

# Kluwer Arbitration Blog

## Hailing the HCCH (Hague) 2005 Choice of Court Convention, A Response to Gary Born

João Ribeiro-Bidaoui (Permanent Bureau of the Hague Conference on Private International Law) · Wednesday, July 21st, 2021

The HCCH 2005 Choice of Court Convention (“**Convention**”), adopted over fifteen years ago, has recently become the subject of damning criticism from Gary Born in a series of posts published on the Blog (see [Part I](#), [Part II](#), and [Part III](#)). In the series, Born dramatically suggests that states bound by the Convention should denounce it, and that other states, including those like the United States, China, and Israel whose signature foreshadows ratification, should discontinue their work. Now that the Convention appears to stand in the dock, it seems fitting to respond, firmly, against the charges laid at the Convention’s feet.

In [Part I](#) of his series, Born asserts: “the Convention seeks to transpose the [New York Convention’s](#) legal regime, which was designed specifically for international arbitration, to the very different context of forum selection clauses and national court judgments.” Not only is this a fundamental misconception of the genesis and purpose of the Convention, one that invalidates the very basis of Born’s indictment, but it also applies an incorrect standard when comparing the Convention to the New York Convention. First, the negotiators were well aware of the differences between, on the one hand, exclusive choice of court agreements and judgments based upon them, and, on the other, international arbitration clauses and the judicial recognition and enforcement of their resulting awards. This is why they drafted an instrument specifically tailored to choice of court agreements and the court judgments that are issued pursuant to this.<sup>1)</sup> Second, the proper standard for a realistic and fair appreciation of the Convention is the kaleidoscopic treatment of choice of court agreements, and the uncertainty and unpredictability that judgments based upon such agreements face in the absence of a global legal regime.

The two instruments are, therefore, each in their own field, comparable with respect to their ultimate objectives, and different as regards their structures, precisely because of the differences between the fields. As such, arbitration and litigation [ought to be regarded as co-ordinates rather than rivals](#).

This post responds to Born’s key arguments, asserting that: (1) both the Convention and the HCCH more generally have a role to play in enhancing judicial integrity and competence, (2) the Convention does not dilute safeguards of party autonomy, and (3)

the Convention contains sufficient safeguards to guarantee procedural fairness.

### **Enhancing Judicial Integrity and Competence: Benefits of the HCCH (Hague) System**

Born's call to arms against the Convention suggests a prevalence of under-developed or allegedly corrupt judiciaries in the global arena. While the weaknesses in some court systems cannot be ignored, a rise in highly efficient, effective commercial courts has been witnessed over the past decade, with talented and experienced judges, working with integrity within transnational litigation and enhancing its accessibility, especially for micro-, small- and medium-sized enterprises. And that is why states are increasingly aware that this Convention is crucial to the development of judicial cooperation (e.g., between the United Kingdom and the European Union following Brexit) and the role it plays in the development of a [transnational system of international commercial courts](#).

More broadly, joining a HCCH Convention means joining a system of transnational litigation - the HCCH (Hague) system - with a plethora of experiences and decades of case law on topics ranging from service of process, taking of evidence, legal aid, and choice of law, as well as an infrastructure of central authorities, all aiding the operation of cross-border dispute resolution. The HCCH system contributes, therefore, to enhance the rule of law, which, in turn, has the welcome corollary of incrementally developing judiciaries and judicial cooperation. This has a positive impact on international arbitration. The arbitral system cannot operate autonomously and as Born repeatedly emphasises, itself relies on judiciaries to exercise supervisory jurisdiction and to recognise and enforce arbitral awards.

There are also specific benefits to states who choose to join the Convention that reach beyond the content of the provisions themselves. In the context of this debate on the interpretation of Article 9, a particular benefit is the regular convening of Special Commission meetings where contracting parties may consider the practical operation of specific HCCH instruments.<sup>2)</sup> The Special Commission can issue authoritative recommendations and advice on uniform interpretation of the Convention,<sup>3)</sup> including sharing of good practices and facilitation of judicial dialogue. Indeed, the Special Commission can resolve the real and practical issues faced by the Convention, removing the need for any more ink to be spilled. There is no equivalent mechanism in the arbitration realm.

By joining the Convention, states ensure that judgments rendered by their courts can circulate in accordance with international standards. More contracting parties mean more international accountability and more foreseeability in circulation of judgments. That means more rule of law at the international level, not less, as Born daringly suggests.

### **Party Autonomy**

The main criticism that Born levels at the Convention's treatment of party autonomy is that the chosen court can make a final and unreviewable decision regarding the core question of whether there is a valid choice of court agreement (Article 5(1), Article 9(a)). Unlike the New York Convention, the enforcing court does not have the opportunity to review that decision (in the absence of particular circumstances to be discussed below). This is in line with a quasi-universal rule that the law of the forum governs matters of procedure, including jurisdiction – *forum regit processum*.<sup>4)</sup>

At this point, one cannot avoid noting that the provision allowing judicial review has not always been seen as a benefit of the New York Convention. Commentators in the arbitration community, including Born, [have argued strongly that courts should not be allowed to second-guess arbitrators' decisions on jurisdiction](#). It is thus surprising that one of those same commentators now argues that multiple levels of court review on questions of jurisdiction are a benefit of the arbitral system – even more so in the light of Born's vehement criticism of the integrity of courts in many countries around the world (see in particular [Part III](#) of Born's series).

A more consistent and constructive approach would suggest that the courts should have a residual role in reviewing decisions on jurisdiction which excessively or fundamentally offend notions of due process. And the Convention, indeed, contains scope for such review in its provisions on public policy (Article 9(e)) (discussed below).

Once it is understood that the chosen court is allowed to make the final determination on the validity of the choice of court agreement, absent anything contrary to public policy, the question of whether the chosen court of the parties is deemed to be “good” or “bad” is largely dependent on the parties' circumstances. In [Part II](#) of his series, Born suggests that the Convention “is subjecting the players to arbitrary, incompetent and corrupt decisions by foreign referees.” This perspective is skewed; the Convention does not subject the parties to any court, rather the parties subject themselves. By excluding, from its scope, typical contracts between parties with uneven bargaining power, such as consumer and employment agreements, the Convention allows both parties to make their choice freely and consciously, akin to any arbitration agreement. Other than the residual scrutiny on public policy grounds, policing the parties' choice is undesirable and runs counter to the principle of party autonomy. Born's argument is even more puzzling when we know that, in accordance with the [UNCITRAL Model Law on International Commercial Arbitration](#), judicial assistance and supervision of the arbitral process is a cornerstone of the system. How the same courts would show distinct levels of integrity when dealing with choice of court agreements as compared with assisting arbitral tribunals and enforcing their awards remains a mystery.

Crucially, choice of court agreements under the Convention are consensual and thus litigation in the chosen forum is predominantly consensual; comparing it with the benefits of arbitration, real or perceived, is irrelevant. Regardless of whether the Convention is in operation, there will be choice of court agreements. The real question is whether it is preferable to have choice of court agreements subject to an international system of enforcement, or to have agreements without such a mechanism, and potentially leading to conflicting judgments.

## Procedural Fairness

One of the central criticisms levelled by Born at the Convention is its alleged failure to safeguard procedural fairness. As Hartley points out in [another response](#) to Born's recent three-part series, the wide ranging grounds in Article 9 of the Convention are sufficient to address such concerns.

Provided that certain jurisdictional criteria are met, there should be only limited scope to argue, for example, that the procedures of the foreign court were not appropriate. However, where there has been a denial of procedural fairness in the proceedings, such as a failure to provide due notice, denial of an opportunity to be heard, corruption or lack of a fair trial, the case should fall squarely within the Convention's Article 9(e) ground to refuse recognition or enforcement. In [Part III](#) of his series, Born criticises a so-called "two-pronged standard of proof". However, it is, in fact, the New York Convention itself which introduces a "two pronged" approach to procedural fairness and procedural public policy. Enforcing courts address many cases involving procedural fairness under either Article V(1)(b)(d) (procedural grounds) or Article V(2) (public policy grounds) or both. There is no clear delineation in the New York Convention, or in national caselaw, as to the boundaries between the two provisions. Moreover, contrary to Born's assertion in [Part III](#) of his series, the fact that the Convention avoids this overlap does not in any way mean that enforcing courts need to "dilute" the procedural fairness in Article V(1)(b) of the New York Convention, or the procedural fairness standard in the U.S. Supreme Court decision *Hilton v Guyot*. It is not envisaged that either of those mechanisms would allow for a "broad scale attack"<sup>5)</sup> on a foreign legal system, but appropriate allegations of procedural unfairness can be considered under those provisions. In that respect, Article 9(e) of the Convention offers a comparable protection in its field.

## Conclusion

The main purpose of the Convention is to enable parties to make an effective choice, for that choice to be respected and judgments from the chosen court enforced. And to accurately and fairly assess the benefits of the Convention, we must be careful through which lens we view its value and accomplishments. The spheres of transnational litigation and arbitration in which these Conventions operate have substantial, inherent differences, hence, as pointed out above, different structures.

The international community should insist that the only appropriate question is this: is it preferable to have an international system governing choice of court agreements, or instead a myriad of domestic and regional regimes? That is the alternative option against which the Convention's success must be measured. Considering the key criticisms levelled at the Convention, it is difficult to see how a common international framework could be more prone to undermine party autonomy than an array of domestic regimes. It is also inconceivable that judicial corruption would thrive more under a global standard monitored by the international community than in the absence of one.

Party autonomy is an underlying principle of both the New York Convention and the Convention. It may be implemented variedly in the different instruments but should not be categorically rejected solely because forum selection clauses designate judges and not arbitrators.

The jury is asked to commend Born's seminal work in the field of international arbitration, but to reject the indictment against the Convention. The New York Convention and the Convention each have their own field of application and their own specific structure and features. Both will continue to be necessary in a world where arbitration agreements and exclusive choice of court agreements coexist, and both are here to stay.

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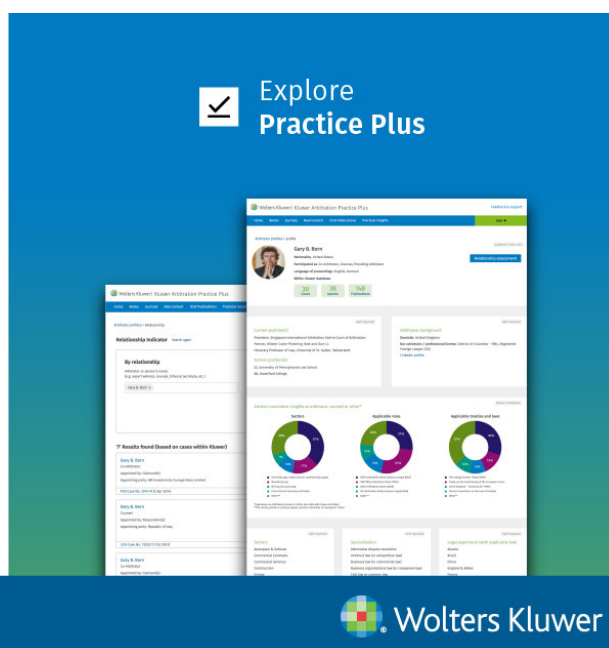
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### References

- Trevor Hartley & Masato Dogauchi, Hague Conference on Private International Law
- ↑1 Convention of 30 June 2005 on Choice of Court Agreements Explanatory Report, para 1. Cited by Born.
  - ↑2 Article 24 of the Convention
  - ↑3 Article 23
  - ↑4 Wolfgang Hau, Proceedings, law governing, in Encyclopedia of Private International Law. Cheltenham, UK: Edward Elgar Publishing Limited (2017).
  - ↑5 Ronald A. Brand & Paul M. Herrup, The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents 118 (3rd ed. 2008).

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