



The Hague Choice of Court Convention Takes Effect, and With It Greater Certainty for International Transactions

International commercial arbitration has long been characterized as indispensable to global capital flows; it allows transacting parties access to a mutually chosen forum when disputes between them arise and leads to an enforceable award at the end of the arbitral process. With recent developments, however, the monopoly held by arbitral institutions on international dispute resolution may be starting to change.

Two decades of research, drafting, and negotiation conducted under the auspices of the Hague Conference on Private International Law led to the creation of the *Hague Convention on Choice of Court Agreements* (the “Hague Convention” or “Convention”) in June 2005. Two years later, Mexico was the sole ratifying country, but after a decade of languishing as an ineffective Convention, the Latvian presidency of the European Union (“EU”) deposited an instrument of ratification on behalf of 28 EU member states.¹ As a result of these accessions, the Convention entered into effect on October 1, 2015. The United States and Singapore have also signed the Convention, but neither has ratified it yet.

The aim of the Hague Convention is fairly simple. Where parties have agreed to resolve their commercial disputes in a specific national court, the Convention

provides that such agreement will be enforced in every signatory state,² other signatory states must abstain from asserting jurisdiction over the matter,³ and a judgment subsequently rendered by the chosen court will be recognized in other signatory states.⁴ The long-term objective is to create an international legal regime for choice of court agreements similar to that established for arbitration agreements by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”). This would be an important first step in placing judgments on an equal footing with arbitral awards when it comes to worldwide enforcement.

Choice of Court Agreements in General

Choice of court agreements, otherwise commonly known as “forum selection clauses,” provide that a chosen country’s courts will be the arbiters of any disputes that may arise between contracting parties. Such agreements confine disputes to the courts of one jurisdiction as chosen by the parties, so they know exactly where they can sue and be sued. Certainty brings with it significant efficiencies. “The right to litigate in one forum or another has an economic value that parties can estimate with reasonable accuracy,”⁵ so parties often prefer to allocate those costs via contract. This

is especially important in the case of high-value, cross-border transactions where parties can spend considerable time and money litigating jurisdictional issues, which in turn delays the final resolution of their underlying dispute. For this reason, such clauses are often used in contracts facilitating cross-border transactions such as international loan, joint venture, supply, sale, merger, and acquisition agreements.

Forum-selection clauses have permeated commercial activity to such an extent that even many of today's form contracts designate the selected forum to litigate disputes. While there are as many different forum selection clauses as there are different fora around the world, broadly speaking, each such clause can be classified into one of two categories: either it is "an agreement to litigate in the agreed forum or fora" or it is "an agreement to litigate *only* in a forum or fora."⁶ The former is called a "permissive" or "non-exclusive" forum clause, while the latter is called a "mandatory" or "exclusive" forum clause.⁷

Regardless of their form, in most states around the world, forum selection clauses are "*prima facie* valid and ... enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances"⁸ (e.g., by a showing "that the clause [itself is] invalid" due to fraud⁹). This position "accords with ancient concepts of freedom of contract" and assists in the free flow of goods and services.¹⁰ "[E]xpansion of ... business and industry will hardly be encouraged if, notwithstanding solemn contracts, [each nation state] insist[s] ... that all disputes must be resolved under [its] laws and in [its] courts."¹¹

The Hague Convention: A New York Convention for Judicial Judgments?

As set out in the European Commission's Explanatory Memorandum of January 30, 2014, the Hague Convention is "designed to offer greater legal certainty and predictability for parties involved in business-to-business agreements and international litigation by creating an optional worldwide judicial dispute resolution mechanism alternative to the existing arbitration system."¹² Like the arbitration system created by the New York Convention, the Hague Convention is confined only to civil and commercial matters (*viz.* it excludes disputes relating to consumer and employment contracts, most family law matters, insolvency matters, personal injury

claims brought by natural persons, and some insurance contracts).¹³ Again, echoing the New York Convention, the Hague Convention also applies only where the contracting parties have definitely chosen a forum to resolve their disputes.¹⁴ Non-exclusive choice of court agreements do not fall within its purview. The New York Convention also requires the choice of forum (court or arbitration) to be in writing,¹⁵ while the Hague Convention requires it to be in writing or another means easily usable during enforcement proceedings.¹⁶

The Convention achieves its objective of strengthening jurisdictional choice by mandating three things from signatory states¹⁷:

- The chosen court of a signatory state specified in the parties' contract *must* hear the case when proceedings are brought before it.¹⁸ Judges in contracting states will no longer be able to declare the court a "forum non conveniens" of their own accord if it is contrary to what the parties agree on in a choice of court agreement.
- Courts in other contracting states must refuse to hear a case if they have not been designated as the chosen forum in a valid choice of court agreement.¹⁹
- The judgment of the chosen court will be recognized and enforced by the courts of other member States that have signed and ratified the Convention.²⁰

These are the three pillars of the Hague Convention, and they are designed to work together. For example, if two parties confer exclusive jurisdiction upon Spanish courts in their contract but a party nevertheless commences proceedings in Mexico, the Mexican court will be obliged to either suspend or dismiss those proceedings in accordance with its obligations under the Convention. Similarly, once the Spanish court renders its judgment, the Mexican courts will be bound to enforce it.

Finally, just as the New York Convention fostered a general presumption favoring the enforceability of arbitration agreements, the Hague Convention purports to adopt an interpretive presumption toward the exclusivity of a specific choice of court. To wit, it deems all choice of court agreements to be exclusive, unless expressly declared non-exclusive by the parties.²¹ Thus, a contract that provides that "[p]

proceedings under this contract shall be brought before the courts of State X” is deemed to be an exclusive choice. If the parties want to agree to a non-exclusive choice, they must say so expressly.

Like the New York Convention, the Hague Convention aims to create a harmonized set of rules to govern cross-border choice of forum and cross-border enforcement of judgments.

Interaction with the Recast Brussels Regulation

There is some uncertainty concerning how the Hague Convention will interplay with other international instruments, in particular the Recast Brussels Regulation (“Regulation”). This EU Regulation sought to strengthen party autonomy by ensuring that “choice of court agreements may not be circumvented by parties seizing other courts in violation of such agreements,”²² i.e., commencing proceedings first in jurisdictions other than the one chosen by the parties. Because the Hague Convention contains a “give way” provision, in cases that involve only EU-resident parties and/or parties resident in non-Hague Convention states, the Regulation’s rules should prevail where a contract provides for the exclusive jurisdiction of an EU court. However, in other cross-border cases in contracting state courts, the Hague Convention may take precedence.

Whichever instrument applies, however, the practical result in any given case is likely to be the same. That being said, the Hague Convention may provide parties with greater protection against the risk of parallel proceedings being commenced inside the EU where they have chosen a non-EU court to govern their dispute.

The Immediate Impact of the Convention for Transacting Parties

The immediate impact of the Convention will not be limited to parties from the 28 signatory states. Any parties choosing to have their disputes heard in a signatory state, whether or

not they are residents of that state, can take advantage of the Convention and gain certainty in their jurisdictional choice. Parties from signatory states, or parties merely wishing to have their disputes heard in signatory states, would be well advised to consider the benefits that the Convention might provide in their international transactions. When choosing the courts of London, Paris, or Mexico City as the preferred forum, this choice will be given full effect, and the resulting judgment will be enforceable in all other signatory states.

At present, the Hague Convention is relatively limited by its geographical scope, particularly in circumstances where the Recast Brussels Regulation will prevail in many disputes connected with the EU. The main drawback to the limited geographic scope of the Convention relates to the relative weakness of the second pillar; parties wishing to thwart an otherwise valid choice of court can easily find a non-signatory state where parallel proceedings may be sustained. But this, too, may be starting to change, as momentum has gathered for additional ratifications since the EU’s accession. Singapore is likely to ratify the Convention in the coming months, which will increase the incidence of choice and enforceability of judgments from the newly established Singapore International Commercial Court. U.S. ratification may also be on the horizon, but it is being delayed by consideration of whether to implement it at the state or federal level.²³

An expansion of the Convention’s scope to these states will be significant. Contracting parties regularly choose New York, London, or Singapore as the forum for dispute resolution, and having judgments from those places reliably enforced throughout the United States and Europe would be a significant and welcomed development. The Convention is also under consideration in Argentina, Australia, Canada, New Zealand, Paraguay, the Russian Federation, and Turkey.²⁴ This could be the start of a truly global regime. While it might indeed be too soon to predict the demise of arbitration as the preferred means of international dispute resolution, the Convention is certainly a first step toward parity between these often competing modes of dispute resolution.

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Endnotes

- 1 Audrey Dwyer, David Waldron, and Adam Wallin, "[Hague Convention Choice of Court Agreements to Take Effect in October](#)," Lexology (July 13, 2015).
- 2 [Hague Convention on Choice of Court Agreements art. 8\(1\)](#), June 30, 2005 [hereinafter "Hague Convention"].
- 3 *Id.* art. 6.
- 4 *Id.* art. 8(2).
- 5 Patrick J. Borchers, "Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform," 67 *Washington Law Review* 55, 57 (1992).
- 6 *Id.* at 56 n.1.
- 7 *Id.*
- 8 *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (emphasis added).
- 9 *Id.* at 15.
- 10 *Id.* at 11.
- 11 *Id.* at 9.
- 12 [Proposal for a Council Decision on the Approval, on Behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements](#), European Comm'n (Jan. 30, 2014).
- 13 Hague Convention art. 1(1).
- 14 *Id.*
- 15 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 2(1), June 10, 1958, 21 U.S.T. 2517.
- 16 Hague Convention art. 3(c).
- 17 These three observations were noted by Stefan Falge, Helena Franceschi, and Daniel H.R. Laguardia, *The Hague Convention on Choice and Court Agreements A Discussion of Foreign and Domestic Points*, 80 U.S.L.W. 1803 (June 26, 2012).
- 18 Hague Convention art. 5(2).
- 19 *Id.* art. 6.
- 20 Notably, the Hague Convention provides much broader grounds for nonrecognition of signatory state judgments than the New York Convention provides for arbitral awards. Under Article 9 of the Hague Convention, recognition may be refused where (i) the underlying agreement is null and void under the law of the State of the chosen court; (ii) A party lacked the capacity to conclude the agreement under the law of the requested State; (iii) Documents instituting proceedings in the chosen court were not notified to the defendant in "sufficient time"; (iv) Documents concerning recognition or enforcement proceedings in the requested State were notified to the defendant in a manner that is in conflict with that State's "fundamental principles" concerning service of documents; (v) The judgment was obtained through fraudulent procedure; (vi) Recognition or enforcement is "manifestly incompatible" with the public policy of the of the requested State; (vii) The judgment is not consistent with an earlier one given in the requested State in a dispute between the same parties; or (viii) The judgment is not consistent with an earlier judgment given by "another State" in a dispute between the same parties and for the same action where that earlier judgment is also capable of enforcement under the law of the requested State. *Id.* art. 9.
- 21 *Id.* art. 3(b).
- 22 Proposal for a Council Decision, *supra* note 13.
- 23 Christophe Bernasconi, "[What to Expect from the Choice of Court Convention](#)," *International Financial Law Review* (Sept. 22, 2014).
- 24 *Id.*

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