

# Kluwer Arbitration Blog

## Why It Is Especially Important That States Not Ratify the Hague Choice of Court Agreements Convention, Part II

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*This post continues from [Part I](#).*

### **Party Autonomy and Consent: How the Convention Undermines Them**

My previous posts argued that the Convention undermines vital protections that existing law provides for party autonomy and genuine consent. In response, Mr. Ribeiro argues that the Convention advances notions of party autonomy: it supposedly serves to “enable parties to make an effective choice” and “for that choice to be respected” and “allows both parties to make their choice freely and consciously.” That is wrong: in fact, the Convention undermines party autonomy and poses distinct threats of denials of justice.

In Mr. Ribeiro’s words, under the Convention, “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)).” This is a dramatic departure from both existing private international law rules in most developed jurisdictions (in which the recognizing court must re-examine the jurisdictional basis for a foreign judgment) and the treatment of arbitration agreements under Articles V(1)(a) and V(1)(c) of the New York Convention (in which the recognition court may re-examine the existence, validity and scope of the arbitration agreement underlying an award).

Allowing the putatively chosen court to determine – in a final and unreviewable manner – its own jurisdiction is a radical change from existing law. It is also highly problematic: it permits the courts of all of the countries identified above (from Afghanistan to Zambia) to determine that foreign parties have consented to their jurisdiction and to issue largely unreviewable judgments either in favor of or against them. The ills resulting from this regime are likely to be exacerbated by the increasing desire of states to establish and vigorously promote their own assertedly “international” courts (like the Chinese International Commercial Court or similar state-sponsored initiatives in a number of other jurisdictions), producing incentives to both procure and uphold choice-of-court agreements. None of this advances party autonomy; rather, this threatens party autonomy, by removing long-standing safeguards, applied in recognition forums, that are designed to ensure that parties really did consent to a particular dispute resolution mechanism.

Mr. Ribeiro half-heartedly suggests that international arbitration is no better at protecting party autonomy than the Convention because some commentators “have argued strongly that courts

should not be allowed to second-guess arbitrators' decisions on jurisdiction." That is fundamentally inaccurate. As Articles V(1)(a) and V(1)(c) of the New York Convention specifically provide, arbitral awards may be denied recognition based on the recognition court's determination that there was no valid arbitration agreement or that the scope of that agreement was exceeded. Contrary to Mr. Ribeiro's mis-citation of a single [prior post](#) that I authored on this issue, the works of virtually every commentator on the New York Convention underscore the fact that recognition courts conduct *de novo* review of jurisdictional determinations under Article V(1)(a), while annulment courts conduct the same review under Article 34(2)(a)(i) of the UNCITRAL Model Law. The Convention's abandonment of these protections is a radical and dangerous departure from existing law.

Mr. Ribeiro attempts to conceal the extent of this departure by asserting that the Convention merely adopts the "quasi-universal rule that the law of the forum governs matters of procedure, including jurisdiction." There is no such rule and there never was. Mr. Ribeiro's archaic rule that the *lex fori* governs matters of procedure has nothing to do with either jurisdiction or the recognition of judgments; it concerns only the details of the procedural conduct of adjudicative proceedings (such as rules of evidence, pleadings and the like). Rather, the universal rule, under virtually every other judgment recognition convention, as well as the New York Convention, the Inter-American Convention on International Commercial Arbitration, and the European Convention on International Commercial Arbitration, is that the recognition court may review the jurisdictional basis for the subject judgment or award.

### **Procedural Regularity and Integrity: How the Convention Threatens Them Too**

My previous posts also argued that the Convention threatens the rule of law by requiring recognition of corrupt or procedurally unfair or irregular judgments. Professor Hartley and Mr. Ribeiro respond that the Convention provides adequate safeguards for the procedural fairness and regularity of proceedings leading to judgments subject to the Convention. Those responses also only underscore the Convention's defects.

Mr. Ribeiro acknowledges that, under the Convention, "there should be only limited scope to argue, for example, that the procedures of the foreign court were not appropriate"; that acknowledgement is correct, because Article 9(e) of the Convention provides only for non-recognition where "the specific proceedings leading to the judgment" were unfair – not where a particular court, or for that matter, the entire legal system of a national or sub-national territory, lacked independence or was corrupt. Professor Hartley and Mr. Ribeiro also acknowledge that the Convention omits the highly-important guarantees for due process and procedural regularity contained in Articles V(1)(b) and V(1)(d) of the New York Convention.

That is deeply unsatisfactory. The Convention once more departs radically from existing law – which, in virtually all developed jurisdictions, permits recognition courts to inquire into the fairness and independence of both individual foreign litigations and foreign judicial systems, while Articles V(1)(b) and V(1)(d) of the New York Convention do the same for arbitral proceedings. This inquiry is not provided for under the Convention, which also specifically excludes the possibility of challenges to the independence or integrity of foreign legal systems.

Professor Hartley and Mr. Ribeiro claim that truly corrupt foreign judgments can be denied

recognition under the Convention, by reason of Article 9(e)'s general public policy exception. That appeal to the public policy exception is unsettling; it is apparently predicated on the novel and surprising argument that the exception *should* swallow the rule. The public policy exception is designed, in virtually all private international law contexts, as an *exceptional* escape device that permits a state to invoke its own law and policy in rare and unusual cases.

That type of exception is an entirely inadequate means of dealing with a problem that is already well-known and clearly-defined – namely, endemic corruption and lack of judicial independence in many legal systems – and that is already addressed through well-established rules requiring inquiry in recognition courts into the integrity, fairness and procedures of foreign adjudicative proceedings. The proper way to deal with issues of procedural fairness is to do so transparently and specifically, as previous Hague Conference conventions have done, not by appealing to an inherently uncertain public policy exception. Basic due process rights and protections against corruption and political interference are too important to be left to the vague catch-all of a public policy exception.

### **Other Hague Judgments Convention: How the Convention Omits Their Protections**

It is in this respect in particular that the silence of Professor Hartley and Mr. Ribeiro about other Hague Conference judgments conventions is also striking. As previously noted, the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments included, in Article 21, a provision that the Convention would apply only where two Contracting States had agreed to its application on a bilateral basis. Similarly, the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments included, in Article 29, a provision allowing states to opt-out of the Convention's application as to any other Contracting State.

In both cases, these provisions applied even where jurisdiction over the judgment-debtor was undisputed (and indisputable), including where it was established by consent. The reason for these provisions, under both of these Hague Conventions, was the pervasive doubts about the integrity, independence and competence of courts in many countries – which led to insistence on provisions allowing Contracting States to opt-out of application of the relevant Hague Convention as to such states. Critically, the Convention omits those safeguards. Tellingly, Professor Hartley and Mr. Ribeiro make no effort to address or justify that omission.

### **Supposedly Enhancing Judicial Integrity and Competence**

Finally, Mr. Ribeiro argues that, if nothing else, the Convention will “enhance the rule of law, which, in turn, has the welcome corollary of incrementally developing judiciaries and judicial cooperation.” He, alongside Professor Hartley, suggests that, by recognizing judgments from countries with “under-developed or allegedly corrupt judiciaries in the global arena,” the Convention will advance the rule of law and incrementally improve those judiciaries.

That is highly unrealistic. It is reminiscent of the European Court of Justice's principle of “mutual trust” that EU Member State courts will properly apply EU law, even if experience shows that they don't. That principle is naive and unsatisfactory in the European context (as Professor Hartley has previously (and quite persuasively) [emphasized](#)). It is vastly more unsatisfactory in a global

context.

Stated simply, Mr. Ribeiro's argument is that by requiring recognition of judgments of corrupt or non-independent courts, the Convention will induce those courts to be less corrupt and more independent. Mr. Ribeiro does not address, or appear concerned by, the fact that doing so would entail individual denials of justice to individual litigants along the way towards "incrementally developing judiciaries" – an approach that entails serious departures from the rule of law. Moreover, there is no conceivable empirical justification for Mr. Ribeiro's speculation that recognizing corrupt judgments will induce courts not to be corrupt; on the contrary, doing so would likely encourage them to continue their corrupt, but profitable, ways, by giving global effect to their illegally-procured judgments. Rather, denying recognition of corrupt judgments – and explaining publicly the reasons for doing so – is the proper way to discourage corruption and to create incentives for rendering independent and honest judgments. Yet the Convention would significantly inhibit exactly this from happening.

### **Bad International Treaties Don't Improve the Rule of Law**

Finally, Mr. Ribeiro also argues, more generally, that it is preferable to "have an international system governing choice of court agreements, ... instead [of] a myriad of domestic and regional regimes," and that advancing the Hague Conference's work generally is desirable. The Convention is not rescued by appeals to the asserted general superiority of international law, as compared to domestic law, or by institutional appeals for the Hague Conference.

It may well be that a properly drafted international treaty governing choice-of-court agreements would be preferable to existing law. But the Convention is just not that treaty; it is a gravely flawed instrument that threatens the rule of law. Replacing long-standing domestic and regional law with bad international treaties is not progress; it is damaging to the rule of law and to international commerce, which such treaties are meant to serve. And promoting the Convention is not good for the Hague Conference, for exactly the same reasons: persuading states to adopt flawed treaties will not strengthen, but ultimately weaken, both the Conference and its other treaties.

There may well be good reasons for the Hague Conference to think and draft again – providing a new choice-of-court convention for international consideration. That is not a reason, however, for any state to ratify, or remain a Contracting Party to, the current Convention.

### **Conclusion: Don't Blame Businesses for A Bad Convention**

Professor Hartley concludes his defense of the Convention as follows: "If the parties insist [*sic*] on choosing the courts of a state where judicial corruption is a problem, they have only themselves to blame." That is inaccurate, but it usefully illustrates the Convention's fundamental weakness.

It is fundamentally wrong to say that if parties choose corrupt courts, "they have only themselves to blame." Today, that may be partially true, because the consequences of such choices are relatively limited: most national courts will deny recognition of corrupt judgments and companies will have only themselves to blame for the expense and distraction of litigation.

Under the Convention, however, corrupt judgments would be subject to mandatory recognition – as part of the Hague Conference’s goal of “incrementally developing judiciaries.” In those cases, it would not be just ill-advised or commercially-vulnerable businesses who accept choices of corrupt or inept courts that would have “themselves to blame.” Instead, it would be the Convention, and the national legislatures that ratified it, that would be to blame for the recognition of these courts’ judgments; it would be the Convention, and its promoters, that removed existing, long-standing and vital protections that exist for party autonomy and against corrupt and otherwise tainted judgments, thereby facilitating the recognition of such judgments. When that occurs, Professor Hartley’s question of who to blame would be asked with heightened attention and care.

For the reasons I have previously summarized, states therefore should not ratify the Convention and, if they have done so, they should take steps to denounce it.

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