

Hague Choice of Court Convention and Brussels Recast Regulation

EXCLUSIVE JURISDICTION CLAUSES IN COMMERCIAL CONTRACTS

AN OVERVIEW

Contents

THE HAGUE CHOICE OF COURT CONVENTION OF 2005 2

 Introduction..... 2

 Key Points about the Hague Convention 2

 The Scope of the Hague Convention 3

Exclusive Choice of Court Agreements..... 3

Temporal Scope 5

Subject Matter Scope and Exclusions 5

The Effect of the Hague Convention 6

 Jurisdictional Effects (Chapter II of the Hague Convention)..... 6

The Chosen Court 6

The Non-Chosen Court 7

 Recognition and Enforcement (Chapter III of the Hague Convention) 7

General Obligation (Article 8 of the Hague Convention) / General Grounds Of Refusal (Article 9 of the Hague Convention) 7

Ancillary Provisions (Articles 11-15 of the Hague Convention) 8

 Relationship With Other International Instruments 8

Other Treaties 9

Rules of A Regional Economic Integration Organisation..... 10

 The Hague Convention in the EU Legal Order..... 10

Jurisdictional Effects 10

Recognition and Enforcement of Judgments..... 11

THE BRUSSELS RECAST REGULATION 13

 Introduction..... 13

 Differences between the Brussels I Regulation and the Brussels Recast Regulation 13

Strengthening the Arbitration Exclusion..... 13

 Operation of jurisdiction clauses in favour of EU courts..... 14

EU exclusive jurisdiction clauses versus EU lis pendens 14

“Core” rules on jurisdiction clauses in favour of EU courts 15

Non-EU lis pendens 16

Recognition and Enforcement of EU judgments 16

THE HAGUE CHOICE OF COURT CONVENTION OF 2005

Introduction

1. The underlying objective of the Hague Convention on Choice of Court Agreements of 2005 (“the Hague Convention”) is the promotion of the use of exclusive choice of court agreements (“ECCAs”) in international contracts. This is achieved by encouraging judicial cooperation and imposing obligations requiring effect to be given to ECCAs and to the judgments of courts that are nominated under the Hague Convention.
2. The Hague Convention entered into force on 1 October 2015. Initially its effect was limited in scope to the EU Member States (except Denmark) and Mexico, its significance has grown as more States became parties – such as Singapore. The USA and Ukraine have signed but not ratified the Hague Convention.
3. The Hague Convention was finalised in 2005 by the Hague Conference on Private International Law. The Hague Convention was accompanied by an official Explanatory Report by Professors Hartley and Dogauchi (“the Explanatory Report”) as an interpretative guide.
4. The Hague Convention applies only to exclusive choice of court agreements. Under the Hague Convention, ‘exclusive’ has a technical definition. The Hague Convention aims to increase certainty for contractual parties and pursues this:
 - 4.1. by obliging the Contracting States to uphold an ECCA made in favour of a Contracting State. An ECCA must be upheld by a domestic court whether or not the Contracting State in question is the chosen forum or not;
 - 4.2. by providing that judgments from a chosen domestic court are entitled to be recognised and enforced in other Contracting States under the Hague Convention.
5. It is not anticipated that the Hague Convention will have a significant impact on the position under EU Regulation 1215/2012 (“the Brussels Recast Regulation”), which will take primacy in matters between EU Member States. The main impact of the Hague Convention will therefore be on matters where there is an ECCA between an EU Member State and a non-EU Contracting State.

Key Points about the Hague Convention

6. The Hague Convention provides a new treaty basis upon which a court chosen in an ECCA may (provided there is no other relevant treaty or instrument to which the Hague Convention must give way: see Article 26 of the Hague Convention) be required to analyse the effect of the ECCA. Where the chosen court is in an EU Member State this is unlikely to be as significant an issue as compared to where a non-EU Member State court

is chosen. The application of *forum non conveniens* is excluded by Article 5(2) of the Hague Convention.

7. However, an opinion has been expressed, given that frequently chosen forums will often uphold exclusive jurisdiction clauses in any event, that the Hague Convention is unlikely to cause a sea change in attitudes towards contractual jurisdiction agreements.
8. The Hague Convention also has important provisions on recognition and enforcement of judgments. The Hague Convention aims to remove some of the uncertainties surrounding the results that might ensue when enforcing judgments in jurisdictions where enforcement is difficult and where domestic law can produce unpredictable results.
9. The Hague Convention is a technical instrument. At least four key considerations can be identified in order for the recognition and enforcement regime to be operated:
 - 9.1. the choice of court agreement must satisfy the particular technical definition of “*exclusive choice of court agreement*” in the Hague Convention. (Whilst there is a mechanism for the Hague Convention’s recognition and enforcement regime to apply to a non-exclusive choice of court agreement, there is a threshold condition that both the Contracting State of the designated court and the Contracting State where recognition and enforcement are sought must have entered a declaration to that effect);
 - 9.2. the Hague Convention must be in force in the State of the chosen court;
 - 9.3. the Hague Convention must be in force (or in the process of coming into force) in the State where recognition and enforcement is sought;
 - 9.4. the contract and disputes arising out it must not fall within one of the excluded categories in the Hague Convention.
10. There must also be no declarations made either by the Contracting State of the designated court or the Contracting State in which recognition and enforcement is sought which may adversely affect the operation of the recognition and enforcement regime.

The Scope of the Hague Convention

11. In any case, it will be important to determine whether the case comes within the scope of the Hague Convention in order for it to apply.

Exclusive Choice of Court Agreements

12. The Hague Convention, as stated, above, is only applicable to ECCAs. The important definition is found in Article 3(a) of the Hague Convention: an agreement which “...*designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts*”.

13. This definition has two key requirements:

13.1. The Designated Court:

13.1.1. the chosen court must be either the courts of one Contracting State in a general sense (e.g. “*the courts of England & Wales*”) or named specific courts of a Contracting State (e.g. “*the Commercial Court of Paris*” or “*either the Commercial Court of Paris or the Commercial Court of Lyons*”). These examples are given in Paragraph 104 of the Explanatory Report;

13.1.2. where a Contracting State’s different territorial units have different legal systems, Article 25 of the Hague Convention generally allows those territorial units to be treated as separate States for the purposes of the Hague Convention. It may therefore be advisable to avoid choosing specific courts in two different territorial units of the same State – as this runs the risk that the clause will not qualify as an ECCA;

13.2. The Designation Must Be To The Exclusion of Any Other Courts:

13.2.1. the clause must not allow or canvass the possibility of permitting proceedings before any court other than the one named in the choice of court agreement;

13.2.2. best practice would seem to be to use the word “exclusive” when making this contractual choice;

13.2.3. thus:

13.2.3.1. a choice of court agreement which uses the language of “non-exclusive jurisdiction” will, axiomatically, not be an ECCA;

13.2.3.2. neither will a choice of court agreement designating the courts of two (or more) States;

13.2.3.3. neither will a choice of court agreement designating the courts of one Contracting State but also permitting proceedings in any other court which otherwise would be able to take jurisdiction;

13.2.3.4. and neither will an ‘asymmetrical’ jurisdiction clause which, while restricting one party, allows another party to bring proceedings in a different forum.

14. If the choice of court agreement does not qualify as an ECCA by satisfying the technical definition in Article 3 of the Hague Convention, then the Hague Convention will not be applicable and neither will any consequent judgment will be able to take advantage of the recognition and enforcement provisions.

15. It has been suggested that the Hague Convention should not apply where an arbitration clause is involved. Where a choice of court agreement exists alongside an arbitration agreement (i.e. where the parties have agreed to arbitrate but with an option to litigate exercisable by one party), and that choice of court agreement otherwise qualified as an ECCA, then if litigation is commenced validly pursuant to that choice of court agreement, there is a question as to whether the existence of the arbitration agreement precludes the contract’s dispute resolution clause from being treated as an ECCA under the Hague Convention.

Temporal Scope

16. Article 16 of the Hague Convention governs the transitional aspects, and its entry into force:

16.1. the Hague Convention will only apply to ECCAs concluded after the Hague Convention has entered into force for the Contracting State of the chosen court (see Article 16(1) of the Hague Convention);

16.2. the Hague Convention will only apply to judgments emanating from proceedings that were commenced in a Contracting State after the Hague Convention entered into force in that State (see Article 16(2) of the Hague Convention). It may still be necessary to examine whether the ECCA would be valid as a matter of domestic contract law in the jurisdiction where recognition and enforcement is sought.

Subject Matter Scope and Exclusions

17. The Hague Convention was not intended to apply to domestic cases (i.e. where the parties are resident in the same Contracting State and all other elements of the dispute are connected only to that same State). In terms of jurisdiction, the concept of residency, for the purposes of the Hague Convention, is defined as the State:

17.1. where it has its statutory seat;

17.2. under whose law it was incorporated or formed;

17.3. where it has its central administration; or

17.4. where it has its principal place of business (see Article 4(2) of the Hague Convention). For the purposes of recognition and enforcement a case will not be domestic simply where it involves a foreign judgment (see Article 1 of the Hague Convention).

18. The Hague Convention applies only to “*civil or commercial matters*” (see Article 1(1) of the Hague Convention). This is unlikely to be a controversial or problematic provision.

19. The Hague Convention expressly excludes some specific civil and commercial matters from its scope:

19.1. ECCAs in consumer or employment contracts (see Article 2(1)(a)-(b) of the Hague Convention);

19.2. by virtue of Articles 2(2)(a)-(p) of the Hague Convention, a number of matters are excluded, including:

19.2.1. insolvency;

19.2.2. carriage of passengers or goods;

19.2.3. antitrust/competition law;

19.2.4. rights in rem in (and tenancies of) immovable property;

19.2.5. validity, nullity or dissolution of legal persons and the validity of decisions of their organs;

19.2.6. validity or infringement of intellectual property rights;

19.2.7. validity of entries in public registers;

- 19.3. arbitration (which is deliberately excluded by Article 2(4) of the Hague Convention in order to avoid undermining the efficacy of the New York Convention).
20. Insurance/reinsurance contracts, even if the insurance contract relates to subject matter to which the Hague Convention is not applicable, will still be within the scope (see Article 17(1)-(2) of the Hague Convention).
21. If the choice of court agreement falls outside the scope of the Hague Convention, then its effect will be determined by the relevant national law rules in the relevant Contracting State. This will also be the case where the choice of court agreement does not qualify as an ECCA for the purposes of the Hague Convention.

The Effect of the Hague Convention

22. Where a qualifying ECCA is before the court of a Contracting State, then:
- 22.1. the Contracting State is obliged to uphold the jurisdictional effects of the ECCA; and
- 22.2. the Contracting States are obliged to recognise and enforce a resulting judgment given by the designated Contracting State court.

Jurisdictional Effects (Chapter II of the Hague Convention)

23. The chosen and non-chosen courts in Contracting States are placed under the following obligations.

The Chosen Court

24. Article 5 of the Hague Convention grants jurisdiction to the court (or courts) of the Contracting State chosen in the ECCA unless the ECCA is “*null and void under the law of that State*” (i.e. its national law, including conflict of laws rules). This is the primary exception to the obligation that the chosen court must uphold the ECCA.
25. This rule covers matters of substantive validity but does not extend to formality requirements (which are provided in Article 3(c) of the Hague Convention: the choice of court agreement must be in writing or any other means of communication which renders information accessible).
26. Article 5(2) of the Hague Convention precludes the chosen court from declining to exercise jurisdiction on the grounds that the dispute ought to be decided in the courts of another State (i.e. the national courts cannot apply *forum non conveniens* or *lis pendens* in any other court in order not to hear a dispute governed by an ECCA in their favour).
- 27.

The Non-Chosen Court

28. The courts of non-chosen Contracting States are obligated by Article 6 of the Hague Convention to uphold the ECCA by suspending or dismissing legal proceedings commenced to which the ECCA applies if they are brought before them, unless:
- 28.1. the ECCA is null and void under the national law of the State of the chosen court;
 - 28.2. one of the parties lacked capacity to conclude the ECCA under the law of the State of the court seised;
 - 28.3. there is manifest injustice or it was manifestly contrary to public policy in the State of the court seised;
 - 28.4. the ECCA cannot reasonably be performed (for exceptional reasons beyond the control of the parties);
 - 28.5. the chosen court has already declined jurisdiction.
29. Article 7 of the Hague Convention establishes that interim protective measures are not governed by the Hague Convention.

Recognition and Enforcement (Chapter III of the Hague Convention)

30. The Hague Convention's provisions on recognition and enforcement fall into three categories.

General Obligation (Article 8 of the Hague Convention) / General Grounds Of Refusal (Article 9 of the Hague Convention)

31. Article 8(1) of the Hague Convention establishes the general obligation to recognise and enforce judgments placed on Contracting States. A "judgment" is defined as "any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under [the Hague Convention]. An interim measure of protection is not a judgment" (see Article 4 of the Hague Convention). Where such judgment is given by a court of a Contracting State designated in an ECCA it must be recognised and enforced in other Contracting States, and may only be refused recognition and enforcement on the specific grounds in the Hague Convention.
32. Pursuant to Article 8(2) of the Hague Convention, the court from which recognition and enforcement is sought may not undertake a review of the judgment on the merits and (if the original court founded its jurisdiction on the ECCA) is bound by any findings of fact on which the original court founded its jurisdiction, unless the judgment was given in default.
33. A judgment shall only be given recognition if it would have effect in the original Contracting State and must be enforceable in the original Contracting State (see Article

8(3) of the Hague Convention). If the judgment is subject to review in the original Contracting State or if the time limit for seeking ordinary review has not expired, then Article 8(4) of the Hague Convention makes provision for recognition and enforcement to be postponed or refused.

34. Articles 9(a)-(g) of the Hague Convention lay out the grounds on which recognition and enforcement may be refused, including:
- 34.1. the ECCA is null and void under the law of the State of the chosen court, unless the chosen court has determined that it is valid;
 - 34.2. a party lacked capacity to conclude the ECCA under the law of the State of the court seised;
 - 34.3. failure to comply with provisions regarding adequacy of notice and compatibility of notice periods with national law service principles;
 - 34.4. judgments obtained by fraud in connection with a matter of procedure;
 - 34.5. manifest incompatibility with public policy of the requested state;
 - 34.6. inconsistency with a judgment given in the requested State in a dispute between the same parties;
 - 34.7. inconsistency with an earlier judgment from another state in defined circumstances.
35. If one of the grounds in Articles 9(a)-(g) of the Hague Convention applies then there the national court where recognition and enforcement is sought may exercise its discretion to refuse.

Ancillary Provisions (Articles 11-15 of the Hague Convention)

36. Articles 8-9 of the Hague Convention are of general application. Articles 11-15 of the Hague Convention govern some more specific issues related to recognition and enforcement. In summary:
37. Article 11 of the Hague Convention concerns damages. It provides discretion to the court to refuse recognition and enforcement if the judgment has awarded damages which do not compensate a party for actual loss or harm suffered. The Hague Convention does not require recognition and enforcement of awards of punitive or exemplary damages.
38. Article 12 of the Hague Convention extends Chapter III to judicial settlements approved by, or concluded before, a court designated in an ECCA.
39. Chapter III of the Hague Convention (in Articles 13-15) contains some procedural provisions regarding recognition and enforcement proceedings.

Relationship With Other International Instruments

40. There are a several regional and bilateral legal arrangements covering questions of jurisdiction and the recognition and enforcement of judgments as between States. Within

Europe, such issues are chiefly governed by the Brussels Regime, i.e. the Brussels Recast Regulation and the 2007 Lugano Convention. Other examples exist in the Americas.

41. The Hague Convention has a potentially global nature, thus any given Contracting State may find itself party to both the Hague Convention and another instrument governing jurisdiction and recognition/enforcement issues. Where there are inconsistencies, questions of applicability will arise. The Hague Convention clarifying the prioritisation of different legal instruments. These are set out in Article 26 of the Hague Convention.

Other Treaties

42. Articles 26(1)-(5) of the Hague Convention deal with conflicts between the Hague Convention and other treaties.
43. Article 26(1) of the Hague Convention states, as a rule of interpretation, that the Hague Convention must be interpreted, so far as possible, to be compatible with other treaties in force for the Contracting States (whether those other treaties were concluded before or after the Hague Convention entered into force for the particular Contracting State).
44. Where the rule in Article 26(1) of the Hague Convention does not resolve the inconsistency, there are four “*give-way*” rules which, if satisfied, cause the Hague Convention to yield in favour of the other relevant treaty.
45. Article 26(2) of the Hague Convention is founded on the residency of the parties (as defined in Article 4(2) of the Hague Convention). It aims to preserve the conflicting treaty’s effect, unless States which are Contracting States to the Hague Convention but are not also party to that conflicting treaty can be taken to have an interest in seeing the Hague Convention being applied. The rule provides that the Hague Convention shall not affect the application of the conflicting treaty - only if one or more of the parties is resident in a Contracting State that is also not a Party to the relevant, does the Hague Convention prevail).
46. Article 26(3) of the Hague Convention provides that the Hague Convention will give way where its application would not be consistent with the obligations of the Contracting State to any non-Contracting State under another treaty. This rule only applies to treaties that were concluded before the Hague Convention entered into force in the relevant Contracting State.
47. Article 26(4) of the Hague Convention addresses the recognition and enforcement of a judgment where both the original State and the State where recognition and enforcement is sought have concluded a separate treaty on the matter (whether before or after the Hague Convention) and where both are also Contracting States. Under this rule, the Hague Convention shall not affect the application of that other treaty, but the judgment

shall not be recognised or enforced to a lesser extent than would be made possible under the Hague Convention.

48. Where the Contracting State is a party to a treaty relating to a specific matter (i.e. on a discrete area of law), Article 26(5) of the Hague Convention allows that other treaty to take priority provided that the Contracting State has made a declaration to that effect.

Rules of A Regional Economic Integration Organisation

49. Article 26(6) of the Hague Convention governs the relationship between the Hague Convention and the rules of a Regional Economic Integration Organisation (“REIO”) and provides for two rules for the Hague Convention giving way:
- 49.1. Article 26(6)(a) of the Hague Convention is based on residency (in a mirror of Article 26(2) of the Hague Convention);
- 49.2. Article 26(6)(b) of the Hague Convention simply provides that the Hague Convention shall not affect any REIO rules on the recognition and enforcement of judgments as between REIO Member States.
50. Since the European Union is one of the clearest examples of an REIO, and has its own detailed set of rules governing jurisdiction and recognition/enforcement within the EU (i.e. the Brussels Recast Regulation), this is an important provision (at least until the UK exits the EU).

The Hague Convention in the EU Legal Order

51. Within the EU, jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is now governed by the Brussels Recast Regulation or, as regards Switzerland, Norway and Iceland, the Lugano Convention 2007. All of the EU Member States, with the exception of Denmark, became Contracting States to the Hague Convention on 1 October 2015.

Jurisdictional Effects

52. Choice of Court Agreements in Favour of EU Member State Courts: A choice of court agreement granting jurisdiction to an EU Member State court will generally be governed by Article 25 of the Brussels Recast Regulation which requires a chosen EU Member State court to take jurisdiction based on that clause and requires non-chosen EU courts to decline jurisdiction in the face of a jurisdiction clause in favour of elsewhere in the EU.
53. These are obviously similar obligations to those under Articles 5 and 6 of the Hague Convention in respect of ECCAs. However, the theoretical possibility exists that, whilst the Brussels Recast Regulation will take precedence in many cases (by virtue of Article 26(6)(a) of the Hague Convention), a situation could arise where one ECCA in favour of an EU Member State court may be governed by the Brussels Recast Regulation whilst another ECCA in favour of an EU Member State court will be governed by the Hague

Convention. Would a non-chosen EU Member State court have precisely the same obligations in the face of an ECCA in favour of elsewhere in the EU? In the limited circumstances where the Hague Convention takes priority over the Brussels Recast Regulation, does the non-chosen court have the obligation that would arise under the Brussels Recast Regulation to automatically stay proceedings when the chosen court is seised? Considerations of *forum non conveniens* are not available to an EU Member State chosen court when applying the Brussels Recast Regulation as a result of *Owusu v Jackson (C-281/02)* [2005] QB 801.

54. Choice of Court Agreements In Favour of Non-EU Contracting States: Here the Hague Convention may have a significant effect in addressing a controversial question under the Brussels Recast Regulation: to what extent can an EU Member State court with jurisdiction under the Brussels Recast Regulation decline to exercise it on the basis of a choice of court agreement in favour of a non-EU court?
55. Whilst an EU Member State court has a discretion under Articles 33-34 of the Brussels Recast Regulation to stay proceedings brought before them where the subject-matter is already before the courts of a non-EU Member State, this discretion is subject to certain conditions and thus is not regarded as a comprehensive solution.
56. The Hague Convention provides a mechanism by which an ECCA in favour of a non-EU Member State court can be given direct effect by an EU court in the face of jurisdiction based on the Brussels Recast Regulation. But this will only operate where: (1) the case falls within the basic scope of the Hague Convention; and (2) the “give-way” provision of Article 26(6)(a) of the Hague Convention must not operate in favour of the Brussels Recast Regulation.

Recognition and Enforcement of Judgments

57. Judgments From Other EU Member States: The recognition and enforcement of judgments will remain governed by the Brussels Recast Regulation (even if recognition and enforcement could otherwise fall within the scope of the Hague Convention) by virtue of Article 26(6)(b) of the Hague Convention.
58. Judgments From Other Non-EU Contracting States: Judgments from Contracting States not within the EU that are within the scope of the Hague Convention will be entitled to recognition and enforcement pursuant to the terms of the Hague Convention in every EU Member State. Where the original Contracting State and the EU Member State where recognition and enforcement is sought have their own separate arrangement for recognition and enforcement, that same arrangement may still be given effect if the Hague Convention’s “give-way” rules determine that it should.

THE BRUSSELS RECAST REGULATION

Introduction

59. In January 2015, EU Regulation 44/2001 (“the Brussels I Regulation”) was replaced by the Brussels Recast Regulation as the principal legislation governing jurisdiction and the recognition and enforcement of judgments from other EU Member States in civil and commercial matters in the EU courts.
60. The jurisdictional rules of the Brussels Recast Regulation apply to any proceedings instituted before an EU court on or after 10 January 2015.
61. The recognition and enforcement rules of the Brussels Recast Regulation are related to when the underlying substantive action (rather than the enforcement action) was commenced. The Brussels Recast Regulation will govern recognition and enforcement of judgments where the underlying proceedings were commenced on or after 10 January 2015. Proceedings instituted before 10 January 2015 will remain within the scope of the Brussels I Regulation (see Articles 66(1)-(2) of the Brussels Recast Regulation).
62. The Lugano Convention 2007 governs jurisdiction and the recognition and enforcement of judgments in civil and commercial matters as between the EU and Switzerland, Norway and Iceland (“the Lugano States”) and essentially applies the Brussels I Regulation provisions.
63. The Brussels Recast Regulation does not affect the Lugano Convention (see Article 73(1) of the Brussels Recast Regulation).

Differences between the Brussels I Regulation and the Brussels Recast Regulation

64. Generally, the substance of the Brussels Recast Regulation follows that of the Brussels I Regulation, and has been described as an evolution rather than a fundamental reworking. The recitals to the Brussels Recast Regulation emphasise that there is a need for continuity as regards the interpretation of these instruments (thus previous relevant case law from the Court of Justice of the European Union will still be applicable).
65. Notwithstanding the overall similarities, the Brussels Recast Regulation’s main changes lie in:
- 65.1. the strengthening of the arbitration exclusion;
 - 65.2. the operation of jurisdiction clauses in favour of EU courts;
 - 65.3. new rules concerning disputes pending outside of the EU; and
 - 65.4. the simplification of the procedure for the enforcement of EU judgments.

Strengthening the Arbitration Exclusion

66. There are certain “civil and commercial matters” that are expressly excluded from the scope of the Brussels Recast Regulation, including arbitration (see Article 1(2)(d) of the

Brussels Recast Regulation). The exclusion is justified on the basis that it is necessary to allow the EU courts to uphold arbitration agreements and awards free from the scheme of the Brussels Recast Regulation.

67. The scope of the arbitration exclusion has been the subject of debate previously. In *Allianz SpA v West Tankers (C-185/07)* [2009] 1 AC 1138, where England was the seat of the arbitration, the CJEU prohibited the English court from using an anti-suit injunction to restrain Italian court proceedings brought in breach of the arbitration agreement.
68. The CJEU decided that, although the application for the injunction were outside of the scope of the Brussels I Regulation, the application was not permissible because the injunction risked undermine the operation of the Brussels I Regulation in the Italian court proceedings.
69. The CJEU also decided that any decision from the Italian court concerning the validity of the arbitration agreement was a “judgment” within the Brussels I Regulation for the purposes of recognition/enforcement elsewhere in the EU, despite the fact that the Italian court had been improperly seised.
70. The Brussels Recast Regulation retains the arbitration exclusion but strengthens it. Recital 12 of the Brussels Recast Regulation clearly establishes:
 - 70.1. That, whilst there is nothing in the Brussels Recast Regulation preventing an EU Member State court from examining the validity of an arbitration agreement, any actual ruling on validity is unenforceable under the provisions of the Brussels Recast Regulation;
 - 70.2. That if an EU Member State court, notwithstanding an arbitration agreement, gives a substantive ruling on the underlying dispute then that cannot prejudice the recognition and enforcement of arbitral awards by EU courts under the New York Convention (which takes priority);
 - 70.3. Ancillary court proceedings related to arbitrations are not affected by the Brussels Recast Regulation.
71. The Brussels Recast Regulation clearly separates the arbitral process and court proceedings, hoping that there will be reduction in tactical litigation within the EU aiming to frustrate EU arbitration agreements.

Operation of jurisdiction clauses in favour of EU courts

EU exclusive jurisdiction clauses versus EU lis pendens

72. Under the Brussels I Regulation, a mandatory stay of proceedings was imposed on a second seised EU court where two courts were seised with the same subject matter, cause of action and same parties. This rule gave credence to tactical litigation, known as the “Italian torpedo”, by frustrating the progress of proceedings in the chosen court as a tool

to force a favourable settlement. As a result of *Turner v Grovit* (C-159/02) [2005] 1 AC 101, the use of anti-suit injunctions by an EU court to protect proceedings brought before it against court proceedings in other EU courts.

73. By virtue of Articles 31(2)-(3) of the Brussels Recast Regulation, a first seised EU court is required to stay its proceedings as soon as the designated EU court under an exclusive jurisdiction clause is seised. The non-chosen court will not be able to proceed at all unless and until the chosen court declines jurisdiction.
74. Recital 22 of the Brussels Recast Regulation further provides that the chosen court has priority in the determination of any issues of validity or scope of the jurisdiction clause. Once it has been seised the chosen court can proceed regardless of whether the non-chosen court has already come to a decision on staying the proceedings. There are some limits to the rule:
- 74.1. The Lugano Convention is not affected by the Brussels Recast Regulation. Thus “Italian torpedo” actions may still be possible as between the EU courts and the courts of the Lugano States;
- 74.2. The Brussels Recast Regulation itself contains exceptions which may apply:
- 74.2.1. where the party relying on the jurisdiction clause entered an appearance in the first seised court;
- 74.2.2. provisions regarding insurance, consumer or employment contracts apply, with the result that the jurisdiction clause should not be upheld;
- 74.2.3. where the parties have entered into conflicting agreements;
- 74.2.4. where the chosen court is seised first (see Article 31 of the Brussels Recast Regulation);
- 74.2.5. EU courts have general discretion (see Article 30 of the Brussels Recast Regulation) to stay proceedings if there are related actions pending elsewhere in the EU. However, where there is an exclusive jurisdiction agreement in favour of the second seised court, this discretion is confined to exceptional circumstances.

“Core” rules on jurisdiction clauses in favour of EU courts

75. Article 25(1) of the Brussels Recast Regulation contains the “core” rules on EU jurisdiction clauses. It requires that EU jurisdiction clauses be upheld provided that certain requirements are satisfied.
76. Where Article 23(1) of the Brussels I Regulation required at least one party to be EU-domiciled before it applied fully, the Brussels Recast Regulation removes that requirement. Article 25(1) of the Brussels Recast Regulation (when it applies) will apply regardless of domicile.
77. Article 25(1) of the Brussels Recast Regulation provides that the chosen court shall have jurisdiction unless the agreement is “null and void as to its substantive validity under the law of that Member State”. This includes conflict of laws rules. Under the previous

legislation, the CJEU had consistently held that assessments of the validity of the jurisdiction clause is to be decided on the basis of autonomous EU law requirements (i.e. the formalities required) rather than national governing law (see *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA (C-159/97)* [1999] ILPr 492).

78. National law does not displace the minimal formal requirements which are still contained in the Brussels Recast Regulation (see Articles 25(1)-(2) of the Brussels Recast Regulation) and national law will not govern issues of separability in this context since the concept is expressly preserved by Article 25(5) of the Brussels Regulation.
79. Contractual drafting of jurisdiction clauses in favour of an EU court will require a consideration of which national law will be applicable to determinations of issues of substantive validity under the Brussels Recast Regulation in order to anticipate problems.

Non-EU lis pendens

80. Articles 33-34 of the Brussels Recast Regulation regulate the EU Member State courts response to non-EU *lis pendens*. The issue is - can an EU Member State court which would otherwise be able to take and exercise jurisdiction under the EU legislation choose to decline jurisdiction based on a non-EU jurisdictional factor.
81. If the defendant is not domiciled in the EU then national law can be applied to determine the matter and this will remain the same under the Brussels Recast Regulation (see Article 6 of the Brussels Recast Regulation).
82. The impact of Articles 33 and 34 of the Brussels Recast Regulation is that there is a firm legislative basis upon which situations involving a non-EU jurisdictional factor (such as a jurisdiction clause in favour of a non-EU state) can be prioritised in some cases. The fact that these provisions exist seems to suggest that it is not permissible for an EU court to give effect to such non-EU jurisdictional factors in circumstances other than set out in the relevant articles. Thus, it is important that the non-EU proceedings be brought first in time in order for their jurisdictional factors to be given sufficient weight to displace the jurisdiction of an EU court.

Recognition and Enforcement of EU judgments

83. Under the Brussels Recast Regulation, a more streamlined procedure for the recognition and enforcement of judgments was introduced. The exequatur procedure that existed under the Brussels I Regulation was abolished. The result is that a judgment enforceable in one EU Member State is directly enforceable in another EU Member State. A party can therefore proceed straight to an enforcement application, procedure for which is generally governed by the national law of the EU Member State in question.

84. Notwithstanding these procedural changes, the Brussels Recast Regulation prescribes some requirements regarding documents to be provided and the same limited grounds on which enforcement may be refused as were contained in the Brussels I Regulation.

25th July 2016