Kluwer Arbitration Blog

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

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The 2005 Convention on Choice-of-Court Agreements ("**Convention**") has been vigorously endorsed by the Hague Conference on Private International Law ("Hague Conference") and others as an alternative to the New York Convention, appropriate for ratification by all states. The first post in this series discusses the Convention's drafting history and proponents' claim that the Convention ensures respect for party autonomy by giving effect to forum selection agreements and maximizes efficiency by permitting the recognition and enforcement of foreign judgments relatively easily.

As discussed in this second and the forthcoming third post, the Convention is gravely flawed and is not suitable for ratification, either generally or for the vast majority of states around the world. First, the Convention seeks to transpose the New York Convention's basic structure and terms, which were designed for the international arbitral process, into the very different context of forum selection clauses and national court judgments; in doing so, the Convention would expose commercial parties, in their litigation, to very substantial risks of procedural unfairness and arbitrary or corrupt adjudicative proceedings. Second, the Convention also significantly dilutes essential protections that the New York Convention provides for both party autonomy and procedural fairness.

The New York Convention is an Unsuitable Model for A Choice-of-Court Agreement Convention

It is unwise to attempt to transpose the New York Convention from international arbitration to cross-border litigation. International arbitration is a *consensual* process. It is based on party consent and the entire arbitral process is dominated by the parties and arbitral institutions, not by national courts; it is the parties and the arbitral institutions who have the authority to select the arbitrators who will decide individual disputes; in practice, parties and institutions use this freedom to select arbitral tribunals that are both independent and expert in the subject matter of the parties' dispute. Equally important, it is the parties and arbitrators who have the authority to design the procedures for resolving those disputes, exercising that autonomy to adopt procedures that are efficient and tailored to individual disputes. At the same time, the arbitral process is regulated by relatively strict guarantees of independence, impartiality and fairness, applied by national courts in annulment, recognition and other proceedings at the conclusion of the arbitral process. These

aspects of the arbitral process serve to safeguard both the parties' autonomy, ensuring that parties actually did agree to arbitrate with one another, and the fairness and integrity of the adjudicative process, guaranteeing that the arbitral proceedings are untainted by corruption or gross procedural unfairness.

In contrast, even in cases involving forum selection agreements, national court litigation is predominantly a *non*-consensual process, taking place within a single legal system, with very limited external scrutiny. Parties have virtually no role in the selection of the judges that decide their cases, with both the decision-makers and the adjudicative procedures applied in litigation contexts imposed by governmental authorities in the dispute resolution forum. As a consequence, the parties have little opportunity to ensure either that the judge(s) that resolve their dispute are independent or expert in the subject matter of the dispute, or that the litigation procedures which the judge(s) apply are fair and appropriate. Rather, the identities of the decision-maker(s) and the content of the litigation procedures are determined almost entirely by local government decisions.

It is critical to consider these differences between the arbitral and the litigation process in the context of contemporary realities of cross-border litigation. It is an unfortunate, but undeniable, fact that a substantial number of national judicial systems are highly unsuitable forums for the resolution of international commercial disputes. There is a wealth of evidence demonstrating that, in many jurisdictions – amounting to well more than half of the countries that are potential candidates for ratification of the Convention – basic standards of integrity, independence and competence are seriously compromised.

These conclusions are uncomfortable, but they are demonstrated by a wealth of empirical evidence from neutral, non-partisan sources (summarized below). They are also confirmed by consistent reports by experienced international counsel: the stark reality is that, in many litigation contexts, you get what you pay for. It is essential not to ignore this reality in evaluating the Convention.

Judicial Integrity

First, litigants in a very large number of jurisdictions report direct experiences with judicial corruption in between 25% and 75% of all cases. Transparency International reports that, 30% of respondents from all jurisdictions in 2017 regarded "most" or "all" judges as corrupt, with higher percentages in Africa, Latin America and Russia; the United Nations Development Programme reports that 24% of respondents worldwide reported having paid bribes to the judiciary in the preceding year; and the International Bar Association reports that more than one third of respondents (in a global study) had direct or indirect, recent experience with judicial corruption.

Judicial Independence

Second, and relatedly, reports by non-governmental organizations conclude that, in an alarming number of countries, judicial independence is entirely or largely lacking. Indicia of judicial independence have been falling, rather than increasing, in recent years.[1] The increasing role of state-owned or state-related enterprises in international trade and investment, as well as the re-politicization of international trade relations, exacerbates the risks resulting from the increasing

lack of judicial independence.

Judicial Competence

Third, and again relatedly, basic levels of competence are demonstrably lacking in numerous court systems. In many jurisdictions, judges are poorly trained, badly compensated and under-resourced, while confronted with intolerable caseloads. The lack of judicial competence is frequently associated with increased corruption: as an EU study reported, "another substantial cause of corruption practices in courts is the low level of the judges' professional education, prior corruption experience or lack of real practical experience."

Although not addressed by either the Hague Conference or the Convention's proponents, these considerations are vitally important in assessing the wisdom and suitability of the Convention. The lack of judicial integrity, independence and competence in many legal systems provide powerful arguments against permitting choice-of-court clauses and foreign judgments to be readily recognized and enforced. Those factors mean that, in a substantial number of cases, enforcing a forum selection clause or recognizing a foreign judgment means giving effect to serious denials of justice and procedural unfairness or, at a minimum, recognizing judgments lacking in elementary attributes of diligence and quality.

In this respect, it is fundamentally wrong to claim that the New York Convention and the international arbitral process provide a suitable paradigm for the recognition of judgments and choice-of-court clauses. That is because the international arbitral process contains a number of highly important safeguards against the risks of denials of justice and procedural unfairness. These protections are not present in either national court proceedings or the regime established by the Convention.

Thus, in contrast to national court proceedings, where judges are selected by local officials or randomly, international arbitral proceedings are conducted by arbitrators chosen by or for the parties in individual cases. The parties' role in selecting the decision-makers in individual cases makes the risk of foreign government interference highly unlikely; the parties themselves are able to police the selection of decision-makers. The parties' involvement in the selection of the arbitrators also significantly reduces the risks of corruption or lack of substantive competence: parties are able to select arbitrators who have both integrity and competence (particularly given that arbitrators are virtually always selected after a dispute arises, when the expertise relevant to resolving the parties' dispute is known). As a consequence, despite the substantial numbers of international commercial and investment arbitrations that have been conducted over the past 70 years, there are virtually no recorded instances of corruption by arbitrators.

Moreover, all leading international arbitration regimes provide robust and effective mechanisms for ensuring the independence and impartiality of individual arbitrators. Both commonly used institutional arbitration rules and virtually all national arbitration legislation uniformly require that arbitrators be "independent and impartial," while providing effective procedural mechanisms requiring disclosure of potential conflicts by arbitrators and permitting challenges of arbitrators by parties. The New York Convention and virtually all national arbitration statutes also provide for the possibilities of both annulment and non-recognition of awards rendered by arbitral tribunals lacking independence and impartiality.[2)]

Relatedly, the conduct of international arbitral proceedings is subject to the parties' procedural autonomy, with the arbitral tribunal exercising procedural authority only in the absence of agreement by the parties. That again empowers the parties and arbitrators, insulating the arbitral process from either governmental corruption or interference. Moreover, the New York Convention as well as most, if not all, national arbitration legislations require that arbitral procedures satisfy basic due process standards and to comply with the parties' procedural agreements – with annulment and non-recognition of awards again available as sanctions for violation of these requirements.[3)]

The above characteristics of the arbitral process are essential to the New York Convention's facilitation of the recognition of arbitral awards. The guarantees inherent in the arbitration process provide reliable assurances as to the independence of the arbitral tribunal and the underlying procedural fairness of the arbitral process; they also provide effective external protections, administered by decision-makers outside the arbitral process, in the (rare) event that these assurances are not realized. This contrasts significantly with a very substantial number of national court systems and proceedings, which are characterized by the lack of such assurances, the presence of endemic corruption and incompetence.

Put simply, in recognizing an arbitral award under the New York Convention, a court gives effect largely to the parties' own agreements and actions, taken at critical stages throughout the arbitral process, not to the rulings of a foreign state or government official. In contrast, in recognizing a judgment under the Convention, a court gives effect almost entirely to the rulings of a foreign governmental organ – which, as discussed above, is subject to grave doubts as to independence, impartiality and competence in a very substantial number of cases.

The desire of the Convention's drafters to "level the playing field" between international arbitration and litigation has a surface rhetorical appeal. But that objective, of levelling the playing field, in fact counsels away from accepting the logic of the Convention. International arbitration is a consensual process, dominated by the parties and regulated by enforceable guarantees of independence, impartiality and fairness, applied as external checks on the arbitral process by both annulment and recognition courts; national court litigation is predominantly a non-consensual process, taking place within a single legal system, with uncertain and frequently unreliable assurances of independence, integrity or fairness, as well as endemic levels of corruption in many jurisdictions. Levelling the playing field does not mean treating these two processes the same; it should instead mean treating them differently.

Put concretely, why should American, Canadian, Australian, Singaporean, Swiss, Ghanaian, Uruguayan or other courts commit to recognize all foreign judgments – including judgments of courts in Russia, China, Venezuela, Iran, the Congo, and Nicaragua – in the same basic way that they recognize international arbitral awards? In the latter case, courts give effect to largely independent, expert and fair decisions concerning commercial disputes, made by arbitral tribunals whose members are selected by the parties themselves, applying procedures also chosen by the parties themselves; a robust, pro-enforcement legal framework makes eminent sense in that context, as nearly 70 years of experience under the New York Convention has demonstrated. In the former case, courts would be required to give effect to judgments that are frequently rendered by courts that are neither independent, competent nor fair, and that, at the same time, are subject to no external scrutiny; the historic safeguards of private international law rules in most states, which only permit recognition of foreign judgments after reasonable careful scrutiny of their fairness, make eminent sense in these circumstances.

Exporting the New York Convention to national court litigation is not levelling the playing field; it is subjecting the players to arbitrary, incompetent and corrupt decisions by foreign referees. This conclusion alone should be sufficient to dissuade states from ratifying the Convention. But, as discussed in the third and final post in this series, there are further reasons arguing for the same result: in fact, in transposing the New York Convention to the context of foreign court proceedings, the Convention significantly dilutes the protections that are provided for the arbitral process, further exacerbating the risks of procedural irregularities and further undermining safeguards for party autonomy.

References

?1 World Justice Project, Rule of Law Index 2017-2018 (2018) (annual report on rule of law); Heritage Foundation, Index of Economic Freedom, (2021) (annual report on economic freedom, including judicial integrity and independence); Freedom House, *Freedom in the World 2018* (2018) (annual report on good governance, including rule of law).

?2 Gary Born, *International Commercial Arbitration* 1857-61 (3d ed. 2021).

?3 *Id.* at 1769-75, 1787, 2296-2300 and 2318-2330.

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