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

Gary B. Born (Wilmer Cutler Pickering Hale and Dorr LLP) · Friday, July 23rd, 2021

In a series of recent posts ([Part I](#), [Part II](#) and [Part III](#)), I argued that states should not ratify the [Hague Choice of Court Agreements Convention](#) (“**Convention**”) and, if they had already done so, that they should denounce the Convention. Two good friends, Trevor Hartley and João Ribeiro-Bidaoui, recently [responded](#) on Kluwer Arbitration Blog and [elsewhere](#), disagreeing with my views.

These responses confirm the need to engage in an objective evaluation of the Convention and the importance of this subject. In addition, these responses are also highly illuminating: although they are intended to do the opposite, Professor Hartley’s and Mr. Ribeiro’s replies confirm and powerfully underscore the grave defects of the Convention, the threats that the Convention poses to the rule of law and international commerce, and the need for states not to ratify the Convention.

New York Convention: The Model or Not?

Both Professor Hartley and Mr. Ribeiro begin their discussions by denying that the [New York Convention](#) provided a model for the Convention. As Professor Hartley puts it, “[t]he Brussels Regulation, rather than the New York Convention, was in fact the model for the Hague Convention.” According to Mr. Ribeiro, comparisons with the New York Convention are a “fundamental misconception of the genesis and purpose of the [Choice of Court] Convention” that “invalidates the very basis of Born’s indictment.”

These efforts to distance the Convention from the New York Convention are highly inaccurate, both historically and architecturally. Historically, the Convention’s various promoters have repeatedly and explicitly linked it to the New York Convention, while virtually never doing so with respect to the [Brussels Regulation](#). The [Hague Conference’s Explanatory Report](#), co-authored by Professor Hartley, explains “[t]he hope is that the Convention will do for choice of court agreements what the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 has done for arbitration agreements.” To the same effect, Professor Hartley has written elsewhere that “[t]he New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 is one of the most successful conventions in the legal sphere. The hope is that the Hague Choice-of-Court Convention will prove equally successful.”¹⁾ Or, as Mr. Ribeiro’s predecessor as the First Secretary of the

Permanent Bureau, Andrea Schulz, put it: “It is hoped that the new Convention will do for choice-of-court agreements what the highly successful 1958 New York Convention does for arbitration agreements.”²⁾ And, as Louise Ellen Teitz, one of the individuals acknowledged as a contributor to Mr. Ribeiro’s response, previously [wrote](#), the Convention is “the litigation analogue for the New York Convention because it seeks to provide an equal and viable alternative to arbitration.”

These and numerous other similar characterizations of the Convention and its aspirations are historically authentic, in contrast to the revisionist efforts undertaken by Professor Hartley and Mr. Ribeiro in their posts. They are also substantively and structurally accurate. The Convention deals with choice-of-court agreements and judgments based on such agreements, just as the New York Convention deals with arbitration agreements and resulting arbitral awards; neither Convention deals with other bases of jurisdiction nor types of decisions. Likewise, and critically, both Conventions aspire to be global and universal, open to (and, in the case of the Convention, vigorously promoted to) all states. (These points are explored in a thoughtful recent [post](#) by Thomas Grant and F. Scott Kieff, also criticizing the Convention.)

In contrast to the two Conventions, the Brussels Regulation deals with *all* types of jurisdictional bases (including numerous non-consensual jurisdictional bases, such as domicile, incorporation, necessary party status, and the like) and *all* types of judgments – not just forum selection and arbitration agreements and their resulting judgments. Likewise, the Brussels Regulation is emphatically not global or universal, but a regional European instrument, linked to a regional integration project and regional political and judicial institutions. Thus, there is a world of difference between the character of the Brussels Regulation and that of the Convention, while there are very close parallels between the Convention and the New York Convention – which is why the Convention’s drafters and promoters, quoted above, have hitherto always analogized it to, and based its fundamental structure and aspirations on, the New York Convention, and not on the Brussels Regulation.

This structural analogue between the Convention and the New York Convention has highly important practical consequences. The Convention is *global*, meaning that any state can accede to it; indeed, the Convention aspires to being *universal*. That means that states with the world’s most corrupt, least independent and least experienced courts may, and likely will, become Contracting Parties to the Convention, with none of the institutional and political safeguards that exist under the Brussels Regulation. As discussed below, this has several highly important consequences for assessing the Convention’s wisdom and suitability.

The Brussels Regulation: Professor Hartley’s Surprise

Before examining these points, however, it is both surprising and highly revealing that Professor Hartley now asserts, contrary to the Convention’s Explanatory Report and the vast majority of prior commentary, that “[t]he Brussels Regulation ... was in fact the model for the [] Convention.” If that were indeed accurate, notwithstanding what all the Convention’s promoters have previously said, it would be a further serious indictment of the Convention.

There are extraordinarily important differences between the rules appropriate for forum selection and judgment recognition on a global basis (like the Convention) and those appropriate on a regional basis (like the Brussels Regulation). The Brussels Regulation applies within a limited

number of relatively similar European states, linked by both an integration project and common judicial and legislative organs (i.e., the European Court of Justice and the EU Parliament, Council and Commission). Recognizing judgments and forum selection provisions within this limited (and quantifiably known) community, with central judicial and legislative institutions and safeguards, is utterly different from recognizing those things globally, from any state in the world, and without central adjudicative or other safeguards.

Relying on the Brussels Regulation to justify the Convention is therefore not a defense of the Convention but, in Mr. Ribeiro's words, a very serious indictment. There are serious questions as to whether the Brussels Regulation works even within the European Union. In any event, however, it is entirely inappropriate to extend for global application a regional mechanism that is designed for a specific and singular political and legal context. Relatedly, one must also ask why states like the United States, China and regions like Latin America, and elsewhere, would wish to replace their own legal systems, and long-standing private international law rules, in favor of a multilateral framework, based on the Brussels Regulation, that was designed by the EU for European use.

Despite this, the Convention's provisions do what Professor Hartley now acknowledges – namely, dilute important protections of the New York Convention for party autonomy and procedural regularity and integrity, based upon selected provisions of the Brussels Regulation. In particular, as discussed below and in an accompanying post, the Convention gives final, unreviewable authority to the putatively chosen court to determine whether a valid choice-of-court agreement exists, materially diluting Article V(1)(a) of the New York Convention, while also significantly weakening the protections for procedural regularity contained in Articles V(1)(b) and V(1)(d) of the New York Convention. Transposing these aspects of the Brussels Regulation to an international context is, as noted above, deeply unsatisfactory.

The Choice of Court Convention: Open Doors for Corrupt Courts and Judgments

Importantly, neither Professor Hartley nor Mr. Ribeiro challenges the uniform findings of [Transparency International](#), [Freedom House](#) and other respected non-profit organizations regarding endemic corruption and lack of judicial independence in many parts of the world. On the contrary, Professor Hartley acknowledges, with notable understatement, that there are many “countr[ies] where judicial corruption is a problem.” Similarly, while noting the existence of “highly efficient, effective commercial courts” in a few states, Mr. Ribeiro concedes that “weaknesses in some court systems cannot be ignored.”

If “some” means “most” or “many,” it is correct. One can take one's pick of the countries in the bottom two-thirds of whichever index of corruption one prefers — Afghanistan, Syria, Yemen, Venezuela, Sudan, Libya, Somalia, Congo, and Burundi, as well as China, Russia and countless other states. The simple, if unpleasant, truth is that a very large number of judicial systems around the world lack either integrity, basic competence or judicial independence. Despite that, under the Convention, the judgments of all these states would be subject to mandatory recognition under the Convention (without the protections of the New York Convention and without the institutional structure and other characteristics of the EU).

Professor Hartley responds that “none of these countries is a Party to the Hague Convention; so choice-of-court agreements designating their courts would not be covered.” That is the

Convention's promoters' best defense, but it is, for obvious reasons, wholly unsatisfactory. The critical point is that the Convention is open to all these states for ratification. These states may not be Contracting Parties today, but the Hague Conference and its promoters certainly intend for them to become Contracting Parties in two, five or ten years. And then, when tainted Sudanese, Venezuelan, Libyan, Russian or Chinese judgments for hundreds of millions of Euro or dollars must be recognized against U.K., Portuguese, Singaporean or other businesses under the Convention, Professor Hartley's observation will provide no solace to local shareholders, workers, suppliers and communities.


This post continues in [Part II](#).

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References

¶1 Trevor C. Hartley, *The Hague Choice-of-Court Convention*, 31(3) E.L. Rev. 414, 423 (2006).

?2 Andrea Schulz, *The Hague Convention of 30 June 2005 on Choice of Court Agreements*, 2 J. Priv. Int'l L. 243, 267-68 (2006).

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