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Introduction

1.01 One of the problems of international business transactions is that when parties draft a contract, they cannot always be certain where litigation will take place. For this reason, a provision stating how and where disputes are to be resolved is a desirable feature of any international contract. Unless they know in advance what the forum will be, the parties cannot draft the contract in an appropriate way. Attaining predictability in this respect usually requires a choice-of-court agreement or an arbitration agreement. This book is concerned with the former. It deals with the EU and international instruments that are coming to dominate the field – the choice-of-court provisions in the Brussels I Regulation, both the (current) 2000 version and the (new) 2012 version; the Hague Convention on Choice of Court Agreements of 30 June 2005 (not yet in force, but potentially worldwide), and the Lugano Convention of 30 October 2007 (applicable to certain non-EU European countries).

1.02 Since the Hague Convention and the Lugano Convention were concluded by the European Union, they will have the status of Union law within the EU;[1] so all three instruments will be part of the EU legal system. The new Brussels Regulation was adopted on 12 December 2012 and will apply from 10 January 2015; it is hoped that the EU will ratify the Hague Convention so as to bring it into force at the same time, if not earlier. The Lugano Convention entered into force for the European Union (including the United Kingdom) on 1 January 2010.

§ 1. GENERAL CHARACTERISTICS OF CHOICE-OF-COURT AGREEMENTS

1.03 A choice-of-court agreement is an agreement between two or more parties as to where litigation will take place. It has a dual nature. On the one hand, it is a private-law contract: to this extent it falls under the law of contract. On the other hand, it has, and is intended to have, procedural (jurisdictional) consequences: to this extent, it falls under the law of procedure. This dual nature is reflected in the law applicable to it. The validity of the agreement as a contract is governed, as to substance, by Member-State law – English law, French law, German law, etc. – while its validity as to form is governed directly by the relevant instrument – the Brussels Regulation, the Lugano Convention, or the Hague Convention. The procedural aspects, on the other hand, are always governed directly by the relevant instrument.

1.04 Choice-of-court agreements contain a number of elements.

[1] Except in Denmark: see Chapter 2, § 1.1.2, § 1.2.1, and § 1.3.3.

§ 1.1 Agreement

1.05 First, there must be an agreement. It is possible that a choice-of-court provision might be found in a unilateral legal act – for example, a declaration of trust – but we are not concerned with this possibility.[2] For the purpose of this book, there must be an agreement. This of course gives rise to a host of issues – issues that relate to the concept of an agreement and its validity: consent, capacity, fraud, duress, etc. These will be discussed in due course.[3]

§ 1.2 Litigation

1.06 Secondly, the agreement must concern litigation, not arbitration or some form of alternative dispute resolution. In the past, arbitration was seen by many businessmen as a superior form of dispute resolution, not least because it was supposed to produce results more quickly. Today, these supposed advantages appear more dubious. In certain situations at least, litigation in an efficient and impartial court is the favoured solution.

§ 1.3 Parties

1.07 Another element concerns the parties who are bound by the agreement: can someone who did not originally consent to the choice-of-court agreement nevertheless be bound by it, perhaps because he in some way steps into the shoes of one of the original parties? This too will be considered.[4]

§ 1.4 Content

1.08 A fourth element concerns the content of the agreement. What exactly are the parties trying to achieve? Broadly speaking, a choice-of-court agreement may have two aspects: it may confer jurisdiction on a court which would not otherwise have had it; or it may take jurisdiction away from a court that would otherwise have had it. These two aspects – the positive (jurisdiction-granting) aspect and the negative (jurisdiction-depriving) aspect – are usually combined in the same agreement. In such a case, it is called an "exclusive" choice-of-court agreement. It is, however, possible that one element might exist without the other. Non-exclusive (jurisdiction-granting) choice-of-court agreements are not unknown (they

[2] Choice-of-court provisions in trust instruments are covered in Article 25(3) of Brussels 2012 and Article 23(4) of Brussels 2000 and Lugano. They do not feature in the Hague Convention.

[3] See Chapter 7, § 5. [4] Chapter 8, § 2.

are often found in international loan agreements), though a choice-of-court agreement that was purely negative would be rare.

1.09 A choice-of-court agreement may specify a particular court, or it may simply refer to the courts of a particular country. It may indicate two or more courts, leaving the choice to the claimant; or it may specify different courts depending on the party initiating the proceedings. It may apply to disputes that have already arisen, those that may arise in the future, or both. It may cover only disputes that arise under the contract containing the choice-of-court agreement, or it may cover other disputes, even disputes that arise in tort rather than contract. The ingenuity of draftsmen is the only limit to what the parties may specify. The validity of these variants will be an important part of the discussion in later chapters of this book.

§ 2. CHOICE-OF-COURT AGREEMENTS IN ENGLISH LAW

1.10 Although the English common law is outside the scope of this book,[5] we will consider the main characteristics of the English approach in order to set the context in which the new rules have evolved. Following common-law tradition, we will do this through the cases.

§ 2.1 *The Fehmarn*

1.11 In 1955, a Russian company loaded a cargo of turpentine on board a German ship at the port of Ventspils in what was then the Soviet Union (now the independent State of Latvia). The bill of lading said that all claims and disputes arising under and in connection with the bill of lading were to be decided in the USSR. The Merchant Shipping Code of the USSR was to be applied.

1.12 The ship set sail and delivered the cargo in England. The receivers (who had bought the cargo from the Russians and had become holders of the bill of lading) claimed short delivery and contamination. They sued the German shipping company in England. The latter argued that the English courts should not hear the case, since the claimants were bound by the choice-of-court agreement: they had to go to the Soviet courts.

[5] See Briggs (Adrian), *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, Oxford, 2008); Joseph (David), *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, London, 2005).

In dealing with this argument, Lord Denning said:[6] **1.13**

> Then, the next question is whether the action ought to be stayed[7] because of the provision in the bill of lading that all disputes are to be judged by the Russian Courts. I do not regard this provision as equal to an arbitration clause, but I do say that the English Courts are in charge of their own proceedings; and one of the rules which they apply is that a stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. It is a matter to which the Courts of this country will pay much regard and to which they will normally give effect, but it is subject to the overriding principle that no one, by his private stipulation, can oust these Courts of their jurisdiction in a matter that properly belongs to them.

Lord Denning then embarked on an analysis of the facts of the case in order to see with which country the dispute was more closely connected. He concluded that it was more closely connected with England than with Russia; so he refused to stay the proceedings.

Though it may have been influenced by political considerations – the Cold War was then at its height – this decision illustrates how English courts viewed choice-of-court agreements at the time. In theory, things have not changed. The official position under English common law is still that a choice-of-court agreement is never absolutely binding on an English court. The parties cannot by their private agreement oust the jurisdiction of the courts. **1.14**

It might be thought strange that the English courts should have adopted this rather disdainful attitude towards choice-of-court agreements. England is, after all, one of the most favoured forums in the world for the settlement of commercial disputes. If we exclude from consideration those cases in which the court selected is that of one of the parties (usually the economically dominant one), and consider only those in which the parties choose a neutral forum, London and New York are by far the most popular choices. The legal work that comes to London in this way is of great value to the English legal profession; so one would have expected the English courts to support choice-of-court agreements to the maximum extent. **1.15**

The answer perhaps is to be found in the distinction that English courts draw – in practice, if not in theory – between foreign choice-of-court agreements and forum choice-of-court agreements. It is almost unknown for **1.16**

[6] *The Fehmarn* [1958] 1 WLR 159, pp.161–2 (CA).

[7] Since English courts take the view that a choice-of-court agreement designating a foreign court does not deprive them of jurisdiction but is only a ground for not exercising it, proceedings are stayed (suspended) rather than dismissed. The proceedings can be resumed at a later stage – for example, if the foreign court decides not to hear the case.

an English court to refuse to hear a case when England is the designated forum. There is no question of considering whether the case is more closely connected with England than with a foreign country. There will often be absolutely no connection at all with England; nevertheless, it is taken for granted by all concerned that the English courts will not stay the proceedings. It is only when a foreign forum is selected that there is any realistic possibility that the English court will exercise its discretion to disregard the choice-of-court agreement.

1.17 It might also seem strange that (as was hinted at by Lord Denning) less respect is paid to choice-of-court agreements than to arbitration agreements. The reason is probably that the early arbitration cases concerned domestic arbitration. The choice was between an English arbitrator and an English judge. It was only later that the possibility of foreign arbitration arose. By then, the position had become too ingrained to change. In the case of choice-of-court agreements, on the other hand, the choice has always been between a foreign judge and an English judge.

§ 2.2 *Carvalho v. Hull Blyth Ltd*

1.18 Looked at from a different perspective, the common-law doctrine that choice-of-court agreements are not absolutely binding has something to recommend it. Many lawyers feel that judges in some countries are biased, corrupt, inordinately slow-moving, or plain incompetent. Is it right to force the parties to litigate in such a country when the case could be decided by an English judge? The usual answer is to say that the parties should have thought of that when they designated the court. If they chose a court in a notoriously corrupt country, they have only themselves to blame for any problems that may result. This is a fair point, but there are two situations in which it does not apply. The first is where there is a marked disparity of bargaining power between the parties. Here, the weak party may have been forced to accept an agreement designating a court where he will not get a fair trial. The second situation is where the chosen court undergoes a significant change after the agreement is made.

1.19 The English common law has never been very open to arguments based on inequality of bargaining power (as we shall see, the position is different under the law of the European Union). However, the second situation has come before the English courts. In *Carvalho v. Hull Blyth Ltd*,[8] a Portuguese businessman sold his business interests in Angola to an English-incorporated company. The buyer, Hull Blyth Ltd, agreed to pay the price in a number

[8] [1979] 1 WLR 1228; [1979] 3 All ER 280; [1980] 1 Lloyd's Rep. 172 (CA).

of instalments. It paid three, but did not pay the fourth. Carvalho sued it in England. The contract, however, contained a choice-of-court agreement in favour of the District Court of Luanda, Angola. Hull Blyth asked the court to stay the proceedings. The court refused to do so. The reason was that, after the contract was made but before payment of the fourth instalment was due, a revolution had occurred in Angola. Previously, it had been a Portuguese-ruled territory. Portuguese law had applied and the local courts had been part of the Portuguese court system. There was a right of appeal to Lisbon. After the revolution – actually a long-drawn-out guerrilla campaign that resulted in victory when the Portuguese granted independence to the territory – all this was changed. The Portuguese judges were replaced by Angolan judges and appeals to Lisbon were abolished. Though Portuguese law still applied, it was subject to the spirit of the Angolan revolutionary process. In the opinion of the English court, this meant that, though there was still a court called the "District Court of Luanda", it was not in fact the court designated in the contract. The latter no longer existed.

§ 2.3 *The Hollandia (The Morviken)*

1.20 What if the designated (foreign) court would apply a different substantive law from the forum? In general, this will not affect the matter; however, if the application of a particular law is required by a mandatory rule of the forum (a rule that operates irrespective of the wishes of the parties), the position could be different. This is illustrated by *The Hollandia* (also known as *The Morviken*),[9] a case which concerned the carriage of goods by sea from a port in Scotland to a port in the Netherlands Antilles. The goods were damaged on delivery and an action *in rem* was brought against the carrier in England. The carrier objected to the case being heard in England because the bills of lading contained a choice-of-court clause in favour of the Dutch courts. It also contained a choice-of-law clause designating Dutch law.

1.21 The problem with this was that the United Kingdom was a Party to an international agreement, the Hague-Visby Rules (the Hague Rules 1924 as amended in 1968), which provided that, in the case of a contract for the carriage of goods by sea, the liability of the carrier for damage to the goods could not be restricted by the terms of the contract to less than a certain sum. The Rules provided that any provision in a contract of carriage contrary to this would be null and void. Under the original Hague Rules, the sum in question was quite small; it was considerably increased by the amendment

[9] [1982] QB 872; [1982] 2 WLR 556; [1982] 1 All ER 1076 (CA); [1983] AC 565; [1982] 3 WLR 1111; [1982] 3 All ER 1141; [1983] 1 Lloyd's Rep. 1 (HL).

in 1968. The purpose of this provision was to protect the shipper from the superior bargaining power of the carrier.

1.22 At the time of the case, the Netherlands was a Party to the original Rules but not to the new Rules; the United Kingdom was a Party to both. The contract had restricted the liability of the carrier to the sum permitted by the original Rules. Therefore, the effect of applying the choice-of-law clause together with the choice-of-court clause would be that the case would be heard by a Dutch court, which would apply the original Hague Rules. The lower limit of liability would be upheld, thus reducing the rights of the cargo owner. This would have allowed carriers to circumvent the UK policy of protecting shippers from what the United Kingdom regarded as unfair contracts. Carriers would just have to insert an appropriate choice-of-court clause and choice-of-law clause in the contract of carriage. For this reason, the House of Lords refused to give effect to the choice-of-court clause: they held that the clause was itself a provision that had the (indirect) effect of lessening the liability of the carrier below the minimum permitted by UK law.

§ 3. THE US APPROACH

§ 3.1 *The Bremen*

1.23 For many years, choice-of-court agreements in favour of foreign courts were given little weight in the United States. At most, they were just one factor in a *forum-non-conveniens* analysis.[10] This changed, at least as far as the federal courts were concerned, when the US Supreme Court decided *M/S Bremen v. Zapata Off-Shore Company* in 1972.[11] This case concerned a towage contract between a German towage company and Zapata, a US company. Under the contract, the German company was to tow Zapata's oil rig from a US port to Italy. The contract contained a choice-of-court agreement in favour of the courts of England. They were chosen as a neutral forum. Shortly after the tow began, there was a storm at sea, and the oil rig was severely damaged. Zapata ordered the tug to go to the nearest port of refuge, which was Tampa, Florida. There, Zapata brought an action in Admiralty in a federal district court against the German company for negligent towage. The German company objected to the jurisdiction of the court,

[10] *Forum non conveniens* is a doctrine applied by common-law courts under which they may decide not to exercise jurisdiction in a case on the ground that a foreign court would constitute a more appropriate forum. The foreign court must have jurisdiction under its own law.

[11] 407 US 1; 32 L Ed. 2d 513; 92 S Ct 1907 (US Supreme Court, 1972).

relying on the choice-of-court agreement. However, the trial court refused to give effect to it. It conducted a *forum-non-conveniens* analysis and refused to stay the proceedings. This decision was upheld on appeal. The case then came before the US Supreme Court.

1.24 The Supreme Court held that a choice-of-court agreement entered into by experienced businessmen dealing at arm's length should be upheld unless it is unreasonable. "There are compelling reasons", said the court, "why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect". The appeal was allowed.

§ 3.2 *Carnival Cruise Lines v. Shute*

1.25 *The Bremen* involved a freely negotiated agreement between two business corporations. What if consumers are involved? This situation came before the US Supreme Court in *Carnival Cruise Lines v. Shute*,[12] which concerned tickets for a sea cruise bought by a couple living in the state of Washington, Mr and Mrs Shute. The cruise began in Los Angeles and the ship went south down the west coast of the United States and Mexico. Off the coast of Mexico, Mrs Shute fell and injured herself. The couple sued the cruise line in the state of Washington, where they had bought the tickets. However, the tickets contained a choice-of-court agreement in favour of the courts of Florida, the location of the headquarters of the cruise line. The choice-of-court clause in this case was not between two business corporations; nor was it freely negotiated: Mr and Mrs Shute had to accept it if they wanted to go on the cruise. Nevertheless, the US Supreme Court upheld it. This takes the principle laid down in *Bremen* one step further.

§ 3.3 *The Sky Reefer*

1.26 The last case to consider is *Vimar Seguros v. M/V Sky Reefer*,[13] another shipping case. It concerned a contract for the carriage of goods by sea. The bills of lading contained an arbitration clause specifying Japan as the place of arbitration. The goods were delivered to an American port and the proceedings were brought there. It was argued that arbitration in Japan would be contrary to the (original) Hague Rules, which had the force of law in the United States under the Carriage of Goods by Sea Act 1936: the Japanese arbitrators might not apply the Rules; even if they did, they might interpret them differently from a US court; and even if they did not, the difficulty of

[12] 499 US 585; 111 S Ct 1522; 113 L Ed. 2d 622 (US Supreme Court, 1991).
[13] 515 US 528; 115 S Ct 2322; 132 L Ed. 2d 462 (US Supreme Court, 1995).

bringing proceedings in Japan would make it harder for persons with an interest in the cargo to enforce their rights, thus having the practical effect of lessening the liability of the carrier.[14]

1.27 These arguments were rejected by the US Supreme Court, which expressly stated that its judgment would apply equally to a choice-of-court clause. It said that mere procedural inconvenience did not constitute a lessening of liability within the purview of the Rules. As to the substantive issues (non-application or different interpretation of the Rules), it was premature to consider these: if the case went to arbitration and the Rules were not applied, or were interpreted differently, the award might not be recognized, in which case the plaintiff could re-activate the proceedings, since the trial court had retained jurisdiction. The decision of the House of Lords in *The Hollandia* (see § 2.3) was cited with apparent approval.

§ 3.4 Conclusions

1.28 This short synopsis of English and American case-law[15] shows the essentially pragmatic approach of the common law. General rules are not laid down in advance, and problems are dealt with as they arise. Courts give careful consideration to the practical effects of their rulings. In the European Union things are different. There, the legislator tries to solve problems in advance by adopting rules of general application expressed in abstract language. The CJEU (Court of Justice of the European Union, sometimes known as the "ECJ" or "European Court") has the final say in interpreting these rules, and it sometimes seems more concerned with developing the law as a logical system than meeting the needs of businessmen and other users of the law. Its judgments have a different feel from those of English or American courts.

§ 4. THE EUROPEAN UNION

§ 4.1 The Brussels Convention

1.29 The law of jurisdiction and the recognition of judgments in wide areas of civil litigation was originally codified in the European Union (then the Community) by the Brussels Convention 1968,[16] which was negotiated

[14] These arguments had been accepted in earlier cases: see *Indussa Corp. v. SS Ranborg* 377 F 2d 200 (2d Cir. 1967) (*en banc*).

[15] The discussion of American law has been limited to federal courts. Some state courts may take a different approach.

[16] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968. The original text may be found in OJ 1972, L 299/32 (the

and concluded by the original six EU (EEC) Member States. The United Kingdom became a Party when it joined the EU (EEC), and so have subsequent Member States. It was amended a number of times and was eventually replaced by the Brussels Regulation.[17] Extracts are set out in Appendix 1 of this book.

1.30 The Convention contained provisions on choice-of-court agreements, though they applied only when the designated court was in a Member State. The drafters wanted to have clear-cut rules that left as little as possible to the discretion of the court; so they made choice-of-court agreements absolutely binding. The problem of unfairness was dealt with in two ways. First, choice-of-court agreements had to be in a specified form, designed to ensure that the persons concerned knew what they were doing: originally, they had to be in writing or, if oral, evidenced in writing,[18] though subsequent amendments to the Convention introduced other possibilities. Secondly, it was provided that no effect would be given to choice-of-court agreements in the case of specific types of contract, contracts in which it was thought that abuse was especially likely. Originally these were insurance, instalment sales, and loans to finance such sales;[19] however, the transactions covered were subsequently extended to cover a wide range of insurance, consumer, and employment contracts. There were no provisions to deal with the situation where a party would not obtain a fair trial in the chosen court: the Convention applied only where the designated court was in a Member State, and the drafters were unwilling to contemplate that such a court might be deficient in any way. There was also no provision dealing with the case in which the chosen court would not apply a rule that the law of the forum (the court before which proceedings were originally brought) would regard as mandatory. It may have been felt that this problem could be solved by unifying choice-of-law rules for contracts in the European Union.[20]

1.31 The consequence of this approach was that most of the case-law of the CJEU – the court which had jurisdiction to interpret the Convention – was focused on rather narrow, technical points, often just on whether the formal

English version is in OJ 1978, L 304/77). It came into force for the original Contracting States on 1 February 1973; it came into force in the United Kingdom on 1 January 1987. See also OJ 1982, L 388/1; OJ 1989, L 285/1; OJ 1997, C 15/1. For a consolidated text, see OJ 1998, C 27/1.

[17] Regulation 44/2001, OJ 2001, L 12/1, which came into force on 1 March 2002.

[18] See Article 17 of the original Convention.

[19] There were certain exceptions that applied where the interests of the weaker party would not be prejudiced.

[20] See now the Rome I Regulation, Regulation (EC) No 593/2008, OJ 2008 L 177/6.

requirements had been satisfied. This is in marked contrast to the broad, policy-based approach of the English and American cases.

§ 4.2 The Brussels Regulation 2000

1.32 The Brussels Convention was replaced by the Brussels Regulation, which was adopted on 22 December 2000 and came into force on 1 March 2002.[21] It will be referred to in this book as "Brussels 2000". This largely carried forward the provisions of the Convention, though there were some changes: it was made clear that the Regulation covers non-exclusive choice-of-court agreements[22] – a matter previously subject to controversy[23] – and a definition of "writing" was provided. This definition, which is based on Article 6(1) of the UNCITRAL Model Law on Electronic Commerce 1996, is almost identical to that found in the Hague Convention.[24]

§ 4.3 The Brussels Regulation 2012

1.33 Brussels 2000 was replaced by the Brussels Regulation 2012,[25] which was adopted on 12 December 2012 and will apply (subject to two unimportant exceptions) from 10 January 2015. It will be referred to as "Brussels 2012". It abolished the requirement previously applicable that for a choice-of-court agreement to confer jurisdiction on the designated court at least one of the parties must be domiciled in a Member State; it also laid down rules on the substantive validity of choice-of-court agreements, something that was previously uncertain. Its most important change, however, concerned the effect of the *lis pendens* doctrine on choice-of-court agreements – the so-called "Italian torpedo", a topic that will be explored in Chapter 11. The entire text of the Regulation is set out in Appendix 2 to this work.

§ 4.4 Continuity of the Law

1.34 It is an important principle that the Brussels Convention (in all its different versions) and the Brussels Regulation 2000 and 2012 should be regarded as evolving versions of the same instrument. This means that decisions of the

[21] Regulation 44/2001, OJ 2001, L 12/1. For the position of Denmark, see Chapter 2, § 1.1.2; for certain residual effects of the Convention, see Chapter 2, § 2.2.4.

[22] The second sentence of Article 23(1) of the Regulation states that the jurisdiction conferred by a choice-of-court agreement is exclusive "unless the parties have agreed otherwise".

[23] Compare Fentiman, "Jurisdiction – When Non-Exclusive Means Exclusive" [1992] *Cambridge Law Journal* 234 with the argument for the defendant in the English case of *Kurz v. Stella Musical GmbH* [1992] Ch. 196.

[24] Hague Convention, Article 3(c)(ii).

[25] OJ 2012, L 351/1.

CJEU on an earlier version – for example, the original Brussels Convention – are equally binding with regard to later versions – for example, Brussels 2000 or 2012 – unless there is a change in the wording of the text.[26] As will be appreciated, this principle has wide practical implications.

§ 5. THE LUGANO CONVENTION

§ 5.1 The Original Lugano Convention (1988)

1.35 The original Lugano Convention was adopted on 16 September 1988.[27] The original Parties were the then twelve Members of the European Union (then the European Communities)[28] and the then six members of EFTA (the European Free Trade Association): Iceland, Norway, Austria, Switzerland, Finland, and Sweden.[29] (Since then, Austria, Finland, and Sweden have joined the EU, whereupon they ceased to be EFTA States.) The original parties were, therefore, these eighteen States; the EU (EC) was not a Party.[30]

1.36 The purpose of the Convention was to extend the system under the Brussels Convention to the EFTA countries. The Lugano Convention therefore followed the Brussels model closely, and many provisions were identical, though there were some differences. Since the EU (EC) was not a Party to the Lugano Convention, the CJEU had no jurisdiction to interpret it; however, it was recognized that it would be desirable to have a uniform interpretation of the Lugano Convention in the various Contracting States, as well as a uniform interpretation of the two Conventions in so far as they contained identical or substantially identical provisions. So a protocol was added, Protocol 2 on the Uniform Interpretation of the Convention. Article 1 of this Protocol, which applies only to the Lugano Convention, provides that the courts of each Contracting Party shall, when applying

[26] Brussels 2000, Recital 19; Brussels 2012, Recital 34; *German Graphics Graphische Maschinen*, Case C-292/08, [2009] ECR I-8421, paragraph 27; *Realchemie Nederland v. Bayer CropScience*, Case C-406/09, 18 October 2011, paragraph 38 (Grand Chamber). The position regarding the Lugano Convention is slightly different: see § 5.

[27] OJ 1988, L 319/25.

[28] These were the six original Member States (Belgium, Germany, France, Italy, Luxembourg, and the Netherlands), the three Member States which joined in 1973 (Denmark, Ireland, and the United Kingdom), Greece (1981), and Spain and Portugal (1986).

[29] Somewhat anomalously, the Lugano Convention of 1988 became applicable to Poland on 1 February 2000: see Recital 7 to Brussels 2012.

[30] For an Explanatory Report on the Convention by P Jenard and G Möller, see OJ 1990, C 189/57.

or interpreting the Convention, "pay due account" (*sic*) to the principles laid down by any relevant decision by the courts of the other Contracting Parties.[31] In addition to this Protocol, there are two Declarations annexed to the Lugano Convention. In the first, those Contracting Parties that were also EU (EC) Member States declared that it would be appropriate for the CJEU, when interpreting the Brussels Convention, to "pay due account" to the case-law on the Lugano Convention. In the second, the representatives of the EFTA States declared that it would be appropriate for their courts, when interpreting the Lugano Convention, to "pay due account" to the case-law of the CJEU and the courts of the EU (EC) States on the Brussels Convention. In this way it was hoped to avoid divergent interpretations.

§ 5.2 The New Lugano Convention (2007)

1.37 The 1988 Lugano Convention was replaced by a new Convention of the same name (Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) signed in the Swiss city of Lugano on 30 October 2007.[32] Like its predecessor, its purpose was to extend the EU system to additional European countries – in this case, Iceland, Norway, and Switzerland; so the provisions of the Convention are mostly similar – often identical – to those of the original Brussels Regulation. There are, however, some differences.

1.38 Since the CJEU had decided in the *Lugano Convention*[33] case that conclusion of the new Lugano Convention fell entirely within the sphere of exclusive competence of the EU (then the European Community), the EU Member States (except Denmark)[34] were not Parties to it. So the Parties were Denmark, Iceland, Norway, Switzerland, and the EU (EC).[35]

[31] A system was set up for the exchange of judgments on the Lugano Convention given by courts of last instance and other judgments of particular importance. The phrase "relevant decision" was intended to refer to these judgments: see Jenard/Möller Report, paragraph 113.

[32] OJ 2009, L 147/5. For an Explanatory Report by Fausto Pocar, see OJ 2009, C 319/1.

[33] Opinion 1/03, [2006] ECR I-1145.

[34] See Chapter 2, § 1.2.1 and § 1.1.2.

[35] The Convention entered into force for the European Union (including the United Kingdom) on 1 January 2010. It entered into force in Denmark (a separate signatory of the Convention) and Norway on the same date; it entered into force in Switzerland on 1 January 2011 and in Iceland on 1 May 2011: see <http://www.ejpd.admin.ch/content/ejpd/en/home/themen/wirtschaft/ref_internationales_privatrecht/ref_lugue2007.html> (Swiss Federal Department of Justice and Police). Switzerland is the Depository of the Convention: Article 69(2) of the Convention. For the conclusion of the Convention by the European Union, see Council Decision 2009/430/EC, OJ 2009, L 147/1.

1.39 The fact that the EU is a Party has important consequences within the Union. As in the case of the Hague Convention,[36] the new Lugano Convention constitutes EU law, and the CJEU has the final word on its interpretation. This takes place on a reference for a preliminary ruling from a court in an EU Member State. The CJEU cannot, on the other hand, interpret the Lugano Convention when the case is pending before a court in one of the non-EU Contracting States: a reference to the CJEU is not possible from a court in such a State.

1.40 As was the case under the original Lugano Convention, there is a protocol, Protocol 2 on the uniform interpretation of the Convention and on the Standing Committee, which seeks to ensure that the Convention is interpreted in a uniform way in all the Contracting States, and also to promote uniformity between the interpretation of the Convention, the original Brussels Regulation, and certain other instruments.

1.41 Article 1(1) of Protocol 2 provides:

> Any court applying and interpreting this Convention shall pay due account to the principles laid down by any relevant decision concerning the provision(s) concerned or any similar provision(s) of the 1988 Lugano Convention and the instruments referred to in Article 64(1) of the Convention rendered by the courts of the States bound by this Convention and by the Court of Justice of the European Communities.

1.42 A number of points should be made regarding this provision. It applies to any court interpreting the new Convention. These are courts in the three non-EU Parties (Iceland, Norway, and Switzerland), courts in Denmark (which is an EU State but is independently bound by the Lugano Convention), courts in the other EU Member States and the CJEU. It applies whenever the provisions of the 2007 Lugano Convention arise for interpretation in such a court. The obligation it lays down, however, is merely to "pay due account" to relevant decisions,[37] not necessarily to follow them. The relevant decisions are judgments on the provision in question in the 2007 Lugano Convention, on similar provisions in the 1988 Lugano Convention, and on similar provisions in the instruments referred to in Article 64(1) of the Convention. These latter instruments are:

- Brussels 2000;
- amendments to Brussels 2000, a phrase which covers Brussels 2012;
- the Brussels Convention (and the Protocol concerning its interpretation by the CJEU); and

[36] See § 6.6.

[37] In other words, to take due account of, or to pay due regard to, those decisions.

- the Convention between the EU (EC) and Denmark applying Brussels 2000 to that Member State.

1.43 However, the obligation will apply only where the provision in one of these instruments is the same as, or similar to, the provision of the 2007 Lugano Convention before the court.

1.44 It is expressly stated in Article 64(1) of the Lugano Convention that the Convention will not prejudice the application by EU Member States of the instruments listed in Article 64(1), including Brussels 2000 and 2012. This means that, in interpreting these instruments, courts in EU States (including the CJEU) are not obliged to take "due account" of decisions on the Lugano Convention.

§ 6. THE HAGUE CONVENTION

1.45 The Hague Convention on Choice of Court Agreements was adopted on 30 June 2005. It was concluded by the European Union on behalf of its Member States (except Denmark),[38] but is not yet in force. The text and Report are set out in Appendix 3 to this work.

§ 6.1 Origins of the Convention

1.46 The origins of the Convention may be traced to an American initiative for a judgment-recognition convention with European countries. Subsequently, it was decided to aim for a worldwide convention to be negotiated through the machinery of the Hague Conference on Private International Law (see § 6.2).[39] Negotiations began in 1996. The Europeans were not, however, enthusiastic about a convention just for the recognition and enforcement of judgments – they felt that judgments from European countries were already widely recognized in the United States under the law as it stood at the time – and they were more interested in obtaining an agreement that would limit what they regarded as the excessively wide jurisdiction assumed by American courts.[40] They hoped that the price they could extract from the Americans for agreeing to enforce their judgments in Europe would be an undertaking not to assume jurisdiction on certain specified grounds even

[38] On Denmark, see Chapter 2, § 1.1.2, § 1.2.1, and § 1.3.3.

[39] See Hartley/Dogauchi Report (Explanatory Report on the Convention of 30 June 2005 on Choice of Court Agreements), pp. 16–17.

[40] On whether American courts really exercise wider jurisdiction than European courts, see Hartley (Trevor C), *International Commercial Litigation* (Cambridge University Press, Cambridge, 2009), pp. 156–61.

when there was no question of enforcing the resulting judgment outside the United States.[41] In asking for this, the Europeans were going too far. The Americans were unwilling to agree, and the initial phase of the project, the "Preliminary Draft Convention on jurisdiction and foreign judgments in civil and commercial matters", collapsed in 2001.

1.47 In order to salvage something from the wreckage of what had been the most ambitious project undertaken by the Hague Conference, it was decided to aim for agreement on a more limited basis. The project proposed was a convention on choice-of-court agreements in business-to-business transactions. It was hoped that this would achieve for choice-of-court agreements what the extremely successful 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards had accomplished for arbitration agreements. Negotiations commenced on this basis at the end of 2003. They were successful and culminated in the adoption of the text of the Convention at a diplomatic conference in June 2005.

§ 6.2 The Hague Conference on Private International Law

1.48 Despite its name, the Hague Conference on Private International Law is an international organization. It was founded in 1893 and has its seat in The Hague, its task being to promote international conventions on private international law. Today, both States and "Regional Economic Integration Organizations" may become members. The provision regarding Regional Economic Integration Organizations was adopted to allow the European

[41] The plan was to aim for something along the lines of the Brussels Convention (see § 4.1), though the proposal differed from the Brussels Convention in being a "mixed" convention. The Brussels Convention stated what grounds of jurisdiction could be used, and all other grounds were prohibited (provided the defendant was domiciled in another Contracting State). The proposal, the so-called "Preliminary Draft Convention", departed from this by adopting a three-fold classification of jurisdictional grounds. Approved grounds and prohibited grounds were specified; all other possible grounds fell into the so-called "grey" area. The idea was that if a court of a Contracting State assumed jurisdiction on an approved ground, its judgments would (in principle) be subject to recognition and enforcement in other Contracting States. Courts of Contracting States were also permitted to take jurisdiction on grounds falling into the "grey" area, but the resulting judgments would not be subject to recognition under the Convention; they were not, however, permitted to take jurisdiction on the prohibited grounds, even if no question arose of enforcing the resulting judgment in a foreign country. For further details, see "Preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters, adopted by the Special Commission and Report by Peter Nygh & Fausto Pocar", Prel. Doc. No. 11 of August 2000, available at <http://www.hcch.net>. See, further, F Pocar and C Honorati (eds), *The Hague Preliminary Draft Convention on Jurisdiction and Judgments* (CEDAM, Milan, Italy, 2005). This latter work also contains the Nygh/Pocar Report of the Special Commission (August 2000) (see Appendix 4 to this work).

Union to become a member, something that became necessary when jurisdiction to conclude conventions on some aspects of private international law was transferred from the Member States to the Union (see Chapter 2, § 1.3.2 and § 1.3.4). The Union (then the European Community) became a member on 3 April 2007. At present, it is the only Regional Economic Integration Organization to have done so, a state of affairs that is unlikely to change in the foreseeable future.

1.49 States that are not members of the Hague Conference may become Parties to its conventions. The Choice-of-Court Convention expressly provides that Regional Economic Integration Organizations may also become Parties to it (see Chapter 2, § 1.3.2). This provision was adopted, at a late stage in the negotiations, to allow the European Union to become a Party: when the Choice of Court Convention was adopted, it had not yet become possible for Regional Economic Integration Organizations to become members of the Hague Conference.[42]

§ 6.3 Decision-Making Procedure at the Conference

1.50 In the early years of the negotiations on the Choice of Court Convention and its predecessor, the unsuccessful Preliminary Draft Convention on jurisdiction and foreign judgments in civil and commercial matters, the Member States of the European Union were represented individually, and played an independent role. They often disagreed with each other. For example, the United Kingdom might side with the United States, Australia, and Canada against the Continental EU countries when issues concerning the common law arose. Though the EU Commission was represented, it had no power to speak for the Member States.

1.51 This changed when it was claimed by the European Union that negotiating competence had been transferred to it from the Member States.[43] This had a considerable effect on the negotiations. The EU Member States continued to be individually represented, but the delegations had to meet with the Commission early each morning to agree on a common position with regard to the issues likely to arise that day. Once such a position was agreed, they

[42] The Convention on Choice of Court Agreements was adopted in 2005; the European Union became a member of the Hague Conference in 2007.

[43] After the Convention was adopted, this was confirmed by the decision of the CJEU in the *Lugano Convention* case, Opinion 1/03, [2006] ECR I-1145, in which it was held that the Union had exclusive competence to conclude the revised Lugano Convention (2007) because of the impact which that Convention would have had on the Brussels Regulation. Since the Hague Convention would have had a similar impact, it followed that the Union had exclusive competence in this regard as well.

were not allowed to take a different line in the discussions. The EU States would then vote as a block, their votes being cast by the Commission.

Understandably, the other participants, led by the United States, objected to this situation, since it more or less gave the EU a built-in majority. If the EU could have 27 votes, why should the United States not have 50? To solve this problem it was agreed that votes would no longer be taken: all decisions would be by consensus. **1.52**

This in turn raised the question: what exactly does "consensus" mean? Does it mean unanimity? This was the claim put forward near the end of the negotiations by the Russian delegation, which argued that it could veto any decision; however, this was rejected by the chairman, a ruling accepted by the Russian delegation.[44] The general understanding was that there had to be a significant minority against a proposal for it to be blocked. **1.53**

It was on this basis that negotiations were conducted in the final session of the Conference. It meant that a wide measure of agreement had to be obtained for each provision, since a small group of States could block anything they did not like. This is the reason for the wide list of exclusions from the subject-matter scope of the Convention, as well as the many exceptions and special rules. **1.54**

§ 6.4 The Basic Principles of the Convention

Both the Choice of Court Convention and its predecessor, the Preliminary Draft Convention on jurisdiction and foreign judgments in civil and commercial matters, were based on the European Union's Brussels Convention (see § 4.1). However, while the Brussels Convention covered most grounds of jurisdiction, the Hague Choice of Court Convention covers just one: choice-of-court agreements. Its objective is to lay down rules for the formal and substantive validity of such agreements and to ensure that valid agreements are effective. This requires three things: that the chosen court should hear the case (even if another court was seised first); that other courts should not hear it (the Convention applies only to exclusive choice-of-court agreements);[45] and that the judgment of the chosen court should be recognized and enforced by the courts of other Contracting States. **1.55**

[44] Hague Conference on Private International Law, Twentieth Session, Commission II, Minutes No 20, 27 June 2005 (afternoon), p. 10, paragraphs 77–80.

[45] However, Article 22 makes provision for the recognition of judgments given pursuant to non-exclusive choice-of-court agreements, provided that the States in question have made declarations adopting Article 22.

1.56 These three principles are fairly simple. The bulk of the Convention, however, is concerned with when they will apply – for example, subject-matter scope – and what the exceptions are. These are the questions that took up most time in the negotiations and that raised the most difficult problems, problems that, in some cases, were solved only on the basis of complex compromises.

§ 6.5 The Status of the Report

1.57 As is the practice of the Hague Conference, the Hague Convention on Choice of Court Agreements is accompanied by an official Report. This was drawn up by two *Rapporteurs*, the present author and Professor Masato Dogauchi of Japan. They were appointed by the Conference at the beginning of the second round of negotiations (the negotiations on the Choice of Court Convention).[46] Their function was to explain, not what they thought the Convention should mean, but what the States taking part in the conference intended. To ensure that they did this correctly, successive drafts of the Report were sent to the States for their comments and criticisms. When the States indicated that the *Rapporteurs* had misinterpreted their intention, the passages in question were changed. A procedure was set up to deal with cases in which a State and the *Rapporteurs* could not resolve their differences, but this never had to be used: all objections were satisfactorily resolved. For this reason, the Report may be considered an accurate statement of the intention of the participating States. The text of the Report is reproduced in Appendix 3 to this work.

§ 6.6 The Status of the Hague Convention in the European Union

1.58 Since the Convention was concluded by the European Union on behalf of the Member States (except Denmark),[47] it enjoys the status of Union law within the Member States of the Union (except Denmark).[48] As a consequence, it is binding both on the institutions of the Union and on the Member States.[49] To the extent that if fulfils the requirements for direct effect under Union law (which it almost certainly does), it must be directly applied by the courts of Member States.[50] It prevails over Member-State law in the event of

[46] Two different individuals (the late Professor Peter Nygh and Professor Fausto Pocar) were *Rapporteurs* for the Preliminary Draft Convention.

[47] On the position regarding Denmark, see Chapter 2, § 1.1.2, § 1.2.1, and § 1.3.3.

[48] *Haegeman v. Belgium*, Case 181/73, [1974] ECR 449, paragraph 5 of the judgment. For a full discussion, see Hartley, *Foundations*, Chapter 6.

[49] Article 216(2) TFEU.

[50] Hartley, *Foundations*, Chapter 7, § 7.

a conflict,[51] and the CJEU has the final say on its interpretation as far as the EU Member States are concerned (see § 7). In many ways, its effect in the Member States is the same as that of an EU Regulation.

§ 7. THE ROLE OF THE CJEU IN INTERPRETING THE REGULATION AND CONVENTIONS[52]

1.59 Article 267 TFEU gives the CJEU jurisdiction to interpret the Union Treaties and "acts" of the institutions. As a regulation, the new Brussels Regulation is clearly an act of a Union institution: it is Union legislation adopted jointly by the European Parliament and the Council. As regards the Conventions, it might seem strange to consider an international agreement between the Union and non-member States as an act of a Union institution, but this is what the CJEU has held in a series of decisions.[53] So all these instruments are covered by Article 267 TFEU.[54]

1.60 Under Article 19 TEU (Treaty on European Union), the term "Court of Justice of the European Union" (CJEU) covers the Court of Justice, the General Court, and specialized courts. We shall be concerned only with the first of these: in this book, references to the CJEU should be read as references to the Court of Justice, unless the context indicates otherwise. This is because, for the time being at least, only the Court of Justice has the power to hear preliminary references from the courts of Member States.

1.61 The Court of Justice consists of one judge from each Member State.[55] This means that it is dominated by judges from the smaller Member States. At

[51] Hartley, *Foundations*, Chapter 7, § 9.

[52] It is not possible to discuss this topic in detail. For such a discussion, see Hartley, *Foundations*, Chapter 9 and the items listed under "Further Reading" at the end of that chapter.

[53] The first case in the series is *Haegeman v. Belgium*, Case 181/73, [1974] ECR 449; [1975] 1 CMLR 515. For further details, see Hartley, *Foundations*, Chapter 9, § 2.6.

[54] The Brussels Convention was not covered by the predecessors of Article 267 TFEU because the European Union was not a Party to it, but a similar procedure applied under a protocol to the Convention, the Protocol on the interpretation by the Court of Justice of the Convention of 27 September 1968. Prior to the coming into force of the Treaty of Lisbon, the interpretation of the Brussels Regulation by the CJEU was subject to the provisions of Article 68 TEC, under which Article 234 TEC (the equivalent of Article 267 TFEU) applied only to a limited extent to provisions adopted, as was the original Brussels Regulation, under Article 61(c) and Article 67(1) TEC. Since the coming into force of the Treaty of Lisbon, Article 267 TFEU has applied to the Brussels Regulation (both original and new versions) in the same way as it does to other measures.

[55] Article 19(2) TEU. For a full discussion of the court as an institution, see Hartley, *Foundations*, Chapter 2. For the Rules of Procedure and other texts, see <http://curia.europa.eu/jcms/jcms/Jo2_7031>.

the present time, there are eight Member States which have a population of less than five million. Between them, they have eight judges, even though their combined population is less than a fifth of that of Germany, the largest Member State. Germany has only one judge.

1.62 A further problem is that there is a great disparity between the generous salary and allowances given to judges on the CJEU and the low salaries of judges and other public officials in Eastern Europe. For financial reasons alone, an appointment to the CJEU must be extremely attractive to East Europeans, something that could tempt Governments in those countries to use their power to nominate judges for appointment to the CJEU as a means of exercising political patronage, something that could distort the selection process.

1.63 It is also noticeable that the majority of judges on the CJEU have backgrounds in politics, public administration, diplomacy, and public law. Although there are notable exceptions, few seem to have had experience in civil and commercial law.[56] Perhaps for these reasons, the CJEU seems more concerned with protecting the rights of States than with giving effect to the needs of business. Its most notorious decision in this respect is a case concerned with choice-of-court agreements, *Gasser v. MISAT*,[57] which will be analysed in due course (Chapter 11, § 1.1).

1.64 Under Article 267 TFEU, any court or tribunal of a Member State may make a reference to the CJEU when it has to interpret the Regulation, or the Lugano or Hague Conventions, in order to decide the case before it. A court from whose decisions there is no judicial remedy *must* make such a reference.[58] When a reference is made, the proceedings in the Member-State court are suspended, and the reference is sent by the Member-State court to the CJEU.[59] In due course, the case will be heard by the CJEU.

1.65 The parties may put forward their arguments in writing and in a short oral presentation. Member States may also appear. In a reference from a court in an English-speaking country, the proceedings will be in English. Those judges who do not understand English will listen on headphones to a simultaneous translation. Most of the judges on the panel hearing the case

[56] See the biographies of the judges on the CJEU's website, at <http://curia.europa.eu/jcms/jcms/Jo2_7026>.

[57] *Gasser v. MISAT*, Case C-116/02, [2003] ECR I-14693.

[58] It is controversial whether the English Court of Appeal could be regarded as such a court in cases where it refuses permission to appeal. It seems that it is not, but, in such a case, the Supreme Court must itself make a reference, if necessary when considering whether to grant permission to appeal: see *Lyckeskog*, Case C-99/00, [2002] ECR I-4839, a case concerning the appeal system in Sweden.

[59] The parties have no right to bring the case before the CJEU; only the Member-State court before which it is pending may do so.

will be from civil-law countries; indeed, there is no guarantee that *any* of the judges will be from England or another common-law country. For this reason, counsel should present their arguments from a European perspective, rather than relying solely on an English point of view.

1.66 After the close of the oral proceedings, the Advocate General will present his Opinion. An Advocate General in the CJEU (not to be confused with an Attorney General in a common-law country) does not speak on behalf of the Union or any other body. He or she has the same status as a judge and is entirely independent in the performance of his functions. The Advocate General's Opinion is not binding on the CJEU, but the latter attaches great weight to it. If it is followed – which happens in most cases – it may be cited in later cases in order to explain the rather terse reasoning of the CJEU. If it is not followed, it may be used in later cases in an attempt to induce the CJEU to change its mind, something that rarely happens but is not impossible.

1.67 When the CJEU retires to consider its judgment, the deliberations are normally in French. There are no translators present, something that puts judges lacking a good knowledge of French at a disadvantage. The judgment is drafted in French, and translated into the language of the case, which will be English in the case of a reference from the United Kingdom.

1.68 The CJEU has jurisdiction only to *interpret* Union law: it cannot *apply* it to the facts of the case, though the distinction between interpretation and application is not always clear.[60] After its ruling is given, the case goes back to the Member-State court, where the proceedings will continue to judgment. The Member-State court is bound by the ruling given by the CJEU, though (in very rare instances) it may make a second reference to seek further clarification.

1.69 Although there are no judgments so far by the CJEU on the Hague Convention or Brussels 2012 – at the time of writing, they are not yet applicable – there is a significant body of case-law on the Brussels Convention and Brussels 2000. These cases will be considered in the pages that follow.

§ 8. WHEN DOES THE COMMON LAW APPLY?

1.70 This is not a book about the English common-law rules on choice-of-court agreements.[61] However, it is appropriate to say a word as to when the instruments we are considering preclude the application of the common law.

[60] See Hartley, *Foundations*, Chapter 9, § 7.

[61] On this, see Briggs (Adrian), *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, Oxford, 2008); Joseph (David), *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, London, 2005).

1.71 The first point is that all the instruments (Brussels 2000, Brussels 2012, the Lugano Convention, and the Hague Convention) have the status of EU law in the Member States of the European Union.[62] This means that where they are applicable according to their terms, they override English law. The question when they apply is a complicated one, and a large part of this book is devoted to it. It includes questions of scope, a matter discussed in Part II. It is impossible to consider it here in detail, but a couple of preliminary points may be made.

1.72 The first is that the Brussels Regulation (2000 and 2012) applies when the designated court is in an EU State; Lugano applies when it is in an EFTA–Lugano State (Iceland, Norway, or Switzerland), and Hague applies when it is in a State Party to that Convention.[63]

1.73 The second preliminary point is that in Brussels 2000 and Lugano the provisions conferring jurisdiction on the designated court apply only if at least one of the parties (not necessarily the defendant) is domiciled in a Member State (or, in the case of Lugano, a State Party to that Convention). The equivalent provisions in Brussels 2012 and Hague apply irrespective of domicile. In all the instruments (Brussels 2000, Brussels 2012, Lugano, and Hague) the provisions denying jurisdiction to courts other than that designated apply irrespective of domicile.[64]

1.74 Having said this, it is now possible to indicate in a general way, and without mentioning all the exceptions, when the common law can apply. We consider the question separately with regard to three situations.

§ 8.1 The Chosen Court is in England

1.75 We first take the case where the chosen court is in England and proceedings are brought before that court. If the relevant instrument is Brussels 2000 or Lugano, and if neither party is domiciled in an EU or Lugano State, the provisions of the instrument conferring jurisdiction on the designated court will not be applicable; so the jurisdiction of the court will depend on the common law. A stay on the basis of *forum non conveniens* will not be precluded. If, on the other hand, the relevant instrument is Brussels 2012 or Hague, the provisions conferring jurisdiction on the designated court will apply irrespective of domicile.

[62] For the Regulation, this follows from general principles of Union law; for the Lugano Convention, see § 5.2, and for the Hague Convention, see § 6.6.

[63] See Chapter 5, § 1.

[64] See Chapter 5, § 2, but, in the case of Hague, see Chapter 5, § 2.3.

1.76 If one of the instruments is applicable, and if the choice-of-court agreement complies with its requirements, the English court will be obliged to hear the case, unless the instrument in question provides otherwise. There is no role for the common law, and a stay may not be granted under the doctrine of *forum non conveniens*.

1.77 What if the choice-of-court agreement does not comply with the requirements of the relevant instrument, but is valid under the common law? Will the instruments preclude the court from hearing the case? The answer depends on the instrument. The Hague Convention requires agreements which comply with its provisions to be respected; however, it does not preclude a court from taking jurisdiction on the basis of an agreement that does not comply with its provisions (unless there is a valid agreement in favour of another court).[65] Thus, if there is only one choice-of-court agreement (designating the courts of England), which does not satisfy the formal requirements of the Hague Convention, but is valid under the common law, the Hague Convention does not prevent the English courts from hearing the case.

1.78 The position under the other instruments (Brussels 2000, Brussels 2012, and Lugano) is different. The first point is that all these instruments contain a provision under which proceedings cannot be brought against a person domiciled[66] in a Member State (or, in the case of Lugano, an EFTA–Lugano State) unless the court before which the proceedings are brought has jurisdiction under the instrument.[67] This means that, as against such a defendant, the English court will not be permitted to take jurisdiction on the basis of a choice-of-court agreement unless the agreement complies with the requirements of the relevant instrument.

1.79 The second point is that even if the defendant is not domiciled in any Member State (or EFTA–Lugano State), certain provisions will still prevent the English court from taking jurisdiction under the common law. The most important apply where:[68]

- there is a choice-of-court agreement in favour of the courts of another EU or Lugano State;
- proceedings between the same parties and involving the same claim are already pending before the courts of another EU or Lugano State;[69] or

[65] Hartley/Dogauchi Report, p. 40, note 141.

[66] This is not domicile as understood under the common law, but a separate concept closer (in the case of individuals) to residence.

[67] Brussels 2000 and Lugano, Article 4(1); Brussels 2012, Article 6(1).

[68] This list is not exhaustive: see Brussels 2012, Articles 18(1) and 21(2).

[69] Brussels 2000 and Lugano, Article 27; Brussels 2012, Article 29.

- the courts of another EU or Lugano State have exclusive jurisdiction – for example, if the proceedings concern rights *in rem* in immovable property in that State.[70]

Where one of these exceptions applies, the English court will not be able to take jurisdiction under the common law. These provisions apply irrespective of the domicile of the parties.[71]

1.80 What is the position where none of these exceptions applies, and the defendant is not domiciled in an EU or Lugano State? Will the Brussels Regulation 2000 or 2012, or the Lugano Convention prevent the English courts from taking jurisdiction under the common law? This raises the question whether the provisions laying down the requirements for a valid choice-of-court agreement[72] are intended to preclude a court from taking jurisdiction where they are not satisfied, even if no other provision requires this.

1.81 There is a provision in each of the instruments which states that where the defendant is not domiciled in an EU or Lugano State, jurisdiction is determined by the law of the State in which the court is located.[73] This would seem to allow the common law to operate in this situation. However, the provision is subject to a number of exceptions. There are more exceptions in Brussels 2012 than in the other two instruments, but in all of them one of the exceptions concerns choice-of-court agreements. In Brussels 2000, for example, Article 4(1) states:[74]

> If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.

1.82 Article 22 relates to exclusive jurisdiction (rights *in rem* in immovables, etc.) and Article 23 relates to choice-of-court agreements. Does this mean that, even if the defendant is not domiciled in an EU or Lugano State and no other provision precludes the court from taking jurisdiction, the English court is nevertheless precluded from hearing the case if the choice-of-court agreement does not satisfy the requirements laid down in the instrument?

[70] Brussels 2000 and Lugano, Article 22; Brussels 2012, Article 24.

[71] In the case of choice-of-court agreements and exclusive jurisdiction, this results from the wording of Article 4(1) of Brussels 2000 and Lugano, and Article 6(1) of Brussels 2012. In the case of proceedings in another EU or Lugano State, it was laid down in *Overseas Union Insurance v. New Hampshire Insurance*, Case C-351/89, [1991] ECR I-3317.

[72] Brussels 2000 and Lugano, Article 23; Brussels 2012, Article 25.

[73] Brussels 2000 and Lugano, Article 4(1); Brussels 2012, Article 6(1).

[74] Article 4(1) of Lugano is identical except that "Member State" is replaced by "State bound by this Convention". Brussels 2012 is the same except that there are more exceptions.

This cannot have been the intention. The other exceptions are intended either to protect the jurisdiction of another court in an EU or Lugano State, or (in the case of Brussels 2012) to ensure that, in certain special cases, a claimant can find a forum to sue a defendant not domiciled in such a State. If neither of these considerations applies, the only reason to prevent the English court from taking jurisdiction would be to protect the rights of the defendant. However, nowhere in any of the instruments is there any indication that there is a policy of protecting defendants who are not domiciled in an EU or Lugano State. An English court can, for example, take jurisdiction over such a defendant if a claim form is served on him during his temporary presence in England, a ground of jurisdiction singled out for express condemnation with regard to its use against defendants domiciled in an EU or Lugano State. Why should the position be different in the case of a choice-of-court agreement that does not meet the requirements laid down in the instruments? **1.83**

A more plausible explanation of the exception regarding choice-of-court agreements is that it is not intended to preclude an English court from taking jurisdiction where it is designated in a choice-of-court agreement which does not measure up to the required standard, but only to preclude it from taking jurisdiction where there is a choice-of-court agreement designating the courts of another EU or Lugano State. In other words, the rule is that where the defendant is not domiciled in an EU or Lugano State, jurisdiction of a court is determined by Member-State law unless the courts of another EU State or Lugano State have exclusive jurisdiction under a choice-of-court agreement (or one of the other exceptions applies). If this is correct, there is still room for the common law to operate in many situations. **1.84**

§ 8.2 The Chosen Court is Not in England

We now take the case where proceedings are brought before an English court and the chosen court is in another country. If the chosen court is in an EU State, a Lugano State, or a Hague State, and the choice-of-court agreement complies with the requirements of the relevant instrument, the English court will be precluded from taking jurisdiction, even if it has jurisdiction under common-law rules. Unlike under the common law, the instruments give no discretion to the court seised: it *must* decline jurisdiction. **1.85**

What if the choice-of-court agreement (which specifies the courts of an EU State, a Lugano State, or a Hague State) complies with the requirements of the English common law but not with those of the relevant instrument? Is the English court permitted or required to suspend the proceedings or decline jurisdiction in favour of the chosen court? The answer to this depends on **1.86**

whether the English court has jurisdiction under the instruments (in practice Brussels (2000 or 2012) or Lugano) or only under the traditional English rules. In the former case, it will be obliged to hear the case: it is not permitted to decline jurisdiction unless the choice-of-court agreement complies with the provisions of the relevant instrument. However, if its jurisdiction rests only on the traditional English rules of jurisdiction, it will be entitled to suspend the proceedings: if English law gives it jurisdiction, English law can permit the court not to exercise it.

1.87 The position is probably the same if the designated court is not in a country covered by any of the instruments: if the English court has jurisdiction under one of the instruments, it must hear the case; if it has jurisdiction only under the traditional English rules, the instruments will not preclude it from suspending the proceedings. In the past, it was thought that it could give effect to the choice-of-court agreement even if it had jurisdiction under Brussels or Lugano, but this no longer appears to be correct. For a full discussion, see Chapter 5, § 1.1.1.

§ 8.3 Foreign Judgments

1.88 The final case to consider is where the choice-of-court agreement designates the courts of a foreign country, those courts give judgment, and the English court is asked to recognize the judgment. In this situation, the position depends on the country the courts of which granted the judgment: this will determine the applicable instrument.

1.89 The Hague Convention requires judgments which comply with its provisions to be recognized in other Contracting States. It does not, however, preclude recognition of other judgments. Consequently, if the choice-of-court agreement complies with the common law but not with the Hague Convention, that Convention will not prevent the English courts from recognizing the judgment.

1.90 Under Brussels (2000 and 2012) and Lugano, the position is different. Subject to limited exceptions, a judgment given by the courts of an EU or Lugano State must be recognized in other EU or Lugano States. Generally speaking, the court asked to recognize the judgment is not permitted to consider the grounds on which the court of origin took jurisdiction. Except in a few special cases, the judgment must be recognized even if the court of origin took jurisdiction contrary to Brussels (2000 or 2012) or Lugano. As a result, the rules on choice-of-court agreements do not come into play.

1.91 The position is different where the judgment is given by a court in a country outside the EU or Lugano area. EU or Lugano judgment-recognition rules do not apply here,[75] nor do EU or Lugano rules on choice-of-court agreements.[76] Consequently, Member States are entitled to apply their own law in deciding whether to recognize the judgment. The common-law rules can operate in this situation.

[75] EU and Lugano judgment-recognition rules apply only where the court which granted the judgment is an EU or Lugano State.

[76] EU and Lugano choice-of-court rules apply only where the designated court is in an EU or Lugano State.