Kluwer Arbitration Blog

Scrutinizing the 2005 Hague Convention: Two Further Reasons to Keep Arbitration a Viable Option

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Gary Born, in a three-part series in Kluwer Arbitration Blog last month, addressed why States should not participate in the 2005 Hague Convention on Choice Of Court Agreements ("**Hague Convention**"). We assume that readers are familiar with Mr. Born's posts (available as Part I, Part II, and Part III), and so we will confine ourselves to recalling this proposition in Mr. Born's argument: the 2005 Hague Convention, though drafted and promoted as a sort of congener to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**"), is so very different from the New York Convention that to equate the two is to make a fundamental mistake. We agree with the cogent reasons that Mr. Born supplies to explain why equating the Hague Convention and the New York Convention is a mistake. We also think that readers would benefit from considering a further difference between the two Conventions: because they address different subject matter—judgments adopted by courts, on the one hand, awards adopted by arbitral tribunals, on the other hand—the courts that apply them are not likely to do so in a similar way. As we will suggest, there are grounds to be concerned that courts will be more deferential to foreign *judgments* than to foreign *awards*, and this would be so, even if the terms of the treaties were all but identical.

To start with the terms—which are analogous but not identical—both Conventions are built around provisions that require contracting States to recognize as binding, and to enforce, certain decisions reached by foreign dispute settlement organs. Obligations to recognize and enforce are contained in Article 8 of the Hague Convention and Article III of the New York Convention. Both Conventions also contain provisions permitting contracting States to refuse to recognize or enforce—Article 9 and Article V, respectively.

Let us, for convenience, refer to these latter two provisions as "scrutiny provisions," because they reserve an option for the contracting States to scrutinize the instruments that the treaties otherwise obligate the contracting States to recognize and enforce. We use this expression without prejudice to the precise modalities of reasoning and procedure that a judge or other authority (though in practice typically a judge) might be called upon to apply under the two Conventions.

Comparing the scrutiny provisions, one sees that they display structural and substantive likeness, at least to a degree. Mr. Born amply demonstrates that the formal similarities are largely illusory and outweighed by the differences.

However, even to the extent that the drafting suggests an intention to produce similar outcomes, there are grounds to be concerned that, in practice, courts implementing the two Conventions will approach them differently and that dissimilar outcomes will result. At least two factors are likely to influence judges to apply the Hague Convention's scrutiny provisions more leniently than they apply the corresponding provisions of the New York Convention.

First, under the Hague Convention, it is a *judgment* that the judge is invited to scrutinize, which is to say an authoritative decision reached by a public officer in the judiciary. Notwithstanding the empirical evidence gathered, for example, by the UN Development Programme, the International Bar Association, and Transparency International, that the judiciary in many countries lack independence or competence or both, the formal trappings of the judiciary are likely to impart to the judgment a patina of credibility. We do not posit that this is a factor that a judge would articulate. We suggest, even, that this factor may exert its influence in less than conscious ways, even on perfectly self-aware judges. The influence that we have in mind is in the nature of one of those subtle prejudices that arise from verbal cues, feelings of solidarity, and professional *amour propre*. That foreign *judges*, not arbitrators, are involved here, on the terms of the Hague Convention, *should* not matter. But, when the advocates of the Convention say that those terms, when implemented, will place much the same scrutiny on foreign judgments that the scrutiny provisions of the New York Convention place on arbitral awards, skepticism is in order. We suggest that the scrutiny will *not* in practice be the same, and this is in part because judges will treat other judges differently than they treat arbitrators.

It is interesting to note that empirical research seems to identify a latent preference for decisions reached by organs labeled "courts" over organs labeled "arbitral tribunals." A study concerning investor-State dispute settlement (ISDS) recently found that, all else being equal, the *general public* prefers decisions reached by judges to decisions reached by arbitrators. We argue elsewhere (in a forthcoming article) that further study is needed, before confident conclusions can be reached as to what, precisely, the general public finds suspect about arbitration; we think that, when it comes to ISDS cases involving issues that attract considerable public attention, the public profile of the individuals who make the decisions may matter more than the institutional format—court or arbitral tribunal—in which the decisions are made.[1)] Judges are not the general public, and so a study of public sentiment at large is even less sure a guide to how judges think. Moreover, the judges applying the Hague Convention will deal with a much larger number and diversity of decisions than do tribunals arbitrating investor-State claims. The professionalism of the judge, one would hope, would prevail over the sorts of sentiment that, evidently, lead the general public to have *a priori* confidence in courts and suspicion toward arbitral tribunals. However, judges do not live in a vacuum. The evident popular current against arbitration—which presumably extends beyond ISDS—*should* not influence judges, but in practice, at least in some instances, it might.

A second factor may influence judges to apply the Hague Convention provisions more leniently as well. In most courts, there exists a nexus of considerations relating to deference toward other sovereigns—considerations that are denoted variously across countries and settings as "comity," "non-justiciability," "act of state," etc., that caution judges against second-guessing the legal acts of foreign governments.[2)] Added to these considerations are doctrines, also present in many countries, that call on judges to exercise deference to executive officers of their own country in matters that pertain to foreign affairs.[3)] The Hague Convention, unlike the New York Convention, addresses itself to the work product of other sovereigns (national courts being organs of the States

to which they belong)[4] and in this way is involved in sovereign-to-sovereign relations—a linkage absent (or much less pronounced) in the New York Convention, which addresses itself to arbitral awards, the work product of private arbitrators.

True, judges applying the Hague Convention are supplied a self-contained régime[5] for addressing the judgments that parties call upon them to recognize. The nexus of considerations that we identify here should not enter the picture, except to the extent required by formal reasons contained in the applicable law. From the standpoint of the judicial function as properly discharged, those considerations are otherwise irrelevant: none of the considerations here *should* influence judges to apply anything less than the scrutiny to foreign judgments that the Hague Convention invites. The likelihood, however, is that these considerations *will* influence judges. They will shift the judges' frame of mind toward deference, rather than scrutiny.

Both of the factors that we identify here owe to the circumstance that it will be judgments of foreign judges comprising foreign courts, rather than awards of arbitrators comprising arbitral tribunals, that the Hague Convention will call on judges to recognize and enforce. Mr. Born adduces reasons to doubt the analogy that champions of the Hague Convention make between the Hague Convention and the New York Convention. We think those reasons, which are reasons of both black letter law and empirical evidence, are salient. We also think that the factors that we have suggested here, though largely of a socio-legal character, support much the same conclusion. Judicial determinations will simply tend to get less scrutiny than arbitral awards. Judges called on to recognize and enforce foreign decisions—whether by courts or by arbitral tribunals—*should* focus on the substantive and procedural merits of each decision, not on the mere label of how the decision is reached or by whom it is reached.[6] The risk is that, in practice, the label *will* affect the scrutiny that a judge places on any decision under review. This is a further reason why we join Mr. Born in his conclusion that to participate in the Hague Convention is unlikely to serve the interests either of parties seeking fair and competent settlement of their disputes or the general interest in building and maintaining rule of law.

Arbitration, with its principle of party autonomy and its backstop of New York Convention scrutiny, continues to offer the better choice. As Chief Justice of Singapore Sundaresh Menon has described it, party autonomy is "the cornerstone of arbitration. Party autonomy finds its expression in the parties' voluntary submission and participation in arbitration in a form and manner of their choosing, which extends also to the manner of appointing and constituting the tribunal."[7] Prudent parties can ensure that arbitrators are carefully selected for their demonstrated track record of professionalism in the conduct of live proceedings and for producing carefully written opinions firmly grounded in the factual record and applicable legal texts. Determinations made through such a process serve the interests of the parties, any courts involved, as well as all interested policy-makers and members of the public.

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References

?1 Grant & Kieff, *Appointing Arbitrators: Tenure, public confidence, and a middle road for ISDS reform*, forthcoming in Michigan Journal of International Law (2022).

?2 As to comity and act of state in the US setting, see the classic articulation in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-11 (1964) and *id.* at 417-18 ("To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations" (internal quotation marks omitted)). Notwithstanding statutory enactments to qualify and confine those doctrines, disputation continues. See *Federal Republic of Germany v. Philipp*, 141 S.Ct. 703, 709-711 (2021). As to non-justiciability, see the excellent summary of the case law by Dapo Akande (current UK candidate for election to the International Law Commission).

?3 As to the US jurisprudence and related academic commentary, see David H. Moore, *Beyond One Voice*, 98 Minn. L. Rev. 953 (2014). For a recent précis of the English jurisprudence, see Mrs. Justice Roberts' judgment in *MM v. NA (Declaration of Marital Status: Unrecognised State)* [2020] EWHC 93 (Fam), paras. 17-36 (Jan. 22, 2020).

?4 See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, draft art. 4(1): 2001 I.L.C. Yearbook Vol. II, Part Two, p. 40; and *id.* Comment (6), pp. 40-41.

?5 We use the expression "self-contained régime" to indicate that the Convention is intended to set the terms for recognition and enforcement, not that it seals the process of decision hermetically against any and all other rules. We take note the caveats identified some time ago against exaggerated notions of self-containment in treaty systems, as to which see Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17(3) Eur'n J. Int'l L. 483-529 (2006).

?6 Of course, *how* and *by whom* a decision is reached matter in a variety of ways and are properly considered by a judge. Our concern here is that mere labels—e.g. "court proceedings" *versus* "arbitral proceedings"; "judgment" *versus* "arbitral award"—might influence judges *independently* of those considerations properly considered in reaching a legal decision

?7 Sundaresh Menon, *Adjudicator, advocate or something in between? Coming to terms with the role of the party-appointed arbitrator*, 83 Arbitration 185, 195 (2017), citing Gary Born, International Commercial Arbitration, 2nd edn (2014) 1639.