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What is all the fuss? The Potential Impact of the Hague Convention on the Choice of Court Agreement on International Arbitration

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We make reference to the Kluwer Arbitration Blog post of 23 September 2016 by Sapna Jhangiani and Rosehana Amin, entitled 'The Hague Convention on Choice of Court Agreements: A Rival to the New York Convention and a 'Game-Changer' for International Disputes?'. That blog concluded that the Hague Convention was potentially a game changer. We respectfully disagree.

Background

The Hague Convention on Choice of Court Agreements, concluded in 2005, which came into force on 1 October 2015 (the "Hague Convention"), aims to improve enforcement of international judgments, as well as ensuring states uphold the choice of court in contractual agreements. It aims to create a system of recognition of court decisions with the same level of predictability and enforcement as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), which entered into force on 7 June 1959 (the "New York Convention"). Here we explore whether in fact the Hague Convention will be such a game-changer, whether the Hague convention really is a threat to international arbitration and whether it will change the international dispute landscape so drastically.

Ratification and alternative regimes

The Hague Convention has been ratified by the European Union (the "EU") (except for Denmark), and by Singapore and Mexico (29 countries in total). Another two countries, the United States and Ukraine, have signed the Hague Convention but have not ratified it to date. It must also be noted that with Brexit, the United Kingdom, upon exiting the EU (i.e. after 29 March 2019), will have to sign and ratify the Hague Convention independently if it wishes to be a part of it. The New York Convention by contrast, applies to 154 countries.

Comparative regimes to the Hague Convention include the Brussels Convention (Recast) of 12 December 2012 (the "Brussels Recast"), applicable only to EU member states. Under Chapter III of the Brussels Recast, judgements given in one EU member

state shall be recognised in another member state without any special procedure required (Article 36); and such judgment is enforceable without the need to be declared enforceable (Article 39). The EU is also part of the Lugano Convention of 1988, which governs the enforcement of judgments as between Iceland, Switzerland, Norway and all pre-2004 EU states, plus Poland. So the same applies in these countries.

Other regimes include those under the Administration of Justice Act 1920 (for High Court judgements) and the Foreign Judgments (Reciprocal Enforcement) Act 1933 (for lower courts or tribunals), which are effective between the United Kingdom and Commonwealth countries, including Crown states such as the Isle of Man and Jersey to streamline the enforcement of England and Wales judgments.

However, there are countries that have no reciprocal arrangements with other countries such as the United States (or at least until it ratifies the Hague Convention). Therefore, to enforce a decision one has to start new legal proceedings in the court of the country or state in which enforcement is sought, so as to obtain a judgement in that jurisdiction. In the United States one must commence proceedings in the competent state court. The state court, in turn, will determine, based on the local laws, whether to give effect to the foreign judgment.

So the Hague Convention is not such a game changer. There are already conventions in existence, which assist enforcement.

Hague Convention vs. New York Convention

Even if the Hague Convention becomes ratified by more states the ease of enforcement of judgements seems unlikely by itself to impact on the popularity of arbitration.

First the scope of the Hague Convention is more limited than the New York Convention. The Hague Convention excludes consumer contract; employment contracts; carriage of goods; intellectual property matters as well as some fourteen other matters (Article 2). In contrast, the New York Convention does not have a set list similar to Article 2 of the Hague Convention. Instead it defers to national law to make such exclusions (see Article V(2)(a) and (b) of the New York Convention).

The list of matters excluded under Article 2 of the Hague Convention means that even if some parties might otherwise have been inclined to use the Hague Convention they may not be able to. Such parties who will not have the same enforcement protections are, therefore, unlikely to turn away from arbitration and choose court litigation instead.

In terms of recognition and enforceability, under the Hague Convention, Article 8 provides for enforcement and recognition of foreign judgments. Under Article 8, judgments are directly enforceable and the courts of contracting states are not allowed to review the judgment on the merits and *"shall be bound by the findings of fact"*. Similarly, under the New York Convention, Article III provides that the courts of contracting states must enforce awards rendered in another contracting state in the

same way, using national procedural rules, as if it were enforcing a domestic award. However, the New York Convention goes a step further and expressly precludes the imposition of onerous conditions or higher fees than would be imposed on domestic arbitral awards, whilst the Hague Convention does not impose this restriction on national courts.

The Hague Convention and the New York Convention appear to have a very similar list of exceptions as to when the relevant state may refuse to recognise or enforce judgements, including: nullity; impropriety; incapacity; unenforceability and procedural unfairness. However, unlike the New York Convention, the Hague Convention allows a national court to refuse to enforce a judgment or recognise a decision if the judgement or the decision are contrary to a domestic judgement involving the same parties (regardless of the subject matter or cause of action).

Conclusion

The Queen Mary Survey of 2015 outlines the reasons why parties opt for arbitration rather than litigation. These include (in order): (i) enforceability of award and arbitration agreements; (ii) avoiding specific legal systems/national courts; (iii) flexibility; (iv) selection of arbitrators; (v) confidentiality and privacy; (vi) neutrality; (vii) finality; and (viii) speed and costs. If the first reason for users to opt for arbitration (rather than litigation) is enforceability of the award, one might see the Hague Convention as a possible threat to arbitration. However, since the second most popular reason for using arbitration (by a mere 1%) is to avoid specific legal systems/national courts, that may not be the case.

Arbitration and litigation have their own advantages and disadvantages beyond any greater ease of enforcement. But even if ease of enforcement alone were a factor, it seems unlikely the Hague Convention offers much in the way of advantages, which might tip the balance away from arbitration.

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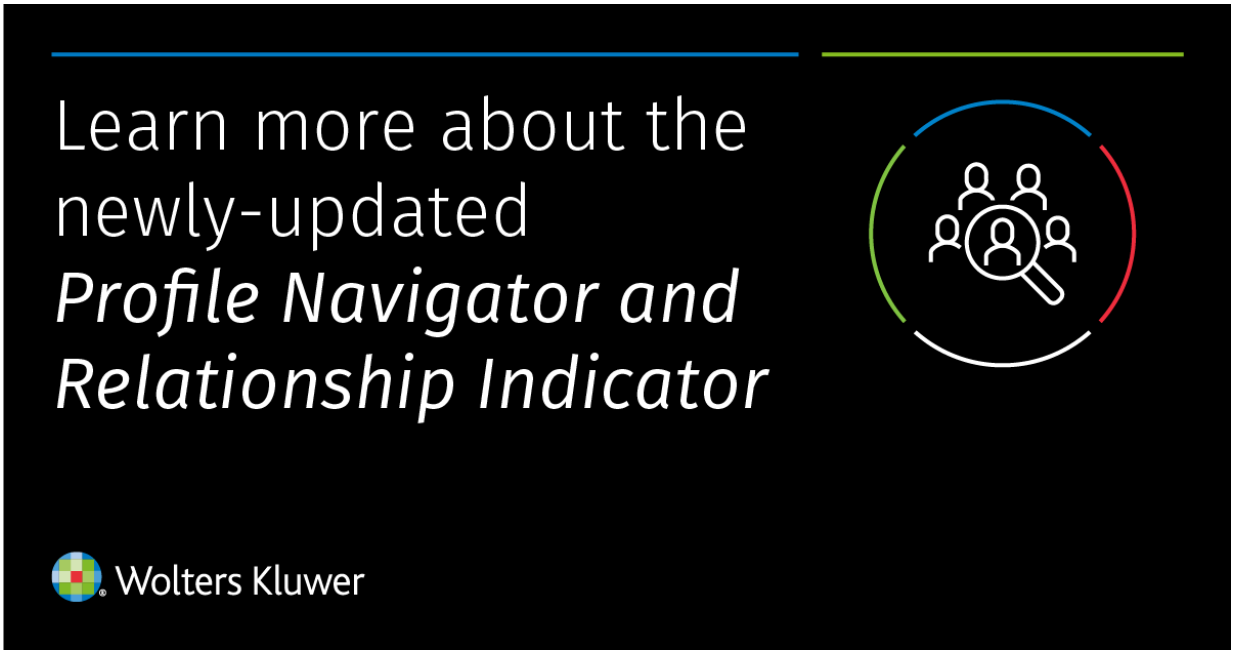

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