

New Era for Choice Of Court Agreements

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On Jan. 19, 2009, Washington, D.C. was focused on the imminent inauguration of President Barack Obama, which may explain why another historic event went practically unnoticed. As one of his final acts as Legal Adviser to the Secretary of State, John B. Bellinger signed the 2005 Hague Convention on Choice of Court Agreements (Convention)¹ on behalf of the United States. This marks the first time in history for this country to join an agreement, bilateral or multilateral, on reciprocal recognition and enforcement of judgments.

The Convention is the product of long and difficult negotiations under the auspices of the Hague Conference on Private International Law. In 1992, the United States proposed to the Conference the adoption of a multilateral convention on the recognition and enforcement of foreign judgments. The stated goal was to overcome the existing uncertainty in the resolution of transnational disputes, reflected in forum shopping practices, parallel litigations and the difficulties and expenses in the recognition and enforcement of foreign judgments.² The proposal included three lists of jurisdictional bases and corresponding recognition and enforcements rules:

- (i) grounds that were acceptable and thus required recognition and enforcement of resulting judgments (“white list”),
- (ii) grounds that were unacceptable and thus prohibited recognition or enforcement of resulting judgments (“black list”), and
- (iii) grounds permitted under national laws, that neither required nor prohibited recognition and enforcement of resulting judgments (“grey list”).

By 2001 it became clear that no consensus could be reached on a text covering all types of jurisdictional bases. Instead, the Conference focused on the minimal but realistic consensus, namely, the recognition of choice of forum agreements and the enforceability of resulting judgments. Only four years later, the Convention was adopted.

Application and Operation

The Convention applies to international cases in civil or commercial matters, where the parties entered into an exclusive choice of court agreement.³ The Convention does not apply to consumer or employment contracts.⁴ Numerous subject matters are excluded, such as family law matters; wills and succession; insolvency; carriage of passengers and goods; maritime claims; anti-trust matters; liability for nuclear damage; personal injury claims; certain tort claims (that do not arise from a contractual relationship); and intellectual property rights.⁵

The Convention also does not govern interim measures of protection. The Convention neither requires nor precludes interim measures of protection by a court of a Contracting State and does not affect whether or not a party may request or a court should grant, refuse or terminate such measures.⁶

An exclusive choice of court agreement is defined as an agreement that is documented in writing or “by any other means of communication which renders information accessible so as to be usable for subsequent reference,” concluded by two or more parties, and designates the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts.⁷ Exclusivity is presumed unless the parties have expressly provided otherwise. The Convention specifically sets forth that an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement thus cannot be contested solely on the ground that the contract is not valid.⁸

The Convention establishes three basic rules:

- The chosen court must hear the case.⁹ There is no discretion. The doctrine of forum non conveniens in favor of courts of another State does not apply.
- Any court not chosen is prohibited from exercising jurisdiction.¹⁰
- Any judgment rendered by the chosen court of a Contracting State must be recognized and enforced by the courts in any other Contracting State.¹¹

The party seeking recognition or applying for enforcement has to produce certain documentation.¹² Complete and certified copies, and, where necessary, certified translations, of the judgment and the exclusive choice of court agreement (or other evidence of its existence) need to be provided. If the judgment was given by default, the requesting party has to establish that the defendant was duly notified. The procedure for recognition and the actual enforcement of the judgment are generally governed by the law of the requested State.¹³

There are some exceptions. A court of a Contracting State other than that of the chosen court can exercise jurisdiction if:

- (a) the agreement is null and void under the law of the State of the chosen court;
- (b) a party lacked the capacity to conclude the agreement under the law of the State of the court “seized”;
- (c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seized;
- (d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or
- (e) the chosen court has decided not to hear the case.¹⁴

Since there is no *lis pendens* provision, the proverbial “race to the courthouse” is a possibility when the chosen court assumes jurisdiction, while the court not chosen finds that one of the exceptions applies.¹⁵

Similarly, recognition or enforcement may be refused if:

- (a) the 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;

- (b) a party lacked the capacity to conclude the agreement under the law of the requested State;
- (c) the document that instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defense or was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;
- (d) the judgment was obtained by fraud in connection with a matter of procedure;
- (e) recognition or 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;
- (f) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or
- (g) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.¹⁶

However, there shall be no review of the merits of the judgment given by the court of origin, and the enforcing court shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.¹⁷

Outlook for the Future

The Convention is not yet in force. It will enter into force three months after the deposit of the second instrument of ratification, acceptance, approval or accession.¹⁸

It is expected that the United States will ratify the Convention.¹⁹ So far, only Mexico has acceded to the Convention (on Sept. 26, 2007).²⁰ Other countries are expected to follow suit, including the European Union.²¹

In the short run, the focus will be on the Convention’s effect on the enforcement of judgments between Mexico and the United States.²² Currently, recognition and enforcement of judgments between the two countries is principally based on notions of comity.²³

Most practitioners should welcome the Convention, since the existing process is generally perceived as burdensome and lacking of clear standards. As such, the Convention may have a positive impact on the business relationships between Mexico and the United States. In any event, it will likely to be seen as a test case to see how the Convention works between civil and common law countries, and provide guidance for other countries deciding whether they should join it.

If the Convention becomes widely accepted,²⁴ it has the potential of becoming the “litigation twin” to the extremely successful Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the “New York Convention”).²⁵ This would significantly impact whether parties in international business transactions choose arbitration or litigation to resolve their disputes, and how counsel should advise them. The International Chamber of Commerce conducted a survey among its members on the use of choice of court clauses and arbitration clauses, which showed that a complementary instrument to the New York Convention would be highly welcomed by the business community.²⁶ Ultimately, only time will tell, and the New York Convention has a 50 year head start.

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Please note that after this article was submitted for publication, the European Community, represented by the Czech Minister of Justice, has signed (but not yet ratified) the Convention. In accordance with Article 30 of the Convention, the European Community declared that it exercises competence over all the matters governed by the Convention and that its Member States will not sign, ratify, accept or approve the Convention, but shall be bound by the Convention by virtue of its conclusion by the European Community.

1. The text of the Convention can be accessed at http://www.hcch.net/index_en.php?act=conventions.pdf&cid=98.
2. See Brand, R.A. & Herrup, P.M., “The 2005 Hague Convention on Choice of Court Agreements,” Commentary and Documents, p.3 (Cambridge University Press, 2008).
3. Article 1.
4. Article 2(1).
5. Article 2(2).
6. Article 7.
7. Article 3(a)-(c).
8. Article 3(d).
9. Article 5(2).
10. Article 6.
11. Article 8(1).
12. Article 13. All documents submitted under the Convention are exempt from legalization, i.e. no Apostille is required. Article 18. (An Apostille describes a certificate legalizing a document for international use under the terms of the 1961 Hague “Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.” Pursuant to Article 4 of that convention, the certificate shall contain the title “Apostille (Convention de La Haye du 5 octobre 1961)” in the French language.)
13. Article 14.
14. Article 6.
15. The Convention does not affect the application of pre-existing conventions, which expressly includes the rules of “regional economic integration organizations,” such as the European Union. Article 26. Thus, if the EU joins the Convention, the Brussels regime (specifically, the 1968 Brussels Convention and the 2001 Brussels I Regulation), would continue to apply. Both the Brussels Convention and Brussels I do contain *lis pendens* provisions.
16. Article 9.
17. Article 8(2).
18. Article 31. The Convention will then apply to exclusive choice of court agreements concluded after its entry into force for the state of the chosen court and to proceedings commenced after its entry into force in the state of the court seized (typically, where recognition and enforcement is sought.)
19. The last minute signing of the Convention by the Bush administration is not expected to create the same political issues as the U.S. signature under the Rome Statute of the International Criminal Court during the last moments of the preceding Clinton administration. Back then, the incoming government informed the United Nations that it was not the intention of the United States to ratify the treaty.
20. For the current status, see http://www.hcch.net/index_en.php?act=conventions.status&cid=98#legend.
21. In September 2008, a proposal for a European Council decision was presented (see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0538:FIN:EN:PDF>).
22. The implementing U.S. legislation will most likely preempt any inconsistent provisions of the Uniform Foreign Money Judgments Recognition Act, which has been adopted in 32 states, including New York.
23. For further information on the recognition and enforcement of foreign judgments in Mexico, see Armas, O. and Graham, L., “International Execution Against Judgment Debtors,” Mexico Chapter (Oxford University Press, New York, 2009).
24. States may make declarations limiting jurisdiction (Article 19), declarations limiting recognition and enforcement (Article 20), and declarations with respect to specific matters (Article 21).
25. See Brand & Herrup, *supra* n.2, p.3.
26. See <http://www.hcch.net/upload/outline37e.pdf>, p. 1.