



Seminar on international dispute resolution in Brazil and the region

Rio, 5 November 2010

The Hague Convention of 30 June 2005 on Choice of Court Agreements

Ignacio Goicoechea
*Liaison Legal Officer for Latin
America, Hcch*

Prof. Marta Pertegas
Secretary, HCCH

Contents

1. Background
2. Scope
3. Operation
4. Current Status

History

- 1996-2001 HCCH negotiations towards a new global convention on recognition and enforcement of foreign judgments (“mixed convention” - including harmonisation of jurisdiction rules).
- In 2001 it became clear that no consensus could be reached on a text covering all sorts of jurisdictional bases.
- In 2002 experts realized that within the work done, “choice of court agreements in business to business cases” were a field in which there was considerable consensus to continue work and reasonable expectations to reach a useful instrument for the global business community.
- The Convention of 30 June 2005 on Choice of Court Agreements was prepared by two meetings of a Special Commission in December 2003 and April 2004, and unanimously adopted by the Twentieth Diplomatic Session held from 14-30 June 2005.

1. Key support from the business community

- American Bar Association Survey (2003): the absence of a conventional regime causes a lack of legal certainty for US operators on the legal consequences of an exclusive choice of court agreement or on the recognition and enforcement of a US judgment abroad.
- Survey and follow-up by the International Chamber of Commerce (from 2003 onwards): the 2005 Choice of Court Convention must become the equivalent to *New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards*.
- Individual queries addressed to the Permanent Bureau of the Hague Conference.

Basic Objectives of the Convention

- Provide legal certainty and predictability with respect to choice of court agreements (effectiveness)
- Become equivalent of the *New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards* for judgments

Choice of court agreements falling within scope of the Convention

- The Convention applies only in *international* cases
- The choice of court agreement must be *exclusive* but it is deemed exclusive unless it expressly provides otherwise
- The choice of court agreement must relate to a *civil or commercial matter*

Definition of “international” (jurisdiction)

- For purposes of *jurisdiction*, a case is international **unless**:
 - the parties are resident in the same Contracting State;
and
 - their relationship and all other elements relevant to the dispute are connected only with that State

- A State may refuse to exercise jurisdiction where, except for location of chosen court, there is no connection between that State and the parties or dispute (Art 19 declaration)

Definition of “international” (recognition/enforcement)

- For purposes of *recognition/enforcement*, a case is international where the judgment was given in another Contracting State
- A State may refuse to recognise or enforce judgment given by a court of another Contracting State if parties were resident in requested State and relationship of the parties and all other elements relevant to dispute, other than location of chosen court, were connected only with requested State (Art 20 declaration)

Exclusive choice of court agreements

- The Convention applies only to choice of court agreements that:
 - designate the court(s) of a Contracting State (art. 3 a), but,
 - exclusivity is presumed unless the parties have expressly provided otherwise (art. 3 b)

- Choice of court agreement may:
 - relate to **existing** or **future** disputes; and
 - refer to the courts of a Contracting State **generally**, or to a **specific** court(s) of that State
 - refer to two or more specific courts in the same Contracting State

Examples of exclusive choice of court agreements

- “the courts of Brasil”
- “the commercial courts of Brasil”
- “either the commercial court of Sao Paulo or the commercial court of Porto Alegre”

Examples of non exclusive choice of court agreements

- “either the commercial court of Sao Paulo or the commercial court of Bogota”
- “the commercial court of Sao Paulo, but not exclusively”
- “the courts of State X” which is a non Contracting State

Choice of Court Agreements: Formalities - Validity

- Formal requirements – must be concluded or documented:
 - in writing, or
 - by other means of communication which render information accessible for subsequent reference (e-agreement)
- Substantive validity
 - no substantive rules in the Convention
 - reference to the law of the chosen court [Articles 5 (1), 6 (a), 9 (a)]

Exclusions from the scope

- Consumer and employment contracts (art. 2(1))
- Excluded matters – see list art. 2(2): includes family law and succession, insolvency, carriage of goods and persons, anti-trust (competition) matters, validity of IP rights other than copyright and related rights
- But Conv *does* apply where excluded matters arise as *preliminary question* (e.g. by way of defence) and not as object of the proceedings
- If State has a strong interest in not applying Conv to a specific matter, it may declare that it will not apply Conv to that matter (art. 21 – “asbestos clause”, has reciprocal effect)

(criteria: protect public interest and/or third parties interest)

Three key obligations

1. The chosen court **must** hear the dispute
 - Article 5
2. Any non-chosen court **must** suspend/dismiss proceedings
 - Article 6
3. A judgment given by the chosen court **must** be recognised and enforced
 - Article 8

First key obligation:

1. **Chosen court must hear dispute**, unless agreement is null and void under law of that State (Art. 5) (includes conflict of laws rules)
 - Chosen court cannot refuse to hear case because -
 - it thinks a court of *another State* is more appropriate (*forum non conveniens*);
 - a court of *another State* was seised first (*lis pendens*)
 - Does not affect rules on subject matter jurisdiction or venue

Second key obligation:

- 2. *All other courts must suspend or dismiss proceedings,***
unless (Art. 6):
- a) agreement is null and void under law of State of chosen court (includes conflict of laws rules)
 - b) a party lacked capacity to conclude agreement under law of State of court seised (includes conflict of laws rules)
 - c) giving effect to agreement would lead to manifest injustice or would be manifestly contrary to the public policy of the State of the court seised
 - d) for exceptional reasons beyond control of parties, the agreement cannot reasonably be performed, or
 - e) chosen court has decided not to hear the case

Third key obligation:

- 3. *Judgment given by chosen court must be recognised and enforced*** by other Contracting States (Art 8), unless (Art. 9):
- a) agreement was null and void under law of State of chosen court (unless latter determined agreement to be valid)
 - b) a party lacked capacity to conclude agreement under the law of requested State
 - c) no proper notification
 - d) judgment was obtained by fraud in connection with a matter of procedure

<cont.>

Third key obligation (cont.):

- 3. *Judgment given by chosen court must be recognised and enforced*** by other Contracting States (Art 8), unless (Art. 9):
- e) recognition or enforcement would be manifestly incompatible with public policy of requested State, incl. situations where specific proceedings leading to judgment were incompatible with fundamental principles of procedural fairness of that State (due process)
 - f) judgment is inconsistent with judgment given in requested State in dispute between same parties; or
 - g) judgment is inconsistent with earlier judgment given in another State between same parties and involving same cause of action, provided that earlier judgment fulfils conditions necessary for recognition in requested State

4. CURRENT STATUS

- Explanatory Report
 - Co-Reporters: Trevor Hartley (UK) and Masato Dogauchi (Japan) – Report available on HCCH website (www.hcch.net)
- **2 ratifications/acceptances/approvals/accessions** needed for Conv to enter into force (Art.31)
- First accession: Mexico, on 26 Sept 07
- Second accession should follow soon: preparation for accession is progressing:
 - Two recent Signatures: EU: 1 April 09
 - USA: 19 January 09
 - Australia, Argentina, Canada and New Zealand, are also working towards ratification
- Full and continuing support by the international business and academic communities is essential.

Questions?

Ignacio Goicoechea
Liaison Legal Officer
ig@hcch.nl

Marta Pertegás
Secretary, Permanent Bureau
mp@hcch.nl



<http://www.hcch.net>