

HAGUE CONVENTION – RECENT DEVELOPMENTS

Hague Convention of 30 June 2005 on Choice of Court Agreements

Introduction

On 30 January 2014, the European Commission adopted a proposal for a Council decision on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements which, if enacted, will cause that Convention to come into force.

The Hague Convention

The Convention on Choice of Court Agreements (the “Convention”) was concluded on 30 June 2005 under the auspices of the Hague Conference on Private International Law, and aims to ensure the effectiveness of “choice of court” clauses (alternatively known as jurisdiction clauses) between parties to international contracts.

Article 1 provides that the Convention applies to jurisdiction agreements concluded in civil or commercial matters, but excludes certain contracts, including consumer and employment contracts (Article 2). While “civil and commercial matters” is not defined in the Convention, that term is used in various European instruments and is typically given a wide interpretation.

The Convention only applies to those jurisdiction clauses which provide for “exclusive” jurisdiction (Article 1A).

Where the Convention applies, the following three rules are invoked:

1. The chosen court must in principle hear the case (Article 5);
2. Any court not chosen must in principle decline to hear the case (Article 6); and
3. Any judgment rendered by the chosen court must be recognised and enforced in other Contracting States, except where a ground for refusal applies (Articles 8 and 9).

The requirement to give recognition and enforcement is subject to certain exceptions as set out in Article 9, which provides that recognition and enforcement can be refused only on the grounds set out in the Convention:

- 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 which instituted the proceedings or an equivalent document, including the essential elements of the claim,
 - i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or
 - ii) 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.

Although entered into in 2005, the Convention has not yet entered into force. It was signed (but not ratified) by the European Union in 2009 (on behalf of all its member states except Denmark) and the United States, while Mexico acceded to it. In order to come into force, it must be ratified by one more country (pursuant to Article 31, which provides that the Convention shall enter into force “on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession”).

Interaction with European Regulations

At a European level, the effectiveness of choice of court agreements is governed by the Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels I Regulation), which is to be replaced by Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters with effect from 10 January 2015.

However, neither the Brussels I Regulation nor the new Regulation apply to choice of court agreements in favor of third State courts, which is where the Convention will have effect.

The relationship between the rules contained in the Convention and the existing and future EU rules is set out in the Convention, which essentially provides that the Convention will prevail over the jurisdiction rules of the Regulation except if both parties are EU residents or come from third states, not Contracting Parties to the Convention. In relation to the recognition and enforcement of judgments, the Regulation will prevail where the court that

made the judgment and the court in which recognition and enforcement is sought are both located in the European Union.

Recent Developments

On 30 January 2014 the European Commission adopted a proposal for a Council decision on the approval, on behalf of the European Union, of the Convention.

Once the decision has been enacted, the European Union shall join Mexico as a contracting party to the Convention, thereby triggering its entry into force.

On 27 February 2014, the Council of Bars and Law Societies of Europe (CCBE), which represents the bars and law societies of 32 member countries and 12 further associate and observer countries, and through them more than 1 million European lawyers, issued a press release welcoming the development.

The CCBE strongly encouraged the European Union to ratify the Convention on the basis that it was convinced that it would promote international trade and thus would enhance, by virtue of its uniform rules, the judicial cooperation and enforcement of foreign judgments.

Implications

The prospective entry into force of the Convention is to be welcomed. The provisions of the Convention in relation to jurisdiction clauses will provide greater certainty for business entering into cross-border transactions, as will the terms of the Convention relating to the recognition and enforcement of judgments (which are substantially similar to the provisions of the New York Convention which applies to international arbitration awards)

However, the difficulties involved in reaching multilateral agreements on enforcement of judgments and jurisdiction clauses as a result of the differences in approach of the civil and common law systems have also left their mark on the Convention.

At present, there has been very little uptake on the Convention – to date, it has only been signed by Mexico, the United States, and the European Union, and has only been ratified by Mexico. Even if the EU ratifies the Convention and it enters into force, further ratification, and therefore application, of the Convention is likely to be piecemeal and uncertain for the foreseeable future. By way of example, a 2013 report by the Law Reform Committee in Singapore stated while ratification of the Convention would benefit Singapore in respect of the recognition and enforcement of judgment, the prevailing view was that adopting the Convention would not bring “significant practical benefits...at the moment”.

In addition to the limited ratification and application, the Convention also contains various inherent limitations – particularly its application only to “exclusive” jurisdiction clauses, international transactions, and “civil and commercial matters”; and the exclusion of a wide variety of contracts – which will limit its effect. In addition, the Convention will not apply to interim measures.

It is open to Contracting States to widen these exclusions where it has a strong interest in not applying the Convention to a particular matter in its courts.

Conclusion

Overall, the Convention is to be welcomed in promoting a consistent approach to the upholding of choice of law clauses and the recognition and enforcement of judgments. However, its effect, at least for the moment, is likely to be limited given the restricted ratification and application of the Convention, and the inherent limitations within the Convention itself.

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