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HCCH a|Bridged: Innovation in Transnational Litigation

Edition 2021: Enabling Party Autonomy with the HCCH 2005 Choice of Court Convention

Hague Conference on Private International Law – Conférence de La Haye de droit international privé

1 DECEMBER 2021 | ONLINE CONFERENCE | SUMMARY OF THE EVENT

Enabling Party Autonomy with the HCCH 2005 Choice of Court Convention

Introductory remarks

1. The third edition of *HCCH a|Bridged,* which took place online on 1 December 2021, was organised under the auspices of the Hague Conference on Private International Law (HCCH) and with the generous support of the Federal Ministry of Justice and Consumer Protection of Germany.

2. The 2021 edition of HCCH a|Bridged was dedicated to the *Convention of 30 June 2005 on Choice of Court Agreements* ("2005 Choice of Court Convention"). With a view to increasing participation and interest in implementing the Convention in Latin America and the Caribbean, the event was hosted in the region, albeit virtually, with the support of the Caribbean Court of Justice (CCJ) Academy for Law, the American Association of Private International Law (ASADIP) and the Caribbean Community (CARICOM). Over 100 participants attended the event, which included representatives from National Organs of the HCCH, the diplomatic corps, practitioners, academics, and students from 39 States, with a predominant majority from Latin America and Europe.

3. The event aimed to explore the role the 2005 Choice of Court Convention plays in the emerging and innovative litigation market and to discuss its benefits to States, businesses and practitioners. Drawing on the expertise of legal practitioners, the diplomatic community and academia, the event reached various conclusions with a set of takeaways regarding the operation and growing relevance of the Convention.

4. The event was opened by Dr João Ribeiro-Bidaoui, First Secretary at the HCCH, and Head of its Transnational Litigation Team, who explained the concept behind this unique annual event. The HCCH a|Bridged series, beginning in 2019, explores innovation in cross-border litigation, civil procedure and dispute resolution. It provides an annual forum for experts and stakeholders from around the world to discuss and debate contemporary issues and solutions.

5. Dr Christophe Bernasconi, Secretary General of the HCCH, noted that as one of the newer Conventions, the 2005 Choice of Court Convention is the first part of the Judgments Project that began in the mid-90s and which is still part of the core work of the HCCH with the recent adoption of the HCCH *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* ("2019 Judgments Convention"). The 2005 Choice of Court Convention currently applies to thirty-two HCCH Members, across Latin America, Europe, and Asia. It is already in operation since its entry into force on 1 October 2015.

6. Dr Bernasconi highlighted the complementary nature of the Convention to other avenues for dispute resolution among commercial operators. With the Convention being centred around the concept of party autonomy, its importance is emphasised by the increasing number of international commercial courts around the world, designed specifically for the purpose of litigating cross-border disputes. In this regard, Dr Bernasconi stressed that the Convention offers legal certainty and predictability to litigants, as they would be ensured that the chosen court will hear the dispute and judgment given by the chosen court will be recognised and enforced in other Contracting Parties. These benefits will in turn facilitate international trade and business. Joining the Convention would also assist States with the implementation of UN Sustainable Development Goal 16.

Keynote Speech

7. Professor Trevor Hartley, one of the *co-Rapporteurs* of the Explanatory Report on the 2005 Choice of Court Convention, delivered the keynote speech.

History of the Convention

8. Professor Hartley briefly explained the history of the Convention recalling that the negotiations started in 1996, further to a proposal by the United States of America (US) to develop a Convention on the recognition and enforcement of foreign judgments. Initially, each Member State of the European Union (EU) was represented in the negotiations, until it was decided that the EU had exclusive treaty-making power with regard to the Convention.[1] Thus, within the EU and its Member States, the negotiations on the Convention were conducted by the EU Commission with common policy decisions of the Member States being made during early-morning coordination meetings. This explains why the EU is a Party to the Convention, but not the EU Member States in their own right.[2] Under EU law[3] and under the Convention,[4] EU Member States are bound by the Convention.

9. As the negotiations continued, it became clear that the EU and the US had different views, which ultimately led to the suspension of the negotiations in 2001. As a salvage exercise, it was instead decided to negotiate a Convention based on exclusive choice of court agreements, limited to business-to-business relations. With this narrowed scope, the 2005 Choice of Court Convention was successfully concluded on 30 June 2005.

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1 See the CJEU decision in the *Lugano Convention* case (Opinion 1/03, ECLI:EU:C:2006:81, [2006] ECR I-1145), which held that the EU had exclusive power to conclude the 2007 (new) Lugano Convention. This was based on the argument that the Lugano Convention would affect the Brussels I Regulation. The same argument applies with regard to the 2005 Choice of Court Convention.

2 Art. 29 of the 2005 Choice of Court Convention permits a "Regional Economic Integration Organisation" to become a Party to the Convention.

3 Art. 216(2) of the Treaty on the Functioning of the European Union.

4 Art. 30 of the 2005 Choice of Court Convention.

Contracting Parties to the Convention

10. Professor Hartley continued by presenting the Contracting Parties to the Convention, namely the European Union, except for Denmark which joined the Convention separately, Mexico, Montenegro, Singapore and the United Kingdom (UK). With regard to the UK, he explained that the Convention had applied to the UK as a Member State of the EU until the end of the transition period, *i.e.,* 31 December 2020. By ratifying the Convention in its own right on 28 September 2020, the Convention came into force for the UK on 1 January 2021. Professor Hartley stated that the midnight Central European Time on 31 December 2020, *i.e.*, 11.00 p.m. UK time, should be the time at which the Convention applies to the UK as a Party in its own right. This is because the Netherlands is the depositary of the Convention, and the time should count from midnight in The Hague (the Netherlands). As such, as he further stated, there is no gap in the application of the Convention to the UK and there is a seamless transition from its application on one basis, to its application on another.

Interpretation of the Convention

11. Professor Hartley highlighted that for the proper interpretation of the Convention, one needs to refer not only to the text of the Convention,[5] but also to the Explanatory Report, which reflects the intention of the negotiators,[6] and the minutes of the proceedings.[7]

Scope of the Convention

12. Professor Hartley emphasised that the Convention only covers exclusive choice of court agreements and does not cover non-exclusive choice of court agreements. According to Article 3(a) of the Convention, an exclusive choice of court agreement must designate "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". For example, a choice of court agreement can designate *courts* of Mexico, which means every court in Mexico will be covered. Or it can designate *one or more specific courts* in Mexico. But it cannot designate the courts of two separate Contracting Parties.

13. References were made to asymmetric choice of court agreements. Asymmetric choice of court agreements, which are common in international loan agreements, mean that they are exclusive when the proceedings are brought by one party but not so when brought by the other party.[8] Professor Hartley recalled that it was agreed at the Diplomatic Session leading to the adoption of the Convention

5 The text of the 2005 Choice of Court Convention is available on the HCCH website at www.hcch.net under "Choice of Court".

6 The Explanatory Report on the 2005 Choice of Court Convention, prepared by T. Hartley and M. Dogauchi, is available on the HCCH website at www.hcch.net, under "Publications" (Explanatory Report). The Explanatory Report is available in French, English and all the EU official languages (Bulgarian, Croatian, Czech, Danish, Dutch, Estonian, Finnish, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish and Swedish).

7 Minutes of the Proceedings of the Twentieth Session are included in the *Proceedings of the Twentieth Session*, which is available on the HCCH website at www.hcch.net (see path indicated in note 6).

8 For example: "Proceedings by the borrower against the lender may be brought exclusively in the courts of State X; proceedings by the lender against the borrower may be brought in the courts of State X or in the courts of any other State having jurisdiction under its law".

that, in order to be covered by the Convention, the agreement must be exclusive irrespective of the party bringing the proceedings. Back then, there was no support for the view that the Convention should cover asymmetric choice of court agreements.[9] Therefore, asymmetric choice of court agreements are *not* covered by the Convention.

Operation of the Convention

14. Professor Hartley outlined the main features of the Convention. First, the Convention requires the chosen court to hear the case. The designated court cannot refuse to hear the case if another court is seised first. Thus, *"Italian torpedo"* cases do not work under the Convention.[10] Nor can the designated court refuse to hear the case on the ground that another court is more appropriate.[11] Secondly, the Convention requires other courts which are not designated to decline their jurisdiction.[12] Finally, the Convention requires the resulting judgment to be recognised and enforced in other Contracting Parties.[13]

Anti-suit injunctions

15. Professor Hartley clarified that antisuit injunctions are neither required nor prohibited under the Convention.[14] On the one hand, a court is never obliged to grant anti-suit injunctions, but the court can grant them. On the other hand, the Convention does not authorise or validate anti-suit injunctions, and therefore it does not preclude other Parties from taking counter-measures.

Arbitration or litigation?

16. Professor Hartley addressed some of the recent concerns raised by Mr Gary Born. Mr Born pleaded against ratification of the Convention, with his argument revolving around the idea of corrupted court systems and judges. Professor Hartley responded by pointing out that even if a party cannot choose the individual judge who will hear the case, he / she can always choose the court, and there are many courts in the world with honest and competent judges. Moreover, the Convention has safeguard mechanisms that can be invoked to deny recognition of judgments that are obtained in unfair proceedings,[15] and these provisions are as effective as the equivalent provisions in the New York Convention.[16]

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9 HCCH, *Proceedings of the Twentieth Session*, Tome III, *Choice of Court*, Intersentia/Antwerp – Oxford – Portland, 2010, Minutes No 3, p. 578. See also, paras 105 and 106 of the Explanatory Report.

10 Art. 5(2) of the Convention; paras 133 and 134 of the Explanatory Report.

11 Art. 5(2) of the Convention also covers the *forum non conveniens*.

12 This is subject to certain exceptions, *e.g.*, manifest injustice. For a full list of exceptions, see Art. 6 of the 2005 Choice of Court Convention.

13 This is subject to certain exceptions set out in Art. 9 of the 2005 Choice of Court Convention.

14 Art. 7 of the 2005 Choice of Court Convention concerns "interim measures of protection" and provides that: "[i]nterim measures of protection are not governed by this Convention. This Convention neither requires nor precludes the grant, refusal or termination of 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."

15 These are, in particular, Art. 9(d) and (e). Art. 9(d) provides that recognition or enforcement may be refused if the judgment was obtained by fraud in connection with a matter of procedure; and (e) provides that it may be refused if 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.

16 *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958.

17. Furthermore, Professor Hartley recalled that the costs of arbitration should also be taken into consideration by the parties when choosing between litigation and arbitration.

Conclusion

18. Professor Hartley highlighted once again the benefits of the Convention and encouraged more States to join it.

A|bridged presentation: Key findings from the HCCH Questionnaire on the 2005 Choice of Court Convention

19. Dr Ning Zhao, Senior Legal Officer at the HCCH, showcased the key findings from the HCCH questionnaire on the 2005 Choice of Court Convention. Dr Zhao recalled the procedures for the questionnaire: in line with the mandate of the Council on General Affairs and Policy (CGAP), the Permanent Bureau (PB) prepared two questionnaires (one for Contracting Parties and the other for non-Contracting Parties), to "elicit reasons as to why more States have not become party to the Convention".[17] A total of 22 HCCH Members, 16 Contracting Parties[18] and six non-Contracting Parties[19] to the Convention provided responses.[20]

20. 32% of the respondents stated that they have established or intend to establish international commercial courts. The jurisdiction of these courts is generally based on choice of court agreements, and their most common features are the admissibility of foreign expert evidence and evidence in languages other than the official language of the State. A few respondents indicated that their courts or tribunals allow the appointment of international judges, representation of foreign lawyers, and / or are equipped with an advisory council of foreign experts. Court judgments in languages other than the official language of the State is also one of the features.

21. Dr Zhao reported that, regarding transparency of judicial bodies, 95% of the respondents make public the identity of the judges in international cases. 82% of the responses showed that it is possible to challenge the designation of a judge. Since 2015, there have been no reported cases of judicial corruption in relation to international civil or commercial disputes.

22. The responses of non-Contracting Parties showed that their courts generally give effect to exclusive choice of court agreements. Moreover, there have been no cases where a court established its jurisdiction despite an exclusive choice of court agreement designating courts of another State, nor have there been cases where a court refused to recognise or enforce a foreign judgment in which the court's jurisdiction was based on an exclusive choice of court agreement. Respondents also stated that the grounds for refusal provided in the Convention align with their national laws.

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17 See "Conclusions & Decisions adopted by Council (1 to 5 March 2021)", C&D No 35, available on the HCCH website at www.hcch.net under "Governance" then "Council on General Affairs and Policy".

18 Croatia, Czech Republic, the European Union, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Mexico, Romania, Singapore, Sweden and the United Kingdom.

19 Argentina, Brazil, the People's Republic of China, Israel, Switzerland and Viet Nam.

20 The Summary of the responses are available on the HCCH website at www.hcch.net under "Choice of Court".

23. Some respondents mentioned the main considerations that may affect their decision to join the Convention, which include subject matters, jurisdiction or recognition and enforcement. In relation to jurisdiction, the respondents referred to their national law which requires a sufficient connection between the State of the chosen court and the parties or dispute, which differs from the 2005 Choice of Court Convention. In the area of recognition and enforcement, some respondents mentioned that their national laws do not recognise or enforce judgments granting punitive and exemplary damages. Other considerations, such as declining jurisdiction or refusing to enforce a judgment in circumstances where the State considers the court chosen to be unsuitable,[21] were also mentioned.

24. Dr Zhao finally presented States' suggestions on HCCH future work, which include continuously raising awareness of the Convention, and conducting further research or studies on specific subject matters. Some respondents also showed interest in the development of country profiles, a model clause and / or a case law database, and encouraged a joint promotion of the 2005 Choice of Court Convention and the 2019 Judgments Convention.

First session: The Policy Argument

25. The first session focussed on policy discussions as to why States should join the 2005 Choice of Court Convention. For this purpose, a panel of judges from both civil and common law jurisdictions shared their experiences on the role the 2005 Choice of Court Convention plays in the emerging and innovative litigation market of international commercial courts, and how the 2005 Choice of Court Convention enables and enhances the courts' operation.

26. The panel, moderated by Dr João Ribeiro-Bidaoui, First Secretary at the HCCH, consisted of the following panellists:

- Winston Anderson, Judge at the Caribbean Court of Justice
- Fabienne Schaller, Judge at the International Commercial Chamber of the Paris Court of Appeal
- Duco Oranje, President of the Netherlands Commercial Court, Amsterdam Court of Appeal
- Michael Hwang, Former Chief Justice, Dubai International Financial Centre (DIFC) Courts.

The emerging market of the international commercial courts

27. During the first *tour de table*, each judge presented their own court and shared some statistics and general trends.

28. Justice Winston Anderson started by sharing the experience of the judiciary in the Caribbean. He noted that the 2005 Choice of Court Convention in essence is very familiar to judges in the region, as it follows many of the important common law rules on jurisdiction which are still applied in that part of the world.

[21] In the context of the questionnaire, the word "unsuitable" in the responses refers to the situation where a choice of court agreement violates the exclusive jurisdiction of the court in the State addressed.

29. As the highest judicial body in the region, the Caribbean Court of Justice ("CCJ") has two jurisdictions: (i) the original jurisdiction to hear trade disputes between the Member States of the community, where the question of choice of law is not so relevant as it concerns inter-State trade disputes, (ii) and the jurisdiction to hear final appeals from national courts of the States that have subscribed to the CCJ appellate jurisdiction. The States that have so far accepted the appellate jurisdiction are Barbados, Belize, Guyana, and Dominica.

30. In relation to the recognition of jurisdiction of foreign courts, Justice Anderson explained that the CCJ and, by extension, the other courts in the Caribbean, tend to adopt a discretionary approach as to whether the jurisdiction should be recognised. In the majority of cases, however, the parties' choice of court is respected. As such, there have been no cases where the choice of foreign parties to litigate before the Caribbean courts has not been respected. The opposite is also true. If a party has chosen a foreign court to litigate the dispute, the Caribbean courts will respect the choice and, if necessary, institute an anti-suit injunction, or an injunction preventing the litigation taking place in the Caribbean. For example, in a 2013 decision, the CCJ discharged an injunction issued by the Court of Appeal of Belize against the parties litigating in London, in order for the arbitration to proceed in the UK.[22]

31. Justice Fabienne Schaller shared the experience of the International Commercial Chamber of the Paris Court of Appeal ("ICCP-CA"),[23] established in March 2018 which is specialised in international commercial disputes and international arbitration. Its creation was triggered by Brexit, but it intended to getting closer to international standards in international dispute resolution and to encourage the choice of Paris as a forum for international trade disputes. The use of English is possible before this Chamber. Parties can plead, present documents, testify, call witnesses or experts in English without translation, unless parties wish otherwise and cover the costs. Procedural documents (*e.g.*, briefs, complaints, judgments) must, however, be in French. The procedure is tailored for international commercial disputes, with the aim of improving the efficiency of proceedings.

32. As of 24 November 2021, the ICCP-CA has issued 27 judgments regarding jurisdiction; 55 judgments regarding international arbitral awards; and 59 judgments for other disputes on the merits, such as breach of commercial contracts, international transport disputes, commercial agency, unfair competition and bank liability. As for the average duration of proceedings in the ICCP-CA, it takes around 5.7 months for decisions on jurisdiction, 23 months for international arbitral disputes and appeals of exequatur decisions, and 14.3 months for all other commercial disputes. Litigants have come from 73 States covering four continents including Africa, America, Asia and Europe. 66% of the litigants came from Europe, while the remaining 34% were from outside Europe. The top five States represented among international litigants are Germany, Italy, Brazil, the US and Switzerland.[24]

33. Justice Duco Oranje shared the Dutch judiciary's perspective and presented the Netherlands Commercial Court ("NCC")[25]. The NCC was established on 1 January 2019, as a new Chamber in the Amsterdam District Court and Amsterdam Court of Appeal. For the NCC, the documents, the hearings and the judgments are entirely in English. Parties may agree to litigate in accordance with the NCC rules

22 British Caribbean Bank Limited and the Attorney General of Belize, CCJ Appeal no CV 001 of 2013, BZ Civil Appeal No 6 of 2011, [2013] CCJ 4 (AJ).

23 More information about this Chamber can be found on the following webpage: https://www.cours-appel.justice.fr/paris/presentation-generale-ccip-ca-iccp-ca

24 Germany is represented by 28 cases; Italy by 21 cases; Brazil by 19 cases, the United States and Switzerland are both represented by 18 cases.

25 More information is available on the NCC website: https://www.rechtspraak.nl/English/NCC/Pages/default.aspx.

either before or after the dispute has arisen. Since the NCC must be financially self-sufficient, the court fees are higher than those of regular Dutch courts.[26] Parties can only bring international matters to a hearing, and there is no financial threshold for the NCC. Dutch law governs the procedures of the court, but separate rules tailored to the best global practices have been set for the NCC,[27] such as court reporters, using video and audio-recording, tele-conferencing and video-conferencing. The NCC in first instance has a Chamber for provisional relief, and a separate English digital platform has been built for submitting exhibits and documents online.

34. An agreement to litigate at the NCC has to be in writing and must be explicit. Consequently, a choice for the NCC cannot be made by means of tacit consent, in general terms and conditions. For parties to elect the NCC, it is necessary first to designate the Amsterdam District Court as the competent forum. In addition, as the NCC is a Chamber in the Amsterdam Court, parties also have to express their consensus for the proceedings to be conducted in English in accordance with the NCC rules.

35. The NCC is still *in statu nascendi* and has dealt with 10 cases up till now. Litigants came from Ireland, the United States, England, Switzerland, Russia, the Philippines, and the Netherlands.

36. Mr Michel Hwang presented aspects on the Singapore International Commercial Court (SICC) and on the Dubai International Financial Centre (DIFC) Court. He started by explaining the approach of common law jurisdictions to foreign judgments, and highlighted that both Singaporean courts and the DIFC Court are common law courts, operating on the principle that all common law jurisdictions recognise foreign money judgments coming from any other courts in the world. This principle gives all judgments recognition in over 50 States and territories around the world. Most of them are British commonwealth territories, but this also includes the United States.

37. From the viewpoint of a common law jurisdiction, one of the advantages of joining the 2005 Choice of Court Convention is the prospect of having universal recognition of foreign money judgments between common law and civil law jurisdictions, especially with EU Member States, which are amongst the most important commercial States in the world. Mr Hwang therefore noted that Singapore was interested in the Convention from its early days, and he hoped that other common law jurisdictions in the Asia Pacific region, such as Australia, New Zealand, Malaysia, Brunei and India, might become Party to the Convention.

38. Regarding the DIFC Court, Mr Hwang explained that there is a legal obstacle in joining the 2005 Choice of Court Convention as it is only open for signature to States.[28] Consequently, in order for the DIFC Court to be bound by it, the United Arab Emirates would have to join the 2005 Choice of Court Convention.

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26 Fees are fixed at € 15,634 per party in the first instance, and at € 20,846 per party on appeal. It is a fixed fee, without regard to the interests involved. For more details, see the NCC webpage dedicated to costs: https://www.rechtspraak.nl/English/NCC/Pages/costs.aspx.

27 The NCC rules are aligned with elements of litigation and practices of the existing commercial courts and international arbitration institutes, such as the IBA rules on evidence in international commercial litigation.

28 Art. 27(1) of the Convention.

Exclusive choice of court agreements through the lens of case law

39. For the second *tour de table*, Dr Ribeiro-Bidaoui invited each panellist to discuss the case law, and particularly instances in which their courts might have declined their jurisdiction based on exclusive choice of court agreements.

40. Justice Schaller stressed that in order for the ICCP-CA to have jurisdiction, parties have to specify that they want to subject the dispute to the exclusive jurisdiction of the International Chamber of the Paris Court in the first instance, and that all appeals from any decision of the court shall be subject to the exclusive jurisdiction of the ICCP-CA.[29]

41. She then referred to the following relevant case law concerning exclusive choice of court agreements and highlighted that the trend in France is to favour and respect the choice of the parties, provided that the agreement is clear, not null and void, as well as efficient and predictable:

- *SAS Anju Entreprises vs. Société Unilever UK Limited*:[30] The claimant pleaded the non-applicability and the invalidity of the clause and based its claim on the alleged abrupt termination of the commercial relationship. The ICCP-CA held that the choice of court agreement was applicable and valid, and declined its jurisdiction in favour of the English court.
- *Aptos LLC vs. SAS Etap*:[31] In this case, the ICCP-CA rejected a plea of lack of jurisdiction raised by the appellant, based on a choice of court agreement designating the Georgian courts. Analysing the circumstances of the dispute, the ICCP-CA ruled that the clause was not applicable and that the Commercial Court of Paris had jurisdiction.
- *Case of February 26th, 2019*:[32] the case concerned the validity of a loan agreement made between a French company and a Luxemburgish company, including a choice of court agreement conferring exclusive jurisdiction to the District Court of Utsunomiya (Japan), for any disputes arising from the contract. The issue was whether a natural person residing in Belgium designated as guarantor in the contract was bound by the clause. The ICCP-CA considered that the Brussels I*a* Regulation was not applicable. Therefore, according to Article 48 of the French Civil Code of Procedure, which is applicable in international matters, the Court held that even a natural person can be bound by the choice of court agreement.

42. Justice Oranje noted that in the framework of the Amsterdam District Court, there has not yet been much use of the 2005 Choice of Court Convention. According to him, there are two reasons. First, under the Brussels I*a* Regulation, no exequatur is needed for the enforcement of foreign judgments in the territory of the EU Member States. A French judgment can be sent directly to a Dutch bailiff for execution, unless defences based on public policy or fair trial are raised. Secondly, the Dutch courts

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29 See, for example, the model clause drafted by the *Association Paris Place de Droit*: "All disputes arising out of or relating to this contract, including issues relating to the performance, interpretation, validity, breach or termination thereof, shall be subject to the [exclusive] jurisdiction of the International Chamber of the Paris Court of First Instance (tribunal de commerce de Paris) and all appeals from any decision of such court shall be subject to the exclusive jurisdiction of the International Chamber of the Paris Court of Appeal. The Parties hereby unconditionally agree on the protocols which set out the terms pursuant to which the cases will be examined and adjudicated before these chambers."

30 *SAS Anju Entreprises vs. Société Unilever UK Limited*, 4 July 2019, N° RG 19/08038, decision available at: https://www.cours-appel.justice.fr/paris/4072019-rg-1908038-competence-jurisdiction.

31 *Aptos LLC vs. SAS Etap, 7 July 2020*, N° RG 20/01583, decision available at: https://www.cours-appel.justice.fr/paris/07072020-ccip-ca-rg-ndeg2001583-competence-juridictionnelle-internationale-international.

32 *Monsieur "A" vs. Société "B"*, 26 February 2019, N° RG 18/27181, decision available at: https://www.cours-appel.justice.fr/paris/26022019-rg-1827181-competence-jurisdiction.

usually allow enforcement of foreign judgments by reproducing the original judgments into new ones, except for cases where defences regarding public policy or fair trial are raised. This is called a faux exequatur.

43. He then gave an example of a case where the NCC gave effect to a choice of court agreement. The parties to the dispute agreed to enter into a transaction agreement by signing a letter of understanding. The letter did not contain a dispute resolution clause, but it did provide for Dutch law as the applicable law. The transaction agreement provided however that all disputes arising in connection with it would be subject to the exclusive jurisdiction of the NCC. Taking all circumstances into consideration, the NCC held that the letter of understanding and the transaction agreement were so closely connected that the clause contained in the transaction agreement did apply to all matters related to the letter of understanding.

Recognition and enforcement of foreign judgments

44. The last part of the discussion focussed on the recognition and enforcement of foreign judgments. Justice Anderson pointed out that basic common law principles apply to the recognition and enforcement in the Caribbean. As a general rule, courts tend to recognise and enforce judgments from other jurisdictions. He then recalled that in the past, a fresh action had to be brought in Caribbean courts, and on this basis a judgment would be recognised and enforced. In more recent times, new legislation was introduced allowing a foreign judgment to be registered as if it had been given in a local Caribbean court. After registration, the foreign judgments are automatically enforced. Two conditions must be verified however: (i) whether the foreign court had jurisdiction to adjudicate on the case and (ii) whether any circumstances exist to vitiate the enforcement of the judgment in the Caribbean, the main grounds for refusal to enforce being fraud, breach of natural justice in the foreign court or public policy of the Caribbean court.

45. He then complimented the HCCH on the 2005 Choice of Court Convention initiative and encouraged the PB to engage in more educational and awareness-raising activities in the region.

46. Mr Hwang explained how the DIFC Court's judgments are recognised and enforced abroad. Firstly, he stressed that DIFC Courts were declared by the UAE's national legislation as part of the UAE national courts. Consequently, DIFC Court's judgments would be recognised in the rest of the UAE. Secondly, the UAE also signed numerous treaties with other States on the mutual recognition of judgments. For example, the treaty between the States of the Gulf Cooperation Council (GCC), and the treaty between the States of the MENA region (Middle East and North Africa).

47. To further enhance the recognition and enforcement of their judgments abroad, the DIFC Court concluded Memoranda of Guidance ("MOGs") with the courts of Dubai's leading trading partners. These MOGs are statements of law given by the relevant courts of the land. For instance, the Commercial Court of England and Wales, the Supreme Court of New South Wales and the Federal Court of Australia signed such MOGs. Approximately 12 MOGs were signed in total (including with some civil law countries, like the Republic of Korea).

48. This particular protocol attracts the courts which would like to have such kind of reciprocity, and was encapsulated in the Standing International Forum of Commercial Courts ("SIFoCC"), an organisation created in 2017. SIFoCC expanded the MOG on a multilateral basis, and led to the creation of a database on its website compiling the national reports of numerous jurisdictions. This is meant to be a first step

in promoting knowledge of the exact requirements of each member court in recognising foreign money judgments, after which it is hoped that, with this knowledge, reciprocity with other like-minded courts will be more easily achieved.

49. Mr Hwang further shared how the DIFC Court had created a protocol whereby a court judgment could serve as a foundation for an arbitral award if the parties to the judgment had signed a prior arbitration agreement agreeing to refer all disputes about the enforcement of the judgment to arbitration, and thus benefit from wider recognition and enforcement under the 1958 New York Convention.

Second session: The legal and practical argument

50. In the second session, a panel of lawyers and academics from Latin America and the Caribbean region shared their knowledge with regard to the recognition and enforcement of foreign judgments, and explored the reasons why their States have not yet joined the Convention.

51. The session, chaired by Ms Louise Ellen Teitz, Professor at Roger Williams University School of Law, consisted of the following panellists:

- Sir Trevor Carmichael, Lawyer at the Barbados Chancery Chambers
- José Antonio Moreno Rodríguez, Professor and Lawyer, Inter-American Juridical Committee of the Organization of American States
- Nadia de Araujo, Professor at the Pontifícia Universidade Católica do Rio de Janeiro, Lawyer at Nadia de Araujo Advogados
- Mauricio París, Professor at the University of Costa Rica.

An overview of the recognition and enforcement of foreign judgments in Barbados, Brazil, Costa Rica and Paraguay

52. In her introductory remarks, Professor Louise Ellen Teitz highlighted that the Convention served as a tool for both transactional planning and dispute resolution. The discussion started with Sir Trevor Carmichael, who shared Barbados' perspective. The *Foreign and Commonwealth Judgments Reciprocal Enforcement Act* forms the legislative framework governing the enforceability of foreign judgments in Barbados. In order to be recognised and enforced in Barbados and the Caribbean, foreign judgments need to be registered in the High Court. Only certain judgments listed below may be registered: (i) judgments issued in the Superior Court of the UK, (ii) judgments obtained from the High Courts of certain Commonwealth territories, and (iii) judgments held by the Superior Courts in any foreign State, provided that a similar treatment of enforceability will be given to judgments issued in the High Court of Barbados. In addition, the court of origin must have had jurisdiction (the person must have been resident within the jurisdiction of the court of origin), and the judgment should not have been obtained by fraud, or contravene public policy. The procedure must be completed within six years after the date of the judgment, or when an appeal is pending, six years after the date of the last judgment. Furthermore, the judgment will only be registered if it is final and conclusive between the parties. Once the judgment has been registered in the High Court, it can be enforced, but not before the time to set aside the judgment has elapsed.

53. Foreign judgments may also be enforced under the common law principles. The theoretical basis for this action is that the judgment constitutes a simple contractual obligation arising out of the decision of the Court, to which the parties have implicitly agreed by submitting their dispute. In Barbados, the requests for recognition and enforcement of foreign judgments are granted in the majority of cases.

54. Professor Nadia de Araujo explained that, under Brazilian law, both foreign arbitral awards and foreign judgments are subject to a recognition proceeding filed before the Superior Court of Justice ("STJ"). However, the enforcement stage occurs before the federal courts and only after the STJ has recognised the foreign judgment, as provided by the Constitution. Before the STJ, parties can only discuss compliance by the foreign judgment of formal requirements (Art. 963 of the Code of Civil Procedure). This kind of assessment is known as a "limited litigation system" (*sistema de contenciosidade limitada*), where the court only verifies whether the formal requirements are fulfilled and if the foreign judgment manifestly contravenes public policy. Thus, the party against which recognition is sought has very limited grounds to challenge the recognition. The Brazilian decision granting recognition gives the foreign judgment the same effects it had in the State of origin. As to the time duration, if the debtor does not oppose the claimant's request, the proceeding usually lasts a few months. But, once the defendant challenges it, the proceeding can take up to five years to be concluded. Despite that, the STJ's case law is very positive towards the recognition and, until 2021, 90% of the requests were granted.[33]

55. Professor Mauricio París explained that in Costa Rica, recognition of foreign judgments is based on the Convention on Private International Law of 1928, also known as the Bustamante Code. However, the Bustamante Code is not used much in practice, as it has not been ratified by many States.[34] Therefore, the procedure of recognition and enforcement is regulated by the new 2019 legislation on Civil Procedure. The requests are granted in the majority of cases. This legislation also provides that in order to be recognised and enforced, foreign judgments must not contravene *national* public policy. This provision was criticised in Costa Rica, because it introduces the concept of *national* public policy (*ordre public national)*, whereas in matters of recognition and enforcement of foreign judgments, *international* public policy (*ordre public international)* is usually applied.

56. Professor José Antonio Rodríguez noted that Paraguay has very modern legislation with regard to arbitration and international contracts. However, its procedural legislation is rather anachronistic, not very different from other States in the region, although some States in the region are making progress in that field. Nevertheless, litigants find it relatively easy to recognise and enforce foreign judgments before Paraguayan courts.

An overview of the arguments as to why States should join the Convention

57. For the second *tour de table*, Professor Teitz invited the panellists to share, in their opinion, what would encourage their respective States to become Contracting Parties to the Convention.

58. Professor de Araujo explained that Brazil has no legal obstacles preventing it from becoming a Contracting Party to the Convention. The private international law community in Brazil has stressed the need for Brazil to accede to the Convention and the Ministry of Justice has already issued a preliminary

33 In Brazil, 95% of all requests for recognition and enforcement are family law related cases, and only 4% are commercial cases.

34 The Bustamante Code has been ratified by Bolivia, Brazil, Chile, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, Venezuela and the Bahamas.

opinion favouring the accession. The preliminary opinion must now be endorsed by the executive power and sent to Congress for approval.

59. Brazil is also a Member of MERCOSUR and therefore bound by the Buenos Aires Protocol on International Jurisdiction in Contractual Matters.[35] This Protocol expressly allows for choice of court clauses and is currently in force in Argentina, Brazil, Paraguay and Uruguay. Initially, Brazilian courts did not accept choice of court agreements. However, Article 25 of the new Code of Civil Procedure (2016), expressly allows for the choice of a foreign court, provided that parties entered into an exclusive choice of court agreement. This provision is only applicable to international contracts, which means that parties cannot opt for a foreign court in a purely domestic contractual relationship. Moreover, Brazilian courts have exclusive jurisdiction in matters of immovable property located in Brazil, the sharing of property located in Brazil, successions and divorce (Art. 23 of the Civil Code of Procedure). Brazilian courts also deny the jurisdiction of a foreign court in disputes arising from contracts involving a weak party, such as pre-formulated standard contracts or consumer contracts.

60. Professor Moreno Rodríguez shared his optimistic views about the possibility of Paraguay ratifying the Convention. Paraguay became a Member of the HCCH in 2005 and has ratified two HCCH Conventions since then.[36] Professor Moreno Rodríguez highlighted the key role that the Regional Office for Latin America and the Caribbean (ROLAC) plays in promoting HCCH instruments in his State. He has been following technical discussions in Paraguay on the feasibility of Paraguay joining the Convention, and noted that there were some concerns raised because of Paraguayan Law No. 194/93 on Distribution and Agency. This law subjects the main suppliers of Paraguay to a set of rules that have to be applied in case of a dispute. In this regard, he considered that this matter should not be an obstacle considering the public policy provision of Article 6(c) of the 2005 Choice of Court Convention and also since it could be resolved with the declaration option under Article 21 of the Convention, which allows a Contracting Party not to apply the Convention to specific matters where it has a strong interest.[37] In addition, Paraguay is also a party to the MERCOSUR Protocol, which allows choice of court agreements, and for which the Paraguayan Law on Distribution and Representation was no obstacle.

61. Professor París pointed out that there has been a positive trend in Costa Rica towards private international law in the last ten years. Notably, it became a Member of the HCCH and has joined a number of international instruments, such as the HCCH Apostille,[38] Service and Evidence[39]

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35 The Buenos Aires Protocol on International Jurisdiction in Contractual Matters are signed and ratified by Argentina, Brazil, Paraguay and Uruguay. It entered into force on 6 June 1996.

36 Paraguay is a Contracting Party to four HCCH Conventions: (i) HCCH *Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* (Apostille Convention), (ii) HCCH *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, (iii) HCCH *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, and (iv) HCCH *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*.

37 Art. 21 of the Convention provides that "(1) Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined. (2) With regard to that matter, the Convention shall not apply –a) in the Contracting State that made the declaration; b) in other Contracting States, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the State that made the declaration."

38 Costa Rica acceded to the HCCH 1961 Apostille Convention on 6 April 2011.

39 Costa Rica acceded to the HCCH 1965 Service and 1970 Evidence Conventions on 16 March 2016.

Conventions. Recently, Costa Rica signed the HCCH 2019 Judgments Convention.[40] In addition, in 2011, it enacted legislation based on the UNCITRAL Model Law on International Commercial Arbitration.

62. Professor París considered that there might be different reasons to explain why the State has not yet joined the Convention. In general terms, he considered that there should be no legal reasons to prevent it, but recognised that the international acceptance of the instrument might require some attention as, for example, in Latin America, only Mexico has joined it. Other relevant trading partners for Costa Rica, such as the USA or China, have not done so either. According to Costa Rican Civil Procedure Code, courts can decline jurisdiction when there is no sufficient connection between the State and the parties or the case. Therefore, Costa Rica would have to make a declaration under Article 19 of the Choice of Court Convention. The Law on Distribution and Representation Contracts, which is a law of public policy, would also have to be taken into consideration, but he did not see an obstacle here either for joining the Convention.

63. Furthermore, he considered that the Convention would be beneficial for Costa Rica, since there is a need for Costa Rica to have a better regulatory framework for international trade. He recalled that Costa Rican regulations on recognition and enforcement of foreign judgments go back to the 1920s, and do not reflect the country's current open economy. Therefore, now that the ratification process of the 2019 Judgments Convention is on its way, it would be advisable to consider adding the 2005 Choice of Court Convention to this process as well.

64. Sir Carmichael noted that when analysing the arguments as to why his State should join the Convention, one has to consider Barbados' emergence as an international business centre. Over the last 20 years, Barbados has pursued a vigorous international business policy. The country has signed a large number of double tax treaties, and it is within this framework that the 2005 Choice of Court Convention could assist Barbados in developing its international business sector into a more efficient, attractive and global service. In addition, even though there are only 32 Parties bound by the 2005 Choice of Court Convention, its geographical scope surpasses the geographical scope under the Foreign and Commonwealth Judgments Reciprocal Enforcement Act. Joining the Convention would therefore allow Barbados to extend its current recognition and enforcement framework. The 2005 Choice of Court Convention also provides uniformity and predictability, and parties could easily identify which States are Contracting Parties to the Convention and choose their jurisdiction with the assurance that the rules of the Convention would be applied.

65. Sir Carmichael concluded that Barbados would benefit from joining the 2005 Choice of Court Convention, but also stressed that the State first needs to make some changes in its domestic legal system.

Arbitration versus litigation

66. For the third *tour de table*, Professor Teitz engaged the panelists in a discussion around the benefits of litigation, as compared to arbitration, within the context of the 2005 Choice of Court Convention.

67. Professor Moreno Rodríguez stressed that the role of legal practitioners is to explain all the benefits and disadvantages of litigation and arbitration, and let the parties decide on the preferred forum. In that sense, he said, the 2005 Choice of Court Convention is an excellent instrument as it provides the legal certainty that parties need, in order to make the choice between arbitration or litigation in a given case.

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[40] Costa Rica signed the 2019 Judgments Convention on 16 September 2021.

He then remarked that there is a supposed rivalry between litigation and arbitration, which is not helpful, in particular for arbitration. Arbitration needs judges to act in an appropriate manner when they are called to address arbitration-related matters. Arbitration and litigation go hand in hand, and it is not a good policy to fuel an alleged rivalry.

68. As for the recent criticism pointing to the problem of corrupt courts (which was also addressed by Professor Hartley in his Keynote Speech), Professor Moreno Rodríguez responded that if the legal system is corrupt, then this is not a good system for arbitration either. Corrupt judges may unduly interfere or not provide assistance when appropriate in the arbitration procedure, and may also unduly annul arbitral awards. Therefore, the corruption argument applies to both forms of dispute resolution. After responding to the criticisms of a renowned arbitration expert, Professor Moreno Rodríguez recalled that one of the Convention's strongest advocates, Professor Arthur Taylor von Mehren, was not only an expert on international civil litigation but also taught international commercial arbitration at Harvard Law School. It is telling that such a renowned authority in both fields strongly advocated for the Convention, which sometimes was even referred to as "Arthur's baby".

69. To support the benefits of the 2005 Choice of Court Convention for the choice of litigation, Professor Teitz recalled that Mr Peter D. Trooboff, who was also a participant in the negotiations of the 2005 Choice of Court Convention, used to describe the Convention as benefiting the "middle-class litigant". If arbitration works well for large transactions and companies, the middle-class litigant needs an alternative, and the 2005 Choice of Court Convention is indeed that alternative.

70. The second session ended with a question from the audience regarding electronic commerce and transactions, and how they are impacted by the 2005 Choice of Court Convention. Professor París explained that an issue that continues to give headaches in some States, including Costa Rica, is the written agreement requirement of the New York Convention, which has sought to be qualified with interpretative notes and amendments to the Model Law introduced in 2006.

71. The approach to this situation has been partially considered in the 2005 Choice of Court Convention when Article 3(c)(ii) refers to the fact that exclusive choice of court agreements may be concluded or documented not only in writing, but "by any other means of communication that may make the information accessible for subsequent reference". He said that this was partially because in his opinion, for a Convention enacted in 2005, it could have been more explicit when dealing with electronic documents, following for example other international instruments on the subject such as the UNCITRAL Model Law on Electronic Commerce (1996), the UNCITRAL Model Law on Electronic Signatures (2001) or the United Nations Convention on the Use of Electronic Communications in International Contracts , enacted in the same year, 2005.

72. In any case, according to Professor París, it should be noted that this type of choice of court agreement concluded by electronic means would have a very limited application in e-commerce environments, being limited to B2B transactions, since B2C transactions would be expressly excluded from the Convention because they involve a consumer. An important element to consider is the validity of the electronic agreement in other aspects, such as whether it can be perfected by means of a click wrap agreement or whether by browse wrap agreements. This matter is an external loophole of the Convention, which should be resolved by means of the applicable law in the State of the selected forum.

Closing remarks

73. For the final remarks, Mr Ignacio Goicoechea, Representative of ROLAC at the HCCH, summarised the views and opinions expressed during the event, all of which coincided in recommending States to join the 2005 Choice of Court Convention. He highlighted the role of Mexico, which was the first State in the world to incorporate the 2005 Choice of Court Convention in its domestic legal system and celebrated that Brazil and Paraguay were currently considering ratification. He mentioned the advantages of incorporating the 2005 Choice of Court Convention into the legal orders of States that are parties to regional economic integration areas, since the Convention would allow them to harmonise their legal infrastructure at the regional and global levels simultaneously. He finished with an emphatic invitation for States to consider incorporating the 2005 Choice of Court Convention into their respective legal systems, and offered the PB's support during such process.

74. To conclude, Ms Paula María All, President of ASADIP, stressed the importance of dispute settlement systems from the point of view of planning international strategies for companies and individuals and the need to have secure and predictable rules in place for international trade. In this regard, with its restrictions and nuances, the evident universal trend is towards party autonomy. In Latin America and the Caribbean, the determination of the criteria of jurisdiction is not uniform, there is no specific international convention on jurisdiction, and the instruments and criteria for cooperation and for recognition and enforcement of judgments may be different. Legislation and jurisprudence on international jurisdiction in Latin America and the Caribbean are not as clear and consistent as reality requires. However, several Latin American States have taken a step towards enshrining party of autonomy in matters of jurisdiction in international transactions in their private international law regulations. Furthermore, before the possibility of applying *lex fori* to international cases, forum selection clauses are needed to neutralise *forum shopping* and to provide legal certainty. Against this background she highlighted the need to meet flexibility and legal certainty, and thus the importance of joining the Convention to strike this balance.

75. Ms All stated that innovation in the field of transnational litigation today requires a thorough analysis, and an effective and subsequent implementation without losing sight of the fact that a choice of court agreement, with all that it implies, also carries with it the most modern idea of access to justice as a fundamental right. Therefore, this analysis should not remain unfinished business for States in the Latin American region. She invited academics, as well as States that have private international law advisory commissions within their Ministries of Foreign Affairs, to collaborate and be real agents for mobilising the changes that are deemed necessary.

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