EU's ratification of the Choice of Court Convention
Friday 13 November 2015
Impact of the entry into force of the Choice of Court Convention

(Hague Convention of 30 June 2005 on Choice of Court Agreements)

MARTA PERTEGÁS
FIRST SECRETARY, PERMANENT BUREAU
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW
Status of the Convention

Canada
Uniform implementing legislation prepared

United States
Signed (2009), implementing legislation prepared at state/federal level

European Union
Signed (2009), ratified (2015)

Russian Federation
Actively considering ratification

People’s Republic of China
Actively considering ratification

Serbia
Actively considering ratification

Singapore
Signed (2015), ratification expected in 2016

New Zealand
Actively considering ratification

Costa Rica
Considering accession

Argentina
Considering ratification

Australia
Actively considering ratification

Mexico
Acceded (2007)

NB: The boundaries shown and designations used on this map are based upon those used by the United Nations Cartographic Section and are indicative only. They should not be taken to imply official endorsement or acceptance by either the Hague Conference or the United Nations.
Scope of the Convention

1) Applies to international cases
   • For the purpose of jurisdiction: a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State (subject to Art. 19 declaration)
   • For the purpose of recognition and enforcement: a case is international where recognition or enforcement of a foreign judgment is sought (subject to Art. 20 declaration)

2) Applies to exclusive choice of court agreements
   • that designate the court(s) of a Contracting State
   • concluded after entry into force for the State of the designated court
   • must be concluded or documented in writing, or by other means of communication which render information accessible for subsequent reference
3) “Civil and commercial matters”

- Exclusions from scope: consumer and employment contracts (Art. 2(1)) and other “excluded matters” (Art. 2(2))
  - However, the Convention applies when a matter excluded under Art. 2(2) arises merely as a preliminary question or by way of defence, and not as an object of the proceedings
  - A State may refuse to apply the Convention to a specific matter in which it has a strong interest in not applying the Convention
  - e.g. EU Declaration on certain types of insurance contracts
    (Art. 21 declaration)

4) Interim measures of protection

- Outside the scope of the Convention
- The Convention does not affect whether or not a party may request or a court should grant, refuse or terminate such measures
Key Obligations under the Convention

1. The chosen court **must** hear the dispute  
   *Article 5*

2. Any non-chosen court **must** suspend/dismiss proceedings  
   *Article 6*

3. Judgment given by the chosen court **must** be recognised and enforced  
   *Article 8*

   **Predictability**  
of forum, as chosen by  
the parties

   **Prevention**  
of parallel proceedings

   **Enforcement**  
of judgments rendered  
by the chosen court
Case law and the potential impact of the Choice of Court Convention
Donohue v Armco Inc [2001] UKHL 64

Armco and others brought proceedings in the courts of New York.

Ongoing proceedings in the court of New York.

The House of Lords declined to issue an injunction.

Exclusive choice of court agreement not given effect to.

Choice of Court Agreement designating English Courts.

Donohue and potential co-plaintiffs sought an injunction from the court of England, to restrain proceedings in New York.

Donohue

Armco
Donohue v Armco Inc [2001] UKHL 64

**Decision**

“... where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case.” ([24])

Here, the House of Lords held that there were strong reasons for not giving effect to the exclusive jurisdiction clause: “the ends of justice would be best served by a single composite trial in the only forum in which a single composite trial can be procured, which is New York” ([36])
What if the Convention applied?

Armco brought proceedings in the courts of New York

The court of New York **shall** decline to hear case

Choice of Court Agreement designating English Courts

If proceedings are brought in the courts of England, then:

The courts of England **shall** hear the case

The resulting judgment **shall** be recognised and enforced in other Contracting States

Donohue
Jong v HSBC Private Bank (Monaco) SA [2015] EWCA Civ 1057

Jong brought proceedings in the courts of England, against two other HSBC companies for negligence, and sought to serve proceedings on HSBC (Monaco).

Although the exclusive jurisdiction clause was ultimately upheld, the presence of an exclusive jurisdiction clause was only one of the various factors which the court considered. It was not a conclusive factor.
Ms Jong is entitled to proceed to trial in England against the two HSBC companies domiciled in England and Wales, and the risk of conflicting judgments is a factor pointing in favour of HSBC (Monaco) being sued together with the other two HSBC companies.

On the other hand, the existence of the exclusive jurisdiction clause gives HSBC (Monaco) the contractual right to be sued in Monaco and nowhere else.

“In short in my judgment the judge took into account the relevant considerations; did not take into account irrelevant ones, and reached a decision that was within the bounds of reasonableness. **He did not regard the exclusive jurisdiction clause as trumping all other considerations. He rightly regarded it as an important factor to weigh in the balance.”** ([28])
Jong brings proceedings in England, against two other companies, seeks to serve proceedings on HSBC (Monaco):

The court of England shall decline to hear the dispute regarding HSBC (Monaco)

If proceedings are brought in the courts of Monaco, then:

The courts of Monaco shall hear the case

The resulting judgment shall be recognised and enforced in other Contracting States, including United Kingdom

Choice of Court Agreement designating Monaco Courts

HSBC (Monaco), domiciled in Monaco

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Choice of Court Agreement designating Monaco Courts

HSBC (Monaco), domiciled in Monaco
Recognition and enforcement of foreign judgments rendered under the Choice of Court Convention
Recognition and enforcement

- The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously. (Art. 14)

- Where recognition and enforcement is sought in the UK, a judgment which is required to be recognised and enforced under the 2005 Hague Convention must be registered without delay on completion of the formalities in Article 13 of the 2005 Hague Convention if the registering court considers that it meets the condition for recognition in Article 8(3) of the 2005 Hague Convention, without any review of whether a ground for refusal under Article 9 applies. (s. 4B(3), Civil Jurisdiction and Judgments Act 1982(c))
Recognition and enforcement

- In the UK (England and Wales), a decision on the application for registration of a judgment required to be recognised and enforced under the 2005 Hague Convention may be appealed against by either party to the High Court.
  
  (s. 6B(1), Civil Jurisdiction and Judgments Act 1982(c))

- The court to which an appeal referred to in subsection (1) is brought must refuse or revoke registration only if—
  
  (a) the condition for recognition in Article 8(3) of the 2005 Hague Convention is not met;

  (b) the ground for postponement or refusal of recognition in Article 8(4) of the 2005 Hague Convention applies; or

  (c) one or more of the grounds specified in Article 9 of the 2005 Hague Convention apply.

  (s. 6B(3), Civil Jurisdiction and Judgments Act 1982(c))
Relationship between the Choice of Court Convention and the Brussels I Regulation (1215 / 2012)
## Which instrument applies?

<table>
<thead>
<tr>
<th>Parties</th>
<th>Chosen court</th>
<th>Which instrument applies?</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>France Germany</td>
<td>England</td>
<td>“give way” provision applies, Art. 25 of the Brussels I Regulation applies</td>
<td>Exclusive jurisdiction clause will be upheld</td>
</tr>
<tr>
<td>France Mexico</td>
<td>Mexico</td>
<td>Choice of Court Convention applies</td>
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</tr>
<tr>
<td>France Germany</td>
<td>China</td>
<td>Neither Article 25 of the Brussels I Regulation nor the Choice of Court Convention applies.</td>
<td>Exclusive jurisdiction clause may not be upheld</td>
</tr>
</tbody>
</table>
Approach in the Brussels I Regulation

- **Article 25(1) of the Brussels I Regulation:**
  
  “If the parties, **regardless of their domicile**, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either...”

- **Articles 31(2) and (3) of the Brussels I Regulation:**
  
  **Article 31(2):** Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.

  **Article 31(3):** Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.
THANK YOU!

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Topics to be addressed:

- Mexico and the Convention on Choice of Court Agreements
  - Political and commercial approach
  - Mexican law and implementation of the Convention
Mexico and the Convention on Choice of Court Agreements

– Political and commercial considerations
  • Context
    - 30 June 2005 - Convention approved in the HCCH
    - 26 April 2007 - Convention approved by Mexican Senate
    - 19 June 2007 - Publication in the Official Gazette
    - 26 September 2007 - Mexico deposited the instrument of accession
    - 1 October 2015 - Convention came into force
Mexico and the Convention on Choice of Court Agreements

- Implementation of the Convention in Mexico
  - National regulation:
    - Federal Civil Procedure Code
    - Code of Commerce
  - Constitutional approach
    - Decisions of the Mexican Supreme Court of Justice
  - Other international treaties:
    - Convention of Montevideo, 1979
    - Convention of La Paz, 1984
    - Treaty Mexico - Spain, 1989

- Prospect
Hague Convention on Choice of Court Agreements and forum selection in commercial contracts

- Sarah Garvey, Counsel - Allen & Overy LLP
Importance of forum selection

Forum can influence cost, time, outcome ability to enforce

Deals are increasingly global

Negotiation is increasingly complex

Tactical litigation is more and more common (torpedoes, declaratory relief)

Must choose forum carefully to manage risk and gain strategic advantage

Hague Convention on Choice of Court Agreements may influence this selection process
Deciding between arbitration and litigation

- Cost, Time, Confidentiality, Precedent value
- Wide enforceability
- Enforceability
- Inherent powers
- Transparency
- Certainty
- Finality
- Neutrality
- Flexibility

Arbitration

Courts
Enforcement risk can be a pragmatic deciding factor

- How likely is settlement?
- How likely is it that the counterparty will voluntarily comply with a judgment or award?
- What other factors are relevant to your particular transaction?
- Will enforcement be worth the effort?
- Is our client likely to be out of the money?
- How much is likely to be at stake?
- Is enforcement (under NYC or other regime) easy in practice where the assets are located?
- Do judgments carry evidential weight if no formal reciprocity?
English judgments are (quite) widely enforceable

English judgments formally enforceable (subject to certain provisos) in 87 jurisdictions including:

- 27 other EU States
- Australia
- Canada
- Ghana
- Iceland
- India
- Israel
- Malaysia
- Mexico
- New Zealand
- Nigeria
- Norway
- Singapore
- Switzerland

Almost 80% of respondents to A&O Global Litigation Survey of 161 jurisdictions indicate their courts will normally enforce foreign judgments without re-examining merits.

English judgments also enforceable in practice in numerous other jurisdictions (often via an action on the judgment debt) eg New York, Brazil, South Africa.

BUT can still be difficulties even where enforcement required under formal enforcement regimes and where no formal reciprocity can be significant obstacles in some jurisdictions eg Indonesia, Russia, Thailand, PRC.

supporting solicitors
English arbitral awards are (very) widely enforceable

English seated arbitral awards **formally** enforceable (subject to certain provisos) in the other 155 New York Convention jurisdictions including

- 27 other EU States
- Australia
- Brazil
- Canada
- Ghana
- Iceland
- India
- Indonesia
- Israel
- Kenya
- Malaysia
- Mexico
- USA
- New Zealand
- Nigeria
- Norway
- PRC
- Russia
- Singapore
- South Africa
- Switzerland
- Thailand

BUT can still be difficulties even where enforcement required under formal NYC regime
Hague Convention on Choice of Court Agreements - impact on analysis

Contracting State (CS) court designated in **exclusive** jurisdiction clause “shall have jurisdiction” and will not decline jurisdiction on basis that dispute should be heard elsewhere (subject to limited exceptions)

Judgment of CS court designated in **exclusive** jurisdiction clause “shall be recognised and enforced” in other CSs (subject to limited exceptions)

In force between EU and Mexico since 1 October 2015
Singapore likely to ratify soon (and others expected to follow)
Over time may be competition for New York Convention and lead to increase in use of exclusive jurisdiction clauses
Convention applies where parties have agreed exclusive jurisdiction clause (Article 3)

- Defined as “an agreement concluded by two or more parties that ... designates, for the purpose of deciding disputes...the courts of one Contracting State ... to the exclusion of the jurisdiction of any other courts”
- Choice deemed exclusive unless parties expressly provide otherwise
- Must be in writing or “any other means of communication which renders information accessible so as to be usable for subsequent reference”
- Treated as separable - validity cannot be contested solely on ground contract not valid
- Not hybrid clauses and not non-exclusive clauses (but scope for states to extend to non-exclusive clauses - see Article 22)
Exclusive jurisdiction clauses will generally be upheld by chosen Contracting State court (Article 5)

- Contracting State court designated in jurisdiction agreement
  - “shall have jurisdiction to decide a dispute to which that agreement applies, unless the agreement is null and void under the law of that State”
  - “shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State”
Exclusive jurisdiction clauses will generally be respected by non-chosen Contracting State courts (Article 6)

- Courts of a Contracting State other than chosen court will suspend or dismiss proceedings to which an exclusive choice of court agreement applies
- UNLESS
  - Agreement null and void under law of State of chosen court
  - Party lacked capacity under law of State of court seised
  - Giving effect to agreement would lead to manifest injustice or be manifestly contrary to public policy of court seised
  - For exceptional reasons beyond control of parties, agreement cannot reasonably be performed
  - Chosen court decided not to hear case
Convention applies to judgments pursuant to exclusive jurisdiction clauses (Article 4)

- Defined as “any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.”
Judgments will generally be recognised and enforced by Contracting State courts

- Judgment of Contracting State court designated in exclusive jurisdiction clause “shall be recognised and enforced in other Contracting States” in accordance with Chapter III (including severable parts of judgments in certain circumstances - Article 15)
- No review of merits and court addressed bound by findings of fact (unless original judgment given by default)
- Certain docs and translations required (Article 13) but procedure otherwise principally governed by law of requested State (Article 14)
- Court addressed must act expeditiously (Article 14)
- Recognition/enforcement may be refused ONLY on grounds specified (see below)
Recognition/enforcement may be refused in certain circumstances

- Recognised only if has effect in and enforceable only if enforceable in State of origin (Article 8(3))
- May be postponed/refused if judgment subject of review in State of origin/time limit for ordinary review has not expired (Article 8(4))
- NB default judgment - see above
- May refuse recognition/enforcement if
  - Agreement null and void under law of State of chosen court (unless chosen court determined agreement valid)
  - Party lacked capacity under law of requested State
  - Issues re timing/manner of service of proceedings on defendant
  - Judgment
    - Obtained by fraud re matter of procedure
    - Manifestly incompatible with public policy of requested State
    - Inconsistent with judgment in requested State (same parties)
    - Inconsistent with earlier judgment in another State (same parties, same cause of action) if earlier judgment recognisable in requested State
    - Relates to an excluded matter (in certain circumstances)
    - Awards punitive damages
Convention will not always apply

**General limits on scope**
- Must be an international case (Article 1)
- Must be a civil or commercial matter (Article 1)
- N/A to arbitration and related proceedings
- Jurisdiction clause must have been entered into after entry into force in State of chosen court and proceedings must have been instituted after entry into force in State of court seised

**Subject matter exclusions**
- Various subject matter exclusions, including consumer/employment contracts, insolvency matters, anti-trust, tort, validity/nullity/dissolution of legal persons and validity of decisions of organs, validity of certain IP rights – UNLESS merely arises as preliminary question and not as an object of proceedings

**State declarations**
- States can (at any time) make declarations which limit application eg where strong interest may declare Convention N/A to a particular matter (EU has made a declaration re insurance)
Complex interplay with Recast Brussels Regulation (and other treaties) (Article 26)

- Complex and unclear rules regarding interplay with other regimes
- Requires consideration of domicile
- If all parties are resident in EU (a Regional Economic Integration Organisation) or enforcement is intra-EU then EU rules (Recast) will take priority
- What if one party is from a Convention State (e.g., Mexico) and others are EU parties?
Practical implications - competition for New York Convention?

- Still some way to go re territorial competition
  - In force as between EU and Mexico on 1 October 2015
  - Other jurisdictions apparently considering ratification actively including Russia, Turkey, Australia, New Zealand, Canada
  - U.S. signed in 2009 but political impasse re implementing legislation
  - Singapore signed 2015 and is expected to ratify soon
- More grounds for refusing enforcement but unclear whether any substantive difference
- Scope for declarations - need local law advice (but need it in the arbitration context too)
- Untested in local courts
- BUT over time likely to level the enforcement playing field and lead to increase in use of exclusive jurisdiction clauses
Other recent developments may also impact forum selection

New Article 25 of Recast Brussels Regulation – “If the parties, regardless of their domicile, have agreed that...the courts of a Member State are to have jurisdiction ... those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.”

Revised “first in time” rule – where exclusive Member State jurisdiction clause, chosen court can continue even if second seised – tackles torpedo Uncertainty re Third State jurisdiction clauses

French decisions (2012/2015) that hybrid or asymmetric jurisdiction clauses invalid under old Brussels Regulation/Lugano Convention and Moscow decision (2012) that optional arbitration clause unenforceable
Conclusions

- Short term impact will be on
  - Transactions involving Mexican parties
  - CPR - change to rules
  - Legal opinions - changes to language on jurisdiction and enforcement

- Commercial parties will be attracted by greater certainty given to jurisdiction clauses and to the wider enforceability of resulting judgments

- Potential in long term to be as significant as New York Convention
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Questions?

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EU's ratification of the Choice of Court Convention
Friday 13 November 2015