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Why States Should Not Ratify, and Should Instead Denounce, the Hague Choice-Of-Court Agreements Convention, Part I

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Over the past decade, the 2005 Convention on Choice-of-Court Agreements ("**Convention**") has been vigorously promoted by the Hague Conference on Private International Law's Permanent Bureau, the European Union and others. The Convention has been endorsed as a global instrument, appropriate for ratification by all states, that establishes an alternative to international arbitration for the resolution of international business disputes in national courts. Among other things, the Convention is said to ensure respect for party autonomy (by giving effect to forum selection agreements) and to maximize efficiency (by permitting relatively easy recognition and enforcement of foreign court judgments).

Despite these promotional efforts, there has been virtually no critical assessment of the Convention. This post is the first in a three-part series that seeks objectively to assess the costs and benefits of the Convention. This post summarizes the drafting history and basic terms of the Convention. The following two posts discuss the principal defects of the Convention (Part II and Part III), focussing on its failure either to protect the parties' autonomy in commercial matters or the procedural integrity of international dispute resolution. In sum, this series of posts argues that the Convention is gravely flawed and is not suitable for ratification, either generally or by the vast majority of states around the world.

As a preliminary matter, 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. By seeking to do so, the Convention first ignores the realities of endemic corruption among various judiciaries and inexperience and lack of independence in many judicial systems, thereby exposing litigants to very substantial risks of procedural unfairness and arbitrary or corrupt adjudicative proceedings. Second, the Convention also significantly dilutes important protections that the New York Convention provides: party autonomy and procedural fairness. Those dilutions materially exacerbate the risks that arise from the Convention's basic structure and terms.

Apart from a few outliers, most states have been reluctant to ratify the Convention. A previous post on the Convention's reception touches upon some of the issues that will be discussed in this post. As discussed in this and the following two posts, that reluctance is wise. Given the Convention's grave defects, states should not ratify the Convention and, if they have done so, they should exercise their right to withdraw from it promptly.

A Summary of the Convention

The Convention's Background

The Convention was drafted under the auspices of the Hague Conference on Private International Law ("**Hague Conference**"). The Convention was the product of a hasty two-year process (between 2003 and 2005), which sought to produce at least a limited measure of success for the Hague Conference following the failure of negotiations on a global jurisdiction and judgments convention. Broadly speaking, and as detailed below, the Convention's drafters sought to replicate the basic terms of the New York Convention, but in the context of forum selection clauses, providing for the presumptive validity and enforceability of choice-of-court agreements and the presumptive enforceability of national court judgments where jurisdiction was based on such a forum selection provision.

The Convention was opened for signature in June 2005. To date, the Convention has been acceded to only by Mexico (in 2007), the European Union (in 2015), Singapore (in 2016), Denmark (in 2018), Montenegro (in 2018), and the United Kingdom (in 2020). Like its failed predecessor (the 2001 jurisdiction and judgment convention), the Convention is almost entirely an European undertaking. Apart from Mexico and Singapore, other states have either ignored or distanced themselves from the Convention.

Subject Matter of The Convention

The Convention applies only to "exclusive choice of court agreements," or put differently, exclusive forum selection clauses, thereby excluding both arbitration agreements and non-exclusive choice-of-court clauses.[1)] The Convention also applies only to "civil" or "commercial" matters that arise in "international cases."[2)] Although the details are complex, these terms are generally defined broadly, aimed at giving the Convention an expansive scope.

The Convention includes a number of subject matter exclusions from its scope. Among other things, Article 2 of the Convention provides that it does not apply to choice-of-court agreements in consumer and employment contexts, as well as to issues of personal status, legal capacity of natural persons, maintenance obligations and other family law matters, wills and succession, insolvency, in rem rights in immovable property, internal corporate matters, validity and infringement of intellectual property rights, various maritime matters, "antitrust (competition) matters," and various tort claims.

Three Basic Rules

Article 3 of the Convention prescribes three basic rules regarding choice-of-court agreements. First, Article 3(b) provides that a choice-of-court agreement is deemed to exclude the jurisdiction of all courts other than the chosen court unless the parties agree otherwise. Second, Article 3(c) imposes a rule of formal validity, requiring that a choice-of-law agreement be "concluded or

documented" either "in writing" or "by any other means of communication which renders information accessible to be usable for subsequent reference." Third, Article 3(d) codifies the separability doctrine, providing that a choice-of-court agreement shall be "treated as an agreement independent of the other terms of the contract."

Jurisdiction

Chapter 2 of the Convention sets out jurisdictional rules, addressing the validity and enforceability of choice-of-court agreements that are subject to the Convention. Chapter 2 contains two sets of rules providing for: (1) the exclusive and mandatory jurisdiction of a court chosen by a valid exclusive choice-of-court agreement; and (2) the lack of jurisdiction of other courts, not chosen by such a choice-of-court agreement.

Thus, Article 5(1) states that the court of a Contracting State that is designated by a valid exclusive choice-of-court agreement possesses exclusive jurisdiction, which it is mandatorily required to exercise (subject to minor exceptions). "The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State."

Article 5(1) includes a positive grant of jurisdiction, coterminous with a valid choice-of-court agreement, providing for jurisdiction of the parties' chosen court, as well as a choice-of-law provision, selecting the law of the chosen State to govern the validity of the choice-of-court agreement. Relatedly, Article 5(2) prohibits the chosen court under a valid choice-of-court agreement from declining jurisdiction.

Article 6 provides that a court in a Contracting State other than the court chosen in a valid choice-of-court agreement shall suspend or dismiss cases to which the agreement applies. Article 6 provides: "A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive Choice-of-Court agreement applies," subject to specified exceptions. Article 6's most important exception provides that a court is not obligated to dismiss or suspend a case if the agreement is null or void under the law of the State of the chosen court (paralleling Article 5(1) of the Convention and prescribing the same choice-of-law rule). Additionally, Article 6(b) provides that a court need not give effect to a choice-of-court provision where a party lacked capacity under the law of the court seised, including its choice-of-law rules, while Article 6(c) provides that a seised court may exercise jurisdiction after determining that giving effect to the agreement will lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised.

In turn, Chapter 3 of the Convention, provides some parallels to Articles III and V of the New York Convention, by addressing the recognition of judgments rendered by a chosen court in another Contracting State. In Article 8, the general rule is that judgments rendered by courts designated in exclusive choice-of-court agreements shall be recognized in all other Contracting States, without any review of the merits of such judgments, subject only to limited and defined exceptions that are set out under Article 9.

Exceptions to Recognition

Article 9 prescribes an exclusive list of seven exceptions to the obligation to recognize judgments by a chosen court. Article 9(a) provides that recognition may be denied where a choice-of-court agreement is null and void, paralleling Article V(1)(a) of the New York Convention. Importantly, however, Article 9(a) provides that, if the chosen court has determined that a choice-of-court agreement is valid under its law, the requested court must accept this decision: a judgment may be denied recognition if "the [choice-of-court] agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid."

Article 9 also permits non-recognition of a judgment where the judgment-debtor was not properly notified of proceedings in the chosen court. First, Article 9(c) permits non-recognition if the document that instituted proceedings was not notified to the judgment-debtor in sufficient time and in a manner to permit a defence. Second, Article 9(d) permits non-recognition of a judgment where "the judgment was obtained by fraud in connection with a matter of procedure." Finally, Article 9(e) also allows a requested court to deny recognition of a judgment if "recognition and enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State."

The Convention Has Serious Defects

The Convention's advocates have high aspirations for it. The Convention is said to be one of the most significant private international law treaties of the century, destined to "supplant the New York Convention as the norm for resolving international commercial disputes."[3] Despite its drafters' high aspirations, and the European Union's promotional efforts, there are substantial grounds for doubting the wisdom of the Convention.

First, the Convention would replace existing private international law rules, in virtually all countries, governing the recognition of forum selection provisions and foreign judgments, with new rules assertedly modelled on the New York Convention. This objective is pursued by the Convention's drafters notwithstanding substantial differences between the international arbitral process, on the one hand, and proceedings in (many) national courts, on the other hand. These differences raise serious doubts as to the benefits of the Convention's basic structure: put simply, the legal framework and rules that are appropriate for international arbitration are not suitable for national court litigation.

Second, and relatedly, the Convention also omits significant safeguards for the parties' autonomy and important guarantees of procedural fairness. This is in contrast to the New York Convention, as well as national arbitration legislation, which incorporate such safeguards for the recognition of international arbitration agreements and arbitral awards. By omitting these safeguards, the Convention threatens, rather than protects, the autonomy of commercial parties and mandates recognition of judgments notwithstanding significant unfairness in the national court proceedings that produced them.

These related defects in the Convention are detailed in the remaining two posts in this series (Part II and Part III).

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References

?1 Art. 1(1).

?2 *Id.*

?3 Jeffrey Talpis & Nick Krnjevic, *The Hague Convention on Choice of Court Agreements of June 30, 2005: The Elephant That Gave Birth to A Mouse*, 13 Sw. J. L. & Trade Am. 1, 35 (2006).

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