Hague Choice of Court Convention: gaining momentum

by Gregg Rowan, Donny Surtani, Allison Alcasabas and Daniel Waldek, Herbert Smith Freehills LLP

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1 October 2015 marked the entry into force of the Hague Convention on Choice of Court Agreements, which aims to uphold parties' contractual choice of court clauses. While the Convention is still relatively new, there are encouraging signs that it is gaining acceptance and may provide a basis for court judgments from contractually chosen courts to be enforced overseas more readily than at present.

1 October 2015 marked the entry into force of the Hague Convention on Choice of Court Agreements (the Convention), which aims to uphold parties' contractual choice of court clauses, also known as jurisdiction clauses, and to make judgments obtained under those clauses easier to enforce. The goal is that parties from contracting states feel more confident in trading with each other and making use of each other's courts. The framework for international trade between these states should therefore be enhanced.

While the Convention is still relatively new, there are encouraging signs that it is gaining acceptance and may provide a basis for choice of court clauses to be treated similarly to arbitration clauses under the New York Convention, and for judgments from contractually chosen courts to be enforced overseas more readily than at present.

EU approval

The Convention has been approved by the EU on behalf of all EU member states other than Denmark. Mexico acceded in 2007, so it now applies as between Mexico and the contracting member states. It will apply to choice of court agreements entered into after the date on which it comes into effect in the state of the chosen court. In the UK, it has been brought into effect by the Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) Regulations (*SI 2015/1644*).

The Convention does not, however, apply between the contracting member states. Issues of jurisdiction and recognition of judgments as between those states continue to be governed by the recast Brussels Regulation (*1215/2012/EU*) (*see feature article "The recast Brussels Regulation: implications for commercial parties"*).

Scope

The Convention applies only to international cases where a choice of court agreement exists and only in respect of civil or commercial matters (*Article 1*) (*see box "Non-exclusive jurisdiction agreements"*).

What is "international" depends on the context. When determining jurisdiction, a case is international unless all aspects of the case, such as the parties' residence and subject matter, regardless of the location of the chosen court, are connected with only one state. However, when considering an issue of recognition or enforcement, a case is

international if the judgment of a court in one contracting state is to be recognised or enforced in another contracting state.

Certain matters are expressly excluded from the scope of the Convention including, among others, consumer agreements, employment agreements, and certain disputes in relation to intellectual property rights. However, if an excluded matter is merely preliminary to, and not the object of, proceedings, the agreement could still be within the scope of the Convention (*Article 2(3)*).

By contrast, the New York Convention does not limit its scope, save that it only applies when courts are faced with foreign arbitral awards, so it has wider potential application. However, various states have limited their application of the New York Convention, for example, so that it applies in commercial matters only. In addition, each state has its own body of arbitration laws, which may prescribe categories of matters that are non-arbitrable under domestic law. These restrictions will vary from state to state and are not recorded in any central repository. So while the Convention appears to be narrower in scope than the New York Convention, its restrictions may come to be more consistent than those applying to arbitrations.

The Convention also provides for states to limit the scope of its application to them (*Article 21*). For example, the EU has declared that it will not apply the Convention to insurance disputes, save in limited circumstances. The consistent application of the Convention will partly depend on states not making too many of these limitations.

Key terms

The three key provisions of the Convention are that, for agreements containing choice of court clauses that are within its scope:

- A chosen court must, in principle, accept jurisdiction (*Article 5*).
- Other courts must, in principle, refuse jurisdiction (*Article 6*).
- Courts must generally enforce the judgments of other courts that the parties have contractually chosen (*Article 8*) (*see box "The pitfalls of choosing a particular court"*).

There are exceptions to these rules, which are not always analogous to the corresponding provisions in the New York Convention, although there are a number of parallels. Depending on how the Convention is construed by courts, it may be slightly easier for a party to avoid being bound by choice of court agreements, and by judgments produced under these agreements, as compared with arbitration agreements and arbitral awards.

That said, the intention appears to have been to create consistency where possible. There is also a substantial body of precedent in arbitration law which may be of assistance as national courts come to apply similar rules in the Convention.

International reaction

The impact of the Convention will become greater with each increase in its geographic scope, and as more states ratify it, others will increasingly not want to be left behind.

US. With the EU having approved the Convention, many observers are waiting to see how the US will respond, particularly given that the Convention originated from efforts to co-ordinate recognition and enforcement of judgments between the US and its European trading partners.

On 19 January 2009, the US became the first signatory to the Convention. However, it has not yet ratified it, and nor has the US ratified any other convention or treaty that requires recognition or enforcement of non-US court judgments. This means that there is no uniformity among the 50 US states as to the recognition and enforcement of foreign judgments.

It is uncertain whether the US will ratify the Convention. In the six years since signing, key US stakeholders have been at an impasse on a method for implementation that would balance the strongly competing federal and state interests.

Ratification and implementation of the Convention would significantly alter the current US approach to foreign judgments by bringing some uniformity to the process by which those foreign judgments that fall within the scope of the Convention are enforced in the US. However, until the diverging camps of key stakeholders can reach a compromise on the way forward for domestic implementation, US ratification of the Convention may not occur for some time.

Singapore. On 25 March 2015, Singapore became the latest signatory to the Convention. It is anticipated that Singapore will ratify it in late 2015 or early 2016. This would have an important impact on the enforceability of Singapore court judgments and, in particular, judgments of the new Singapore International Commercial Court (SICC), which the Singaporean government is looking to promote as part of its aim of developing Singapore as a hub for international litigation as well as arbitration. Given that the EU is one of Singapore's largest trading partners, the prospect of SICC judgments being enforceable in EU member states could be a key catalyst for the growth of the nascent SICC.

Other states. Elsewhere, reaction to the Convention has been varied. It is understood that Australia is considering signing and ratifying the Convention soon, and it is also believed to be under consideration in Canada and New Zealand. On the other hand, two consultations in Hong Kong in 2004 and 2007 led to mixed reactions. Further developments there do not seem imminent, although the Hong Kong government is keeping the issue under review. It will no doubt monitor developments in Singapore keenly, as the two jurisdictions vie to be the leading dispute resolution hub for the region.

Next on the horizon?

Further work is already underway on a new convention for the mutual recognition of judgments, even where they do not arise from exclusive choice of court agreements. This may be more controversial than the Convention as national courts may be more wary about enforcing judgments of foreign courts to which their citizens did not voluntarily submit. Nonetheless, it is an interesting development in the push for greater harmonisation in the field of international litigation. The learning process that led to the recasting of the Brussels Regulation may well be of value in seeking to agree terms, at least between states that have a high degree of confidence in each other's court systems.

*Gregg Rowan is a partner, and Donny **Surtani** is a senior associate, in the London office of Herbert Smith Freehills LLP; Allison Alcasabas is a partner in the firm's New York office; and Daniel Waldek is a senior associate in the firm's Singapore office.*

Non-exclusive jurisdiction agreements

The Hague Convention on Choice of Court Agreements (the Convention) does not apply to jurisdiction agreements that are non-exclusive (*Article 1(1)*).

Jurisdiction agreements are assumed to be exclusive unless they expressly state otherwise (*Article 3*).

Asymmetric agreements, as commonly found in banking and finance contracts, which require one party to sue in a particular forum but give the other party a choice of suing in different states, will be treated as non-exclusive agreements.

Some standard form agreements, for example, the 1992 and 2002 International Swaps and Derivatives Association Master Agreements, contain non-exclusive jurisdiction clauses. Parties wishing to have the benefit of the Convention in these agreements should seek advice.

The pitfalls of choosing a particular court

When drafting a choice of court clause, parties may wish to choose a particular court, such as, the Commercial Division of the High Court in London, as an alternative to specifying a particular national body of courts, for example, the courts of England.

However, if the chosen court exercises its discretion to transfer the case to another court in the same contracting state, that might free foreign courts from their obligations under the Hague Convention on Choice of Court Agreements to refuse jurisdiction and to recognise and enforce the judgment.

Parties wishing to specify a particular court in this way should seek advice before doing so.

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