58) that States may extend the recognition and enforcement rules of the Convention to judgements based on non-exclusive choice of court agreements: Article 22.

25. The *third limitation* is that the Convention only applies to *civil or commercial matters*. But this includes choice of agreements to which the State or State agency is a party (Article 2(5)), acting in a commercial capacity, *iure gestionis* (not as a government, *iure imperii*).

26. The *fourth limitation* relates to the formal validity of the choice of court agreement. The Convention only applies to agreements that are concluded or documented in *writing,* including through *electronic means* (Article 3 c)). Contrary to Brussels I (recast), Article 25 (1) b) and c), choice of court agreements in another form accepted in business practices or according to common usages in certain business types are not covered by the 2005 Convention.

B. Exclusions

27. The Convention, like the Hague Principles in respect of choice of law, only applies to commercial choice of court agreements, between parties of comparable bargaining power. Vulnerable parties are taken care of by excluding contracts to which they are parties from the scope of the Convention. Therefore, *consumer* and *employment* contracts are excluded (Article 2 (1)). Brussels I has similar restrictions to forum selection, to which it adds certain insurance contracts. So, in order to

align the two instruments, the EU made a declaration, under Article 21 of the Convention, to the effect that it excludes such choice of court agreements in certain insurance matters, which otherwise would be covered[13].

28. Then there follow a range of exclusions based, not on a lack of balance in economic power between the parties, but mainly on the nature of the subject matter. It is a long list, but in the case of many of these exclusions, a choice of court agreement will not come into play in the first place (Article 2 (2)). They fall into three groups,

(i) (Essentially) non-contractual matters: family law, incl. 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 matters; nuclear liability; and of entries in public registers.

(ii) Certain specific contracts: carriage of passengers and goods; tenancies of immovable property; and

(iii)Intellectual property matters: this was a hotly debated exclusion. The validity of IP rights and infringement proceedings, which do not constitute a breach of some contract between the parties, are excluded – these rights generally arise from the act of the State, and do not lend themselves to choice of court. But *licensing* contracts are *included*.

29. Also proceedings on the validity and infringement of *copyright and related matters* (the copyright of the writer of a song, and the related right of the singer-performer), which arise with the creation of the new work or the performance, and do not depend on a system of deposit or registration, are *included*.

30. The Convention specifically provides that insurance and reinsurance contracts are *included* even if those contracts concern excluded matters (Article 17).

31. Finally, not all judgments are covered: *Interim measures of protection* are *excluded* (Article 4(1); Article 7). So both jurisdiction and the recognition and enforcement of such measures are left to domestic law[14].

13) For the text of the declaration, seehttps://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1044&disp=resdn.

14) It may be noted that Brussels I (recast) has a different rule in its Article 2 (a) (2).

VI. Issues addressed by the Convention

32. Which are the main issues the Convention aims to resolve? In the absence of the Convention, questions of jurisdiction and recognition and enforcement are matters for national law, or, in the case of a federal system, e.g. in the US, even of sub-national domestic law, except in so far as treaties apply. That leads to a number of uncertainties, of risks, which may cause parties not to opt for choice of court agreements but to resort to arbitration:

33. Risk no 1: the court designated in the choice of court agreement may decide not to hear the case, because (1) it finds that it does not have jurisdiction at all, or (2) it considers the agreement to be non-exclusive, or (3) it considers that another court should hear the case.

The Convention eliminates these various risks: *First*, under Article 5(1), the court must accept its jurisdiction by virtue of the agreement. *Secondly*, Article 3 b) establishes the presumption that the agreement is exclusive. *Finally*, Article 5 (2) prohibits the court from declining its jurisdiction on the ground that the dispute should be decided by another court.

34. Risk no 2: *another court* than the chosen court considers that it has jurisdiction to hear the case, despite the agreement, because (1) it considers that it is the court first seized, or (2) it finds that the agreement is permissive only and not exclusive, or, (3) it considers that the agreement is invalid under its own law.

The consequences may be dramatic for the defendant, especially if the other court bases its jurisdiction on an exorbitant ground of jurisdiction, such as service on a non-resident defendant during a short visit in a State of the document instituting the proceedings("tag jurisdiction"), or the mere presence of property belonging to the defendant within that State.

The 2005 Convention deals with each of these problems. *First*, Article 6 firmly gives priority to the party's chosen court over other courts. *Secondly*, the choice of court agreement is deemed to be exclusive, not permissive. *Thirdly*, in order to determine the substantive validity of the agreement, the other court must apply not its own law, but the law of the State of the chosen court (Article 6 a)).

35. Risk no 3: the judgment given by the chosen court is not recognised or enforced abroad. Article 8 provides that it *must* be recognised

and enforced, unless one of the exceptions of Article 9 applies – or, as we shall see, Articles 10 and 11 come into play.

VII. Main Rules

First Main Rule – Article 5:The chosen court must hear the case

36. According to the main rule of Article 5 (1), the chosen court may only refuse its jurisdiction when it considers the *agreement null and void under its law*. That includes the case where the agreement is null and void because one of the parties lacked the capacity to agree on the forum selection, e.g. because the company acted without the required consent of the board.

37. Article 5 (2) provides that the chosen court "*shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State*". This provision eliminates both the *forum non conveniens* and *lis pendens* doctrines, and has its counterpart in the second main rule, infra No 40.

38. The Convention does not contain a general provision to protect a weaker party parallel to the 1965 Choice of Court Convention's Article 4 (3), according to which the choice of court agreement "*shall be void or voidable if it has been obtained by an abuse of economic power or other unfair means*". Under the 2005 Convention a choice of court agreement may be void or voidable but only if the law of the chosen forum so provides.

39. Article 5 (3) of the Convention provides that subject matter jurisdiction, and the internal allocation of jurisdiction – questions of venue – are not covered by the Convention, but by domestic law, see the contribution by Prof Ron Brand.

B. Second Main Rule – Article 6: Other courts must suspend or dismiss proceedings

40. This rule is at odds with the doctrine which the Court of Justice of the European Union accepted in *Gasser v. MISAT* in 2003[15]. In that case the Court gave precedence to the Italian court, seized by the Italian party, rather than to the Austrian court chosen by *both parties*. This decision has been widely criticized, because it favoured an inward looking formalism over the principle of party autonomy. In fact, it opened the door to delaying tactics ("firing the Italian torpedo").

15) CJEU, 9 December 2003, Erich Gasser GmbH v MISAT Srl., Case C-116/02. See also *infra*, No 52.

41. Article 6 of the Convention reverses *Gasser*: priority is given to the chosen court. Only if the chosen decides not to hear the case (Article 6 e)), then the other court may assume jurisdiction. Article 6 also excludes the *forum non conveniens* exception. So, if the parties have chosen the court of a Contracting State, they can, in principle, be sure that no other court will hear the case. That also eliminates any exorbitant ground upon which the other court could have based its jurisdiction, e.g. service on the defendant of the document instituting the proceedings, or presence of property belonging to the defendant within that State.

42. There are a number of limited exceptions to this main rule:

(i) substantive invalidity of the choice of court agreement – but here the other court may not apply its own law but must apply the law of the chosen court. This is a more precise rule than under the New York Arbitration Convention, which does not specify what law must be applied to determine the validity of the arbitration agreement, so that the court remains free to apply its own law.

(ii) lack of capacity of one of the parties, according to the law of the court seized. But incapacity may also lead to nullity under paragraph a), so that lack of capacity is determined *both* by the law of the chosen court and that of the other court seized.

(iii) manifest injustice/manifest violation of public policy. A narrow concept of public policy would only cover public interests. Manifest injustice was added to also cover the exceptional case where a party would not get a fair trial in the State of the chosen court, or where the agreement was the result of fraud.

(iv) the agreement cannot reasonably be performed. This covers the case where, e.g., a war in the State of the chosen court would make it impossible to bring proceedings there.

C. Third Main Rule – Article 8: The judgment rendered by the chosen court must be recognised and enforced

43. This rule is subject to a limited number of exceptions, listed in Articles 9-11. Article 8 (5) adds one more specific case, namely where the chosen court has transferred the case to another court in the same State. In principle, the judgment of the court to which the transfer took place must also be recognised and enforced. But if the chosen court had discretion to transfer the case, and the party against whom the judgment

has been rendered had objected to the transfer, then recognition and enforcement may be refused.

44. According to Article 9 recognition and enforcement may be refused in the following cases:

a) the choice of court agreement was *null and void*, again, *under the law of the State of the chosen court*, unless that court has determined that the clause was valid. This will only apply where the chosen court based its jurisdiction on another ground than the choice of court agreement, e.g., on the defendant's domicile.

b) *incapacity*: under the law of the chosen court and under the law of the court addressed.

The next three exceptions are all concerned with procedural fairness:

c) *improper* notification

d) *fraud*, e.g., deliberate service on the wrong address, or party seeks to bribe court, or deliberately conceals key evidence.

e) *public policy*

f) and g) *inconsistent judgments*: both the case where a contrary judgment between the same parties was rendered by a court in the State addressed – that judgment has priority, whether given before or after the judgment – and where the contrary judgment was given by another foreign court; then the requirements are more severe and the judgment must be an earlier judgement based on the same cause of action.

44. Article 10 (2) adds another ground for refusal, prompted by the fact that under the doctrine of issue estoppel, collateral estoppel, or issue preclusion, courts in common law countries are under certain circumstances required to recognise rulings on preliminary questions given in an earlier judgment. Article 10 (2) makes it clear that there is no such obligation under the Convention in respect of judgments to the extent that they are based on a ruling on a matter excluded by the Convention. In other words, *recognition and enforcement may be refused to the extent that the judgment was based on a ruling on a matter excluded from the scope of the Convention*.

45. That goes far, and therefore Art 10 (3) limits the exception regarding the validity of intellectual property rights other than copyright: *recognition and enforcement may be refused only when the ruling on the validity of a patent or trademark is inconsistent with another de-*

cision of the courts of the State under the law of which the intellectual property right arose, or if there are proceedings pending in that State.

46. A final ground of *partial refusal* is contained in Art 11. It addresses the problem of *punitive* exemplary or treble *damages*, which you find in some legal systems. The Convention permits refusal of recognition and enforcement in so far, and only in so far, as damages awarded go beyond compensation of the victim.

VIII. Impact Choice of Court Convention on the Brussels I (recast) Regulation

47. The Convention has been a major source of inspiration for the revision of the rules on choice of forum (prorogation) of Brussels I. We saw already that under the recast, residence of one of the parties in an EU Member State is no longer required. Interestingly, Brussels I (recast) does not even require that the case is international, and so appears to be more liberal than the Convention, but in practice that does not make much difference. The change will be welcomed by SEE non-EU Member States, because companies in Sarajevo, Skopje, Tirana, etc., can now benefit from the Regulation when they designate a court of an EU Member State in their contract.

48. The next four alignments are not only relevant to a choice of court agreement between companies in non-EU SEE Member States, but also to choice of court agreements between a party in a SEE EU Member State, say, based in Ljubljana, and a party based in a SEE non-EU Member State, e.g. Podgorica, when they designate the court of Graz, Hamburg, Marseille or Glasgow.

49. First, Brussels I (recast) now provides a rule on the substantive validity of the choice of court agreement. There was no such rule in the previous Brussels I Regulation. Article 25 provides: the court shall have jurisdiction unless the agreement is null and void under the law of the chosen court. So, if the parties designate the court of Vienna, that court will apply Austrian law, including its private international law rules, to determine the validity of the choice of court agreement, and not Bosnian, Macedonian, Slovenian or Montenegro's law. This rule is inspired by the Convention, Article 5 (1) of which, as we have seen, has the same rule.

50. Secondly, Brussels I (recast), Article 25, paragraph 1, provides that such jurisdiction shall be *exclusive unless the parties have agreed*

otherwise. This rule, which existed already under the previous version of the Regulation, parallels Article 3 b) of the Convention, which says that a choice of court agreement is deemed to be exclusive, unless the parties have expressly provided otherwise.

51. Thirdly, Article 25, paragraph 5 Brussels I (recast) now mirrors Article 3 d) of the Convention, and clarifies that the validity of the choice of court agreement is *independent of the validity of the contract itself*. So, even if the contract between the company in Bosnia and the company in Macedonia were invalid, the validity of the choice of court agreement will be determined by Austrian law – and if it is valid under that law, the court will decide on the consequences of the invalidity of the contract.

52. Fourthly, and this is perhaps the most significant change, Article 31 (2) of Brussels I Recast now provides that *parties' consent to the jurisdiction prevails over pending proceedings in another Member State*. This rule corresponds with Article 6 of the Convention, and does away with the ruling of the CJEU judgment in *Gasser* referred to *supra* No 40.

53. In summary:

choice of court agreements between parties in SEE non-Member States in favour of a court of an EU Member State are now covered by Brussels I recast, and the court designated must accept its jurisdiction.

a court of an EU Member State designated in a choice of court agreement between such parties – one in Bosnia, the other in Macedonia – or between parties one of which is based in a non-EU Member State – Montenegro – and one in an EU Member State – Slovenia –has jurisdiction, unless the agreement is invalid under the law of the chosen court; that jurisdiction is exclusive; the court must determine the validity of the agreement independently of the validity of the contract itself; and the parties' consent takes priority over pending proceedings in other EU Member States.

54. So, it will be seen that, in many ways, the Choice of Court Convention already transpires, so to speak, through Brussels I (recast). Its regime on prorogation of jurisdiction is in essence similar to that of the Convention. This is very helpful to companies, which may now count on similar outcomes, whether Brussels I (recast)or the Convention applies. But, once again, all this applies only if and when the chosen court

is the court of an EU Member State.

IX. Optional declarations

55. The Convention permits Contracting States, and the EU, to adapt the Convention to some of their needs, by allowing them to make a limited number of declarations.

56. Article 19 permits a Contracting State to declare that its courts will not hear completely foreign cases, cases which have no connection with that State, apart from the choice of forum. Such a declaration would assist a State fearing a flood of foreign litigants with no economic relation to that State. It is an unlikely hypothesis.

57. Article 20 permits a declaration to be made to refuse recognition and enforcement where the requested State perceives the case as an internal case. Again, this is not a very likely situation.

58. Article 21 was already discussed, supra No 27. The use made by the EU of Article 21 to exclude certain insurance contracts from the scope of the Convention is interesting, because the detailed declaration made by the EU is not a typical example of what was primarily on the negotiators' minds when they drafted this article with the aim of enabling its application to "discrete areas of the law of the kind excluded by Article 2 (2)"[16]. Rather, they thought of a possible additional exclusion such as Canada had mentioned as a possibility: choice of court agreements concerning "matters related to asbestos". But the EU declaration certainly meets the requirements of clarity and precision required by Article 21. It must be noted that this declaration has reciprocal effect, so that other Contracting States will not be required to apply the Convention to the matter excluded under this Article where the chosen court is in the EU.

59. Article 22 permits a declaration, effective on the basis of reciprocity, to recognise and enforce non-exclusive choice of court agreements. The declaration applies to *recognition and enforcement only,* not to jurisdiction provisions. Such a declaration would give a significantly wider scope to the Convention. The distinction between exclusive/non-exclusive choice of court agreements concerns the possible designation of courts of multiple States as opposed to the courts of a single State. In the relations between two States having made the declaration of Article 22, a judgment based on a non-exclusive choice of court agreement

16) See Explanatory Report (*supra* fn. 1), Nos 234-239

made in one State will be recognised and enforced in the other. Article 22 phrases the exceptions to the recognition rule somewhat differently than Article 9. But it may be assumed that the same restrictions apply[17]. The court of origin must also be the court first seized.

X. Conclusion

60. The 2005 Hague Choice of Court Convention offers companies, in particular small and medium enterprises, a parallel instrument to the 1958 New York Arbitration Convention that will become increasingly attractive as more States join the 2005 Convention. Its ratification by South East European States that are not (yet) Members of the European Union is therefore to be recommended. The Convention has already had a significant impact on bilateral negotiations on instruments on choice of court agreements, and, in particular, on the latest revision of the Brussels I Regulation. This has resulted in a high degree of parallelism between the prorogation regime of Brussels I recast and the 2005 Convention, to the benefit of companies involved in transnational transactions.

17) See R.A. Brand and P. Herrup, *The Hague Convention on Choice of Court Agreements, Commentary and Documents*, Cambridge University Press, Cambridge etc., 2008, 156-157.

ABSTRACT

The *Hague Convention of 30 June 2005 on Choice of Court agreements* entered into force on 1 October 2015 between the European Union (EU) and Mexico. The Convention was previously signed by the United States of America (USA, US) (19 January 2009) and Singapore (25 March 2015), and subsequently by Ukraine (21 March 2016)[18]. Its purpose is to ensure the effectiveness of international commercial choice of court agreements. It aims at filling the governance gap that, in the absence of a uniform global legal regime, currently exists concerning the effect of choice of court agreements and the recognition and enforcement of judgments based on such agreements.

Keywords: Hague Convention on Choice of Court Agreements; Choice of Court Agreements.

18) Current status at: https://www.hcch.net/en/instruments/conventions/status-table/?cid=98

HAŠKA KONVENCIJA O PROROGACIONIM SPORAZUMIMA IZ 2005. GODINE

SAŽETAK

Haška konvencija od 30. juna 2005. godine o prorogacionim sporazumima stupila je na snagu 01. oktobra 2015. godine između Evropske unije (EU) i Meksika. Konvenciju su ranije potpisale Sjedinjene Američke Države (USA) 19. januara 2009. godine i Singapur 25. marta 2015. godine, a kasnije i Ukrajina 21. marta 2016. godine. Svrha ove Konvencije je da osigura efektivnost međunarodnih trgovačkih prorogacionih sporazuma. Konvencija stremi ka nadomještanju praznine u regulaciji koja, u nedostatku jedinstvenog globalnog pravnog režima, trenutno postoji u odnosu na efekat prorogacionih sporazuma i priznanja i izvršenja presuda donesenih na temelju takvih sporazuma.

Ključne riječi: Haška konvencija o prorogacionim sporazumima, prorogacioni sporazumi.