The Hague Choice-of-Court Convention: The answer to Brexit?

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• The Hague Convention applies to all EU Member States (except Denmark)
• After Brexit, the UK will have the right to sign up to it
• If the UK signs up, it will apply as between the UK and the EU
• It also applies to certain non-member States
The positive side

• The Hague Convention was modelled on the choice-of-court provisions of the Brussels I Regulation 2000
• BUT care was taken to ensure that the “Italian torpedo” did not work under it
Hague Convention 2005

Article 5(2):
[A court of a Contracting State designated in an exclusive choice of court agreement] shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.

Report, paras 132 to 134: Article 5(2) was intended to preclude the designated court from declining jurisdiction in the ground that another court was seised first (lis pendens).
The negative side

- Hague has a more restricted application than Brussels
- It contains more limitations and qualifications
I. What Hague covers and does not cover
It only covers **exclusive** agreements:  
**Asymmetric agreements are not covered**

- **Article 1(1):** the Convention applies only to **exclusive** choice-of-court agreements:
- **Report, paras 105 and 106:** It was agreed at the Diplomatic Session at that the agreement must be exclusive **irrespective of the party bringing the proceedings**
- Asymmetric agreements are not covered
Banking contracts

Most international financial contracts contain an asymmetric choice-of-court clause:

• The client can sue the bank only in the designated court

• But the bank can sue the client either in the designated court or in any other court which has jurisdiction under its law

• Such contracts are not covered by Hague
Brussels 2012

- Asymmetric choice-of-court agreements appear to be covered by Brussels I
- But see the judgment of the French Cour de cassation of 26 September 2012, in La société Banque privée Edmond de Rothschild Europe v. Mme X: ECLI:FR:CCASS:2012:C100983
IP and insurance contracts

• IP licencing agreements are fully covered by Hague (and by Brussels)
• Insurance contracts are fully covered by Hague but the EU has taken an opt-out which preserves the restrictions on choice-of-court agreements laid down in Brussels 2012, Article 15; so for insurance the position with regard to the EU is unchanged
Shipping

Hague, Article 2(2):
This Convention shall not apply to the following matters –

\( f \) the carriage of passengers and goods;

\( g \) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage
The above matters are covered, including choice-of-court agreements in bills of lading:

II. Limitations and qualifications
Hague, Articles 6(b) and 9(b)

• A court other than the designated court does not have to decline jurisdiction if a party to the agreement lacked capacity by the law of the court seised

• Likewise, a court does not have to recognize the judgment of the designated court if a party lacked capacity by the law of the court asked to recognize the judgment
Hague, Article 6(c)

• A court other than the designated court does not have to give effect to the agreement if this “would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised.”

• Under Brussels 2012, the only exception is that the agreement is null and void under the law of the designated court.
III. Conclusions
• Joining Hague would give substantial protection to the jurisdiction of UK courts designated in an exclusive choice-of-court agreement

• But it is not a good as Brussels