The Hague Convention could save time and expense on jurisdictional disputes and aims to streamline cross-border enforcement.

On 11 June, the Latvian presidency, on behalf of 27 of the 28 European Union (EU) member states,[1] deposited the instrument of approval of the June 2005 Hague Convention on Choice of Court Agreements (the Hague Convention).[2] The Hague Convention will take effect in the 27 EU member countries and Mexico on 1 October.

This article considers the purpose of the Hague Convention and its interaction with the jurisdictional rules in Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and enforcement of judgments in civil and commercial matters (the Recast Brussels Regulation).

Choice of Court Agreements

Choice of court agreements, otherwise known as “jurisdiction clauses” or “forum selection clauses”, are commonly used in international commercial contracts to state the parties’ intention that a chosen country’s courts are to try any disputes that may arise between them. The agreements aim to provide greater legal certainty to parties in the event of a dispute. This is especially important in the case of cross-border, business-to-business transactions, where high stakes mean that parties can spend considerable time and money battling on jurisdictional issues, which in turn delays resolution of their underlying dispute.

Choice of court agreements may be exclusive or nonexclusive. In an exclusive choice
of court agreement, parties agree that one country’s courts alone may determine any disputes between them. In a nonexclusive choice of court agreement, any dispute between the contracting parties may be heard in the courts of one country alone, but without prejudice to the rights of the parties to commence proceedings before the courts of another jurisdiction, if they wish.

The Hague Convention

The Hague Convention was concluded by the Hague Conference on Private International Law on 30 June 2005. It aims to ensure the effectiveness of choice of court agreements made between parties to transnational commercial contracts. As set out in the European Commission’s Explanatory Memorandum of 30 January 2014, the Hague Convention is “designed to offer greater legal certainty and predictability for parties involved in business-to-business agreements and international litigation by creating an optional worldwide judicial dispute resolution mechanism alternative to the existing arbitration system...”[3]

By default, the Hague Convention applies only to exclusive choice of court agreements made between businesses in civil and commercial transactions. It excludes certain matters, including disputes relating to consumer and employment contracts, most family law matters, insolvency matters, and personal injury claims brought by natural persons and some insurance contracts.

The Hague Convention aims to address a situation where judges in parallel proceedings in different jurisdictions disagree on which court has the jurisdiction to hear a case or enforce judgements by making choice of court agreements binding on courts in countries where the Hague Convention is in force (contracting state[s]). The Hague Convention provides that judges in contracting states will no longer be able to declare the court a “forum non conveniens” of their own accord if it is contrary to what the parties agree on in a choice of court agreement. Judges usually must also refuse to hear disputes if the courts of their jurisdiction have not been designated as the exclusive courts in the choice of court agreement.

In addition, the Hague Convention heavily restricts contracting state courts’ ability to refuse to recognise a decision of another contracting state court.

The Hague Convention therefore aims to save time and expense both at the outset of proceedings, when jurisdictional disputes commonly arise, and after a judgment is given, when parties seek to enforce a judgment abroad.

The Hague Convention’s Key Provisions

The key provisions of the Hague Convention are as follows:

(i) A choice of court agreement must be respected by the courts of a contracting state unless the contract in dispute is null and void under the laws of that contracting state (Article 5).

(ii) Any court not chosen must decline to hear the case or suspend or dismiss proceedings, unless limited exceptions apply (Article 6).
Any judgment made by a designated court must be recognised and enforced in other contracting states, except in very limited circumstances (Articles 8 and 9). The parties’ ability to seek interim relief in nonchosen courts is not affected.

**Interaction with the Recast Brussels Regulation**

The Recast Brussels Regulation is in effect in all EU member states (except Denmark), whereas the Hague Convention will apply in contracting states only.

The Recast Brussels Regulation sought to strengthen party autonomy by ensuring that “choice of court agreements may not be circumvented by parties seizing other courts in violation of such agreements [i.e., commencing proceedings first on jurisdictions other than as agreed in a choice of court agreement]... thus [preparing] the ground for the EU to proceed with the approval of the [Hague] Convention”.[4]

Although it remains to be seen how the Hague Convention and the Recast Brussels Regulation will interact in practice, the Hague Convention contains significant “give way” provisions. As such, in cases that involve only EU-resident parties and/or parties resident in non-Hague Convention states, the Recast Brussels Regulation’s rules should prevail where a contract provides for the exclusive jurisdiction of an EU court. However, in other cross-border cases in contracting state courts, the Hague Convention may take precedence.

For the most part, however, the outcome is likely to be the same irrespective of whether the Hague Convention or the Recast Brussels Regulation applies, although the Hague Convention may provide parties with greater protection against the risk of parallel proceedings being commenced inside the EU where they have chosen a non-EU court to govern their dispute.

**Parties to the Hague Convention**

Starting 1 October, the Hague Convention will take effect in 27 of the EU member states and Mexico. In addition, the United States and Singapore have signed the Hague Convention, but both have yet to ratify it, without which the Hague Convention will not take effect in their territories.

At present, the Hague Convention is therefore limited by its geographical scope, particularly in circumstances where the Recast Brussels Regulation will prevail in many disputes connected with the EU. It remains to be seen whether other countries that have expressed an interest in the Hague Convention will ratify it.

**Conclusion**

The Hague Convention has the potential to radically streamline international litigation that involves exclusive choice of court clauses by eliminating the need for lengthy argument on jurisdictional issues. It may also pave the way for a more uniformed approach to jurisdiction in cases where no exclusive jurisdiction clause applies.
Moreover, in terms of enforcement, the Hague Convention aims to do for litigation what the New York Convention has achieved for arbitration. Like the New York Convention, the Hague Convention aims to create a harmonized set of rules to govern cross-border enforcement. Because the choice between arbitration and litigation often hinges on the ability of parties to enforce a judgment internationally, the Hague Convention goes a long way to resolving enforcement uncertainties by significantly limiting the basis on which courts in contracting states may refuse to enforce a judgment made in another contracting state pursuant to an exclusive choice of court clause.

[1]. Excluding Denmark.

[2]. View the full text of the convention.

[3]. See here.


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