

Hague Convention on Choice of Court Agreements – What you need to know

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Whilst arbitration agreements in international cases are widely recognised under the New York Convention, the same is not always true for choice of court agreements, for which divergent national rules more often apply. The Hague Convention on Choice of Court Agreements (the “Convention”), which entered into force on 1 October 2015, is a major step forward in this regard.

The Convention aims to improve the effectiveness of exclusive choice of court agreements in international litigation by delivering greater certainty on jurisdictional issues and streamlining the enforcement of court judgments and orders between states that are party to the Convention (“**Convention States**”).

While it is early days for the Convention, the hope is that it may in time provide an international regime for recognition and enforcement of court judgments to rival that of the New York Convention in respect of arbitral awards. This alert outlines the current scope of application of the Convention, its key provisions and their practical effect.

Application

The Convention entered into force in the EU (excluding Denmark) and in Mexico on 1 October 2015.

The US and Singapore have signed the Convention, and it is likely that Singapore will ratify it in the near future. Ratification in the US seems further off, amid debate as to the implementation of the Convention within the US’s federal legal system.

The Convention has also been subject to consultation in Hong Kong, and is reported also to be under consideration in Australia.

Key Provisions

The Convention’s main provisions are as follows:

- A court of a Convention State chosen by the parties under an exclusive choice of court agreement (an “**exclusive jurisdiction agreement**”) has jurisdiction to hear a dispute unless that agreement is null and void under the law of that state (Article 5).
- A court of a Convention State not chosen by the parties under an exclusive jurisdiction agreement must suspend or dismiss proceedings brought before it unless limited exceptions apply (Article 6).
- Any judgment given by the chosen court must be recognised and enforced in other Convention States, except where one of the limited grounds for refusal applies (Articles 8 and 9).

Scope

Exclusive Choice of Court Agreements

By default, the Convention only applies where there is an exclusive jurisdiction agreement between the parties. The exclusive jurisdiction agreement must nominate the courts (or a specific court) in a chosen Convention State to hear the parties' disputes, such that the jurisdiction of any other courts is excluded. Where the agreement designates the courts (or a specific court) of only one Convention State, it is deemed an exclusive jurisdiction agreement unless the parties have expressly provided otherwise.

The Explanatory Report to the Convention suggests that asymmetric jurisdiction agreements (i.e. where one party may bring proceedings only in the exclusively designated court, but the other party may sue in other courts as well) are not exclusive jurisdiction agreements.

In the absence of declarations by a Convention State to the contrary (of which none have been made to date), the Convention does not apply to non-exclusive jurisdiction clauses.

Timing

The Convention only applies to exclusive jurisdiction agreements concluded after its entry into force in the state of the chosen court.

"International Cases"

The Convention only applies in international cases. A case is considered international unless the parties are both resident in the same Convention State and their relationship (and all other elements relevant to the dispute) are connected only with that state.

Civil and commercial matters

The Convention applies only in civil and commercial matters, subject to a number of exclusions, including: employment and consumer contracts, insolvency matters, competition matters, tort claims for damage to property not arising from a contractual relationship, international carriage of goods matters, some intellectual property rights, and arbitration and arbitration-related proceedings (Article 2).

Practical impact

Short term impact – The Recast Brussels Regulation will take precedence in most situations

The fact that the Convention is currently only in force in the EU (excluding Denmark) and Mexico means that, in the immediate term, it is likely to have little impact in most disputes.

"Give-way" provisions in the Convention mean that the EU's Regulation (EU) 1215/2012 (the "**Recast Brussels Regulation**") takes precedence over the Convention unless at least one party is based in a Convention State outside the EU. In reality, both the Convention and the Recast Brussels Regulation will often produce the same result, but for the moment it will typically be necessary to rely on the Convention only where one of the parties is resident in Mexico, or a party seeks enforcement of a judgment from or in Mexico. We therefore expect the Convention to be relied upon relatively infrequently in the short term.

The longer term – Potential for fewer jurisdictional disputes and more streamlined enforcement

In the longer term, the Convention has the potential to generate significant time and costs savings in cross-border litigation if widespread international support for it emerges. Parties to exclusive jurisdiction agreements would be afforded greater certainty as to where they could sue and be sued, and the Convention would provide a relatively straightforward and standardised mechanism for cross-border enforcement of court judgments within Convention States.

Certainty of enforcement is likely to be particularly helpful to parties seeking to enforce orders from less established courts, including those of newly established litigation centres such as the Singapore International Commercial Court (SICC). The SICC aims to combine the best features of international arbitration (such as confidentiality) with those of litigation (such as the ability to join third parties). The Convention is likely to boost the attraction of such centres, and ultimately provide greater choice for parties seeking a forum that best fits their preferred mode of dispute resolution, geographical location, and cultural/political outlook.

Adoption of the Convention by other states

Clearly, there is still a long way to go before the Convention establishes the same kind of international enforcement network as is currently available for arbitral awards under the New York Convention. However, it is to be expected that the Convention's recent entry into force in the EU and Mexico will now help it gather momentum in other jurisdictions.

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