Respecting Reverse Subsidiarity is an excellent strategy for the European Union at The Hague Conference on Private International Law: currently being well deployed in the Judgments Project

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In 2009 in *Rabels Zeitschrift* the argument was made that the Maintenance Project in the Hague Conference on Private International Law was a triumph for reverse subsidiarity in the European Union (EU).[1] Subsidiarity is a concept well known in EU law and embedded in Article 5 of the Treaty on European Union. It reserves Union action in areas that fall outside the Union's exclusive competence for proposals whose objectives cannot be sufficiently achieved by the Member States and can be better achieved at Union level. Reverse subsidiarity can be roughly defined as the idea that in areas within Union competence (exclusive or otherwise) the Union should not act internally if the objectives cannot be sufficiently achieved by Union legislation and can be better achieved by an international treaty.

In the sphere of maintenance the Union could not enable its citizens to get maintenance from family members now living outside the EU by adopting Union legislation. It took the opportunity to achieve that aim by concluding a new Treaty and Protocol on maintenance in the Hague Conference on Private International Law in 2007.[2] In addition the Union decided not to legislate unilaterally for recognition and enforcement of maintenance decisions coming from outside the EU in the EU but rather to do so on a reciprocal basis by agreeing to such recognition and enforcement between Contracting States to the Convention. It has since taken a leading role in promoting the Maintenance Convention and Protocol by approving both instruments.[3]

The Union has also operated the principle of reverse subsidiarity in the context of the Hague Choice of Court Agreements Convention 2005 (2005 Convention).[4] In order to ensure that

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[1] P. Beaumont, "International Family Law in Europe – The Maintenance Project, the Hague Conference and the EC: A Triumph of Reverse Subsidiarity" *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 2009, p.509.

[2] See https://www.hcch.net/en/instruments/conventions/specialised-sections/child-support last accessed 22 June 2016.

[3] For the Convention see https://www.hcch.net/en/instruments/conventions/status-table/?cid=131 last accessed 22 June 2016 (33 State Parties) and for the Protocol see https://www.hcch.net/en/instruments/conventions/status-table/?cid=133 last accessed 22 June 2016 (28 State parties).

[4] See the Hague Conference's Choice of Court section at https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court, last accessed 23 June 2016; the definitive official materials on the Convention, in: *Proceedings of the Twentieth Session, Tome III,*

choice of court agreements in business to business cases that select a court or courts in the EU to resolve their disputes are respected by courts in other parts of the world the EU concluded the 2005 Convention in the Hague. The EU has again played a leading role in promoting this Convention and approved it in 2015.[5] In the revision of the Brussels I Regulation the EU decided that it would not introduce a special rule to decline jurisdiction in favour of a third State court that is seised after the EU court where the third State court was selected by the parties in an exclusive choice of court agreement. It did so on the basis that if third States want EU courts to give priority to the exclusively chosen court they should become Parties to the 2005 Convention.[6] It is only if third States become party to that Convention that the EU can be confident that the courts in those countries will respect a valid and exclusive choice of the courts of an EU State when they are seised by a party to such an agreement in breach of that agreement. In this context the EU is trying to make the reverse subsidiarity more effective by creating an incentive for third States to become Parties to the 2005 Convention or run the risk that torpedo actions will be brought in an EU State. Such a policy can be criticised for putting at risk the bargains of businesses in States that don't become Parties to the Convention but arguably businesses in such States are already at risk of their bargains being ignored because the national laws on respecting choice of court agreements are so varied in the absence of an international treaty. Indeed the only way to create long term global business to business certainty about respecting choice of court agreements is for most States in the world to become parties to the 2005 Convention as has already happened for the parallel world of international arbitration by the widespread adoption of the New York Convention on Arbitration.[7]

The Commission recognised in launching its Proposal for a Recast of Brussels I in December 2010[8] that there was not enough support from stakeholders and the Member States for harmonising the rules in the EU on recognition and enforcement of third State judgments to justify including such a proposal in the Recast.[9] The Commission noted that solving the problem through negotiating an international instrument had received "significant support from stakeholders in the public consultation" on the revision of Brussels I.[10] The Commission noted, however, that attempts to revive the Judgments Project at the Hague

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Choice of Court, Antwerp: Intersentia 2010. For analysis of the Convention see the official explanatory report by T. Hartley and M. Dogauchi, available at www.hcch.net/index_en.php?act=publications.details&pid=3959&dtid=3, last accessed 23 June 2016; P. Beaumont, 'Hague Choice of Court Agreements 2005: Background, Negotiations, Analysis and Current Status', *Journal of Private International Law* 2009, p. 125; R. Brand and P. Herrup, *The Hague Convention on Choice of Court Agreements Commentary and Documents*, Cambridge: Cambridge University Press 2008; A. Schulz, 'The Hague Convention of 30 June 2005 on Choice of Court Agreements', *Journal of Private International Law* 2006, p. 243; R. Garnett, 'The Hague Choice of Court Convention: Magnum Opus or Much Ado about Nothing?', *Journal of Private International Law* 2009, p. 161; T. Hartley, *Choice of Court Agreements under the European and International Instruments*, Oxford: Oxford University Press 2013; P. Beaumont, "The revived Judgments Project in The Hague" *Nederlands Internationaal Privaatrecht* 2014, p. 532.

[5] See https://www.hcch.net/en/instruments/conventions/status-table/?cid=98 last accessed 22 June 2016. Recently Singapore became a party to the Convention, joining Mexico and 27 of the 28 EU Member States (not Denmark). The Ukraine and the US have signed the Convention.

[6] See P. Beaumont, "The revived Judgments Project in The Hague" *Nederlands Internationaal Privaatrecht* 2014, p. 532 at 535.

[7] There are currently 156 parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html last accessed 22 June 2016.

[8] COM(2010) 748 final.

[9] Commission Staff Working Paper Impact Assessment SEC(2010) 1548 final. At p.25 the Commission Staff Working Paper said: "It would therefore not make political sense to pursue these options further at this stage."

[10] Ibid.

Conference on Private International Law Council on General Affairs and Policy in April 2010 although supported by the EU had failed because "the majority of delegations, including the USA, Canada, Japan and Australia, were opposed to resume even exploratory work on this matter for the time being."[11] The EU committed itself to continue to "re-launch negotiations on this issue" in The Hague but was not optimistic that it would succeed saying that "it is highly unlikely that a convention could be agreed in a foreseeable future".[12] It must be acknowledged that part of the problem in The Hague in April 2010 was the tendency to see the revival of the Judgments Project as being equated to the revival of the mixed Convention idea that had been considered in the 1990's and was the brainchild of Arthur von Mehren.[13] Interestingly enough the Commission's decision not to propose provisions on recognition and enforcement of Third State judgments in the recast of Brussels I in December 2010 paid dividends in The Hague much quicker than expected. In Spring 2011 the EU was influential in creating a consensus in The Hague Council on General Affairs that an Experts' Group should be established to assess the possible merits of resuming the Judgments Project.[14] The following year the Experts' Group reported to the Council which decided that work on the Judgments Project should proceed. The Council established a Working Group to prepare proposals on the recognition and enforcement of judgments, including jurisdictional filters, and requested the Experts' Group to further study and discuss the desirability and feasibility of making provisions in relation to jurisdiction.[15] Over the next three years the EU showed sufficient flexibility to prioritise the work on a single Convention on recognition and enforcement of judgments and put to the next stage of the The Hague's work programme attempts to reach agreements on rules on conflicts of jurisdiction, agreed bases of direct jurisdiction and the prohibition of exorbitant jurisdiction.

The advantage of utilising reverse subsidiarity is that the EU has the opportunity to see how far other States are willing to go in accepting judgments coming from the EU and does not commit itself to unilaterally recognising judgments coming from third States without any reciprocal benefit. Of course at the moment the Member States of the EU have widely varying rules on recognition and enforcement of judgments from non-EU States. Harmonising these rules in an international rather than EU context means that it is easier to move ahead with a flexible solution based on minimum harmonisation. The model of legislation in the EU on private international law has been maximum harmonisation and therefore an attempt to harmonise completely the very diverse rules within the EU on recognition and enforcement of judgments coming from third States by adopting internal Union legislation would not only have been very contentious politically, as noted above, but difficult to justify from the point of view of "subsidiarity".

The Commission's handling of recognition and enforcement of foreign judgments in The Hague is so far proving wise and successful. The Hague Working Group that was set up in 2012 to develop a recognition and enforcement of judgments Convention reported in 2015 that it had successfully completed a draft and the Hague Council of General Affairs and Policy in March 2016 decided to create the first Hague Special Commission to adopt a

[11] Ibid at p.26.
[12] Ibid.
[13] For an explanation of the terminology and the history of the failure of the mixed Convention in the 1990's and early 2000's in The Hague, see P. Beaumont, "The revived Judgments Project in The Hague" *Nederlands Internationaal Privaatrecht* 2014, p. 532 at pp. 532-533.
[14] See https://www.hcch.net/en/projects/legislative-projects/judgments last accessed 23 June 2016.
[15] Ibid.

Convention since the Maintenance Convention and Protocol were completed in 2007. The first Special Commission met in June 2016.[16]

From 1 to 9 June 2016, the Special Commission on the Judgments Project was convened in The Hague. The Special Commission was attended by 153 participants from 53 States and one Regional Economic Integration Organisation ("REIO"), representing Members of the Hague Conference on Private International Law, and a select number of non-Member States, and 16 international governmental and non-governmental organisations.

The Special Commission identified two main objectives for the Preliminary Draft Convention:

a) to enhance practical access to justice, through the recognition and enforcement

of judgments; and

b) to facilitate trade and investment, and contribute to economic growth, by enhancing legal certainty and reducing costs and uncertainties associated with cross-border dealings, and with the resolution of cross-border disputes.

The future Convention will contribute to these two objectives by -

a) promoting the circulation of judgments to which the draft Convention will apply, subject to certain appropriate safeguards;

b) reducing the need for duplicative proceedings in two or more Contracting States;

c) reducing the costs and timeframes associated with obtaining recognition and enforcement of judgments;

d) improving predictability for businesses and individuals in Contracting States in relation to the circumstances in which judgments will circulate among Contracting States; and

e) enabling claimants to make more informed choices about where to bring proceedings, taking into account their ability to enforce the resulting judgment in other Contracting States.

The future Convention is intended to sit alongside, and complement, the 2005 Convention.[17]

The decision of a majority of the UK to vote to leave the European Union on Thursday 23 June 2016 means that in the not too distant future the UK will not be a Member State of the European Union. This is likely to have the consequence that once the UK has left the Union it will not apply the Brussels I Regulation or the Lugano Convention to provide for recognition and enforcement of judgments from courts in the EU and in the Lugano Contracting States and vice versa.[18] Clearly the Brussels I Regulation will not apply to a

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[16] See https://www.hcch.net/en/projects/legislative-projects/judgments last accessed 22 June 2016.

[17] I am grateful to the Chairman of the Special Commission, David Goddard QC from New Zealand, for the recording of the Special Commission's identification of the two main objectives of the preliminary draft Convention.

[18] See Brexit – Immediate Consequences on the London Judicial Market.
by Marta Requejo on June 24, 2016, see http://conflictoflaws.net/ , last accessed 24 June 2016.

State outside the EU – apart from transitional arrangements for cases already in the pipeline at the time of the UK exit from the EU – and the Lugano Convention is not likely to be a model acceptable to a newly liberated UK. The Lugano Convention is too heavily influenced by the case law of the Court of Justice of the European Union because of its parallelism to the original Brussels I Regulation and it provides for a strict race to the court through the system of *lis pendens*. A post BREXIT UK is likely to want to keep its own rules of jurisdiction (at least in England and Wales) with a discretionary system for declining jurisdiction (the originally Scottish concept of *forum non conveniens*).[19] It may very well be the case that the future Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, alongside the 2005 Convention, will be the best basis for ensuring appropriate recognition and enforcement of judgments from UK courts in other States in the EU and the current Lugano Contracting States and vice versa.

The rest of this article will consider some of the key points in the Preliminary Draft Convention (PDC) adopted by the Special Commission in June 2016.[20]

The scope of the PDC is very similar to the 2005 Convention but the most notable differences are that:

a) It is not restricted to choice of court agreements;
b) It does apply to consumer and employment contracts;
c) It does apply to the civil or commercial law aspects of anti-trust (competition) matters;
d) It does apply to all tort claims apart from defamation and liability for nuclear damage (whereas the 2005 Convention applies to all tort claims covered by an exclusive choice of court agreement apart from "claims for personal injury brought by or on behalf of natural persons", "tort or delict claims for damage to tangible property that do not arise from a contractual relationship", "anti-trust (competition) matters" and "liability for nuclear damage");
e) It does apply to the validity and infringement of all intellectual property rights (whereas the 2005 Convention only applies to the validity and infringement of copyright and related rights and to infringement proceedings brought for a breach of contract between the parties relating to any other intellectual property right or which could have been brought for breach of that contract.

Article 4 of the PDC is a core provision establishing the duty to recognise and enforce foreign judgments from other Contracting States. A judgment cannot be refused recognition or enforcement on any basis other than those provided in the PDC. Of course it should be noted that "enforcement" here means enforceability and not actual enforcement. A judgment can only be declared non-enforceable under one of the grounds set out in the Convention but it could be refused actual enforcement on a basis of national law in the requested State that is not inconsistent with the Convention, eg that the amount awarded by the judgment has already been paid by the judgment debtor or the debtor is down to his or her bare necessities and the local law prevents these being taken away from him or her. Another important feature

[19] *Forum non conveniens* was developed in Scotland and brought into the law of England and Wales in the 1980's, see P. Beaumont, "Great Britain" in *Declining Jurisdiction in Private International Law* Oxford: Clarendon Press, 1995 ed. by J.J. Fawcett, at pp. 207-233.
[20] See https://assets.hcch.net/docs/42a96b27-11fa-49f9-8e48-a82245aff1a6.pdf last accessed 22 June 2016.

of Article 4 is that a judgment will only be recognised under the Convention for as long as it has effect in the State of origin and enforced under the Convention for as long as it is enforceable in the State of origin. Finally it provides the requested State with various options in relation to judgments that are the subject of review, or could still be the subject of ordinary review, in the State of origin. Such judgments may be enforced, enforced subject to the provision of such security as the courts in the requested State determine, postponed or refused. In this situation the refusal would be a dismissal without prejudice.

Article 5 gives a fairly extensive list of jurisdictional bases for the recognition and enforcement of a judgment from the State of origin. These jurisdictional filters or indirect grounds of jurisdiction are not required to be used by the State of origin in determining jurisdiction. Instead their purpose is to ensure that the State of origin had, from the point of view of the requested State, a satisfactory basis for exercising jurisdiction in relation to the judgment which is being brought for recognition and enforcement in the requested State. Some of these grounds of jurisdiction are uncontroversial (eg defendant's habitual residence, branch jurisdiction, tenancies of immoveable property), some are innovative but appear to be acceptable to all (eg the claimant in the courts of the State of origin loses and has to accept being subject recognition and enforcement of the resulting judgment in the requested State, and the jurisdiction based on the State of a place of performance of a contract provided the defendant's activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State) and some require significant further work (eg jurisdiction where the defendant enters an appearance before the court of origin without contesting jurisdiction at the first opportunity to do so, if the defendant would have had an arguable case that there was no jurisdiction or that jurisdiction should not be exercised under the law of the State of origin, and where the judgment ruled on a counterclaim).

Article 5(2) narrows the acceptable jurisdictional filters in relation to judgments against a consumer (a natural person acting primarily for personal, family or household purposes) in matters relating to a consumer contract and against an employee in matters relating to the employee's contract of employment. Express consent is an acceptable filter only if it is given before the court and the contract/activity filter does not apply.

Article 6 is the one provision in the PDR which creates maximum rather than just minimum harmonisation of recognition and enforcement of judgments. It creates exclusive bases of indirect jurisdiction for recognition and enforcement of judgments in relation to universally accepted exclusive bases of jurisdiction. Thus judgments ruling on the registration or validity of intellectual property rights that are required to be registered must be recognised only when they are from the courts of the State of registration, and judgments ruling on rights *in rem* in immovable property must be recognised only when they are from the courts of the State where the property is situated. A compromise has been struck in relation to a widely but not universally accepted exclusive jurisdiction for tenancies of immovable property for a period of more than six months. The courts of the place where the property is situated is an acceptable jurisdictional filter under Article 5 for a judgment ruling on any tenancy of immovable property. Article 6 prohibits the recognition or enforcement of judgments ruling on tenancies of immovable property for a period of more than six months if the property is not situated in the State of origin and the courts of the Contracting State in which it is situated have exclusive jurisdiction under the law of that State.

Article 7 provides the grounds for refusal of recognition or enforcement of judgments. All the grounds are discretionary and are the same as those in Article 9(c), (d), (e), (f) and (g) of

the 2005 Convention except that the ground for refusal relating to fraud has been widened to all fraud and not just fraud "in connection with a matter of procedure". Previously it has been suggested that the fraud ground could be deleted on the understanding that it is covered by the public policy exception (as it is in the Brussels I Regulation and the Lugano Convention)[21] but the Special Commission was keen to ensure that fraud, whether in relation to a matter of procedure or substance, should be covered by a ground independent of public policy to avoid any doubt about it not being covered by the public policy refusal ground.[22] Articles 9 (a) and (b) of the 2005 Convention are not included in Article 7 of the PDC because they only have relevance to choice of court agreements. Article 7 of the PDC has two additional grounds of refusal not found in the 2005 Convention. The first one is an important attempt to protect the effectiveness of choice of court agreements by allowing recognition or enforcement of a judgment to be refused if the proceedings in the court of origin were contrary to an agreement or a designation in a trust instrument under which the dispute in question was to be determined in a court other than the court of origin. This provision will not only protect exclusive choice of court agreements as defined in the 2005 Convention but also asymmetric agreements (eg where the party that is obliged to go to the courts of one State under the asymmetric agreement obtains a judgment in another State) and quasi-exclusive agreements (eg only the courts of two States are allowed to exercise jurisdiction under the agreement of the parties and one of the parties has obtained a judgment in another State). The second additional ground is designed to protect proceedings pending in the requested State where the courts in that State were seised of proceedings between the same parties on the same subject matter before the courts of the State of origin were seised. The courts of the requested State may dismiss without prejudice the recognition or enforcement of the judgment or postpone the recognition or enforcement proceedings until after the pending proceedings are concluded if there is a close connection between the dispute and the requested State.

Articles 8, 9, 10, 11, 12 and 15 of the PDC are very similar to Articles 10, 11, 12, 13, 14 and 15 of the 2005 Convention. One notable difference that should be greatly welcomed is the new provision in Article 12(2) of the PDC. This prohibits the court of the requested State from refusing the recognition or enforcement of a judgment under the Convention on the ground that recognition or enforcement should be sought in another State. This provision is designed to prevent the requested State creating jurisdiction rules for hearing actions for recognition and enforcement or indeed declining to hear a case for recognition or enforcement of a judgment under the Convention because it regards itself as a forum non conveniens for such a recognition or enforcement application. There has been some evidence of courts and academics in North America putting jurisdictional or *forum non conveniens* hurdles in the way of applications for recognition and enforcement.[23] All delegations at the Special Commission wanted to avoid this happening in the future under the Convention.

The PDC also has three further provisions that are not in the 2005 Convention. First, Article 14 provides for adaptation of foreign non-money judgments. Second, Article 16 keeps the

[21] See P.R. Beaumont & L. Walker "Recognition and enforcement of judgments in Civil and Commercial Matters in the Brussels I Recast and some lessons from it and the recent Hague Conventions for the Hague Judgments Project" *Journal of Private International Law* 2015, p. 31 at pp. 54-56.

[22] A few words have been added to the public policy refusal ground in square brackets indicating that there is no consensus yet on the inclusion of those words: "and situations involving infringements of security or sovereignty of that State".

[23] See P. Beaumont, "The revived Judgments Project in The Hague" *Nederlands Internationaal Privaatrecht* 2014, p. 532 at p. 538.

Convention as a minimum harmonisation Convention on recognition and enforcement of foreign judgments (apart from the exclusive or quasi-exclusive bases of jurisdiction in Article 6 of the PDC discussed above) by providing that: “Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law.”