Competition for the New York Convention?: The U.S. Signs The Hague Choice of Court Agreements Convention

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To enhance predictability when litigating disputes arising out of international business transactions, the U.S. signed the June 30, 2005 Hague Convention on Choice of Court Agreements (the "Convention") on January 19, 2009. In the U.S., such clauses are typically referred to as forum selection clauses, which are almost always included in contracts arising out of international business transactions.

The Convention, adopted after 13 years of difficult negotiations by members of The Hague Conference on Private International Law ("The Hague Conference"), seeks to bolster the enforceability of exclusive choice of court agreements and, importantly, *the international recognition and enforcement of resulting judgments*. It applies to international disputes in civil and commercial matters not expressly excluded by the Convention. Consumer and employment contracts are outside the scope of the Convention.

The Convention confers exclusive jurisdiction to the courts of a contracting state chosen by the parties to adjudicate existing or future disputes and *presumes that the parties' choice is exclusive, unless the parties expressly agreed otherwise*. The choice of court agreement needs only be in writing or by means otherwise rendering it accessible for future reference. The court designated by the parties is required to exercise jurisdiction, unless it finds that the choice of forum agreement is null and void under its law. Such court may not decline jurisdiction on grounds similar to *forum non conveniens*. Courts of other contracting States must stay or dismiss the action unless (i) the choice of forum agreement is null and void under the law of the chosen court; (ii) a party lacked the capacity to conclude the agreement; (iii) enforcing such agreement would lead to a manifest injustice or violate the forum's public policy; (iv) the agreement cannot be enforced; or (v) the court designated by the parties has declined to hear the case. Thus, parallel proceedings are possible under the Convention if each litigant races to a different court and the court not identified in the choice of court agreement holds that any of points i through iv applies while at the same time the court identified in the choice of court agreement in fact exercises jurisdiction.

The Convention expressly provides that the validity of choice of court agreements is separate from the validity of the other terms of the contract, so that litigants may not challenge the validity of the underlying agreement in order to evade the jurisdiction of the court they chose.

Critically, the Convention goes much further than just enforcing the parties' selection of a particular court. Judgments rendered by courts in a contracting state chosen in the parties' forum agreement must be recognized and enforced by the courts of the other contracting states, unless (i) the agreement was void under the law of the designated court unless that court determined that the agreement was valid; (ii) a party lacked the capacity to conclude the agreement under the law of the chosen court; (iii) the defendant did not have sufficient notice of the foreign proceedings; (iv) the judgment was procured through procedural fraud; (v) recognition and enforcement would be 'manifestly incompatible' with the public policy of the state where recognition is sought; or (vi) the judgment is inconsistent with a prior judgment in a similar dispute between the same parties issued by the courts of a contracting state. Courts may also refuse to recognize and enforce judgments to the extent they award exemplary or punitive damages that do not compensate the plaintiff for the actual loss it suffered. Contracting states may enter reciprocal declarations that they intend to recognize and enforce judgments under the Convention resulting from non-exclusive choice of jurisdiction agreements. The U.S. has not made any such declaration.

The Convention reserves the application of other conventions entered into by other contracting states, including rules of regional economic integration organizations. For instance, should the European Union adhere to the Convention, the Convention would co-exist with the 1968 Brussels Convention and the 2001 Regulation on jurisdiction and recognition of foreign judgments, both of which also include provisions on choice of court agreements. If, however, one of the parties is domiciled outside the European Union, the Convention would trump these regional instruments even where the chosen court is within the European Union. Both the 1968 Brussels Convention and the 2001 Regulation contain provisions on *lis pendens* intended to avoid parallel proceedings. These provisions have been interpreted by the European Court of Justice in *Gasser* to require the court designated in the parties' choice of court agreement to stay proceedings if another court in a member state has been seized before.

The Convention is not in force yet. It will enter into force three months after the deposit of the second instrument of ratification, acceptance, approval or accession. Besides having been signed by the U.S., which still has to ratify it, the Convention was acceded to by Mexico on September 26, 2007. The Convention will apply to exclusive choice of court agreements concluded after its entry into force for the state of the chosen court and to proceedings instituted after its entry into force in the state of the court seized, for instance in the court where enforcement of a judgment will be sought.

The Convention, considered by many as the brainchild of the late Professor Arthur von Mehren, is a much less ambitious instrument than the one he initially envisioned. In 1992, embracing Prof. von Mehren's ideas, the U.S. proposed to The Hague Conference the adoption of a multilateral convention on foreign judgment recognition and enforcement. The U.S., who was not a party to any multilateral convention on the recognition and enforcement of foreign judgments, was seeking to allow litigants to enforce U.S. judgments abroad. The proposal consisted of a mix of three lists of jurisdictional bases and corresponding recognition and enforcement rules. The first list contained clearly acceptable jurisdictional grounds and required recognition and enforcement of any consecutive judgment. The second list identified unacceptable grounds, excluding the recognition and enforcement of resulting judgments and the third list addressed jurisdictional grounds permitted under national laws, neither requiring nor prohibiting recognition and enforcement of judgments. After negotiations stalled in 2001, members of The Hague Conference envisioned a more modest instrument, similar to the 1958 New York Convention on the recognition and enforcement of international arbitration agreements and the resulting arbitral awards, and ultimately adopted the Convention on June 30, 2005.

After ratification in the U.S., any implementing legislation is likely to preempt inconsistent provisions of the Uniform Foreign Money Judgments Recognition Act, which has been adopted in 32 states, including New York.

Some commentators question whether the Convention will be widely ratified. If, however, the Convention is widely ratified, choice of court agreements and the resulting judgments may benefit in the same way that international arbitration agreements and awards have benefited under the highly successful New York Convention. This would have a significant impact on whether parties in an international business transaction should use arbitration or litigation to resolve their disputes, depending of course on this and a host of other considerations.

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