The Hague Convention on Choice of Court Agreements

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The Twentieth Session of the Hague Conference on Private International Law concluded on June 30th, 2005 with the signing of the *Hague Convention on Choice of Court Agreements* [the "Hague Choice of Court Convention"]. This new multilateral treaty represents a significant step forward towards improved harmonization of international trade law by providing greater certainty and predictability for parties involved in business-to-business (B2B) agreements and transnational litigation.[1]

Scope

The principal aim of the *Hague Choice of Court Convention* is to establish "uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters… [within a] secure international legal regime that ensures the effectiveness of exclusive choice of court agreements by parties to commercial transactions and that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements."[2]

Thus, the Hague Choice of Court Convention is similar to the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*[3] [4] by establishing rules for enforcement of exclusive choice of court agreements in international commercial transactions and certain international civil matters in order to "promote international trade and investment through enhanced judicial co-operation."[5]

An "exclusive choice of court agreement" is defined as any written agreement[6] [7] between two or more parties designating the court or courts of one Contracting State to the exclusion of the jurisdiction of any

other courts for the resolution of any legal disputes, unless the parties have expressly provided otherwise. Furthermore, an exclusive choice of court agreement is an independent or severable term if it forms part of a contract, and cannot be contested solely on the ground that the contract itself is invalid.[8]

Exclusions

Article 2 of the *Hague Choice of Court Convention* excludes consumer agreements and employment contracts (including collective agreements) of an international character. Nor does it apply to purely domestic agreements in which "the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State."[9] Article 2 further excludes the following issues from the scope of the Convention:

a) the status and legal capacity of natural persons;
b) maintenance obligations;
c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;
d) wills and succession;
e) insolvency, composition and analogous matters;
f) the carriage of passengers and goods;
g) marine pollution, limitation of liability for maritime claims, general average and emergency towage and salvage;
h) anti-trust (competition) matters;
i) liability for nuclear damage;
j) claims for personal injury brought by or on behalf of natural persons;
k) tort or delict claims for damage to tangible property that do not arise from a contractual relationship;
l) rights *in rem* in immovable property, and tenancies of immovable property;
m) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;
n) the validity of intellectual property rights other than copyright or related rights;
o) infringement of intellectual property rights other than copyright or related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract;
p) the validity of entries in public registers.[10]

Sub-article 2(3) of the *Hague Choice of Court Convention* provides, however, that the proceedings will not be excluded where one of the aforementioned matters arises merely as a preliminary question and not as an object of the proceedings. Thus, if one of the excluded matters arises solely by way of a defence, it is not necessarily excluded if it is incidental to the object of the proceedings.[11]

Jurisdiction

Generally, the court of a specific State chosen by the parties in an exclusive choice of court agreement has jurisdiction, unless the agreement is null and void under the law of that designated State.[12] If an exclusive choice of court agreement exists, a court not chosen by the parties does not have jurisdiction, and must decline to hear the case.[13] A judgment resulting from jurisdiction exercised in accordance with an exclusive choice of court agreement must be recognized and enforced in the courts of other Contracting States (other countries that are parties to the Convention).[14]

Contracting States may declare that their courts will recognize and enforce judgments given by courts of other Contracting States designated in a non-exclusive choice of court agreement.[15] This provision is potentially the most significant benefit for harmonization, as the likely effect of any Contracting States making this declaration will be to restrict the effect of the *forum non conveniens* doctrine for defendants challenging jurisdiction in the context of recognition and enforcement of foreign judgments.[16]

Escape Clauses

The Hague Choice of Court Convention contains a few important (albeit limited) escape clauses. It allows courts not chosen to ignore choice of court agreements, if one of the parties lacks capacity, giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to public policy, or where the chosen court has declined to hear the case.[17] Similarly, under Article 9, the chosen court may refuse recognition or enforcement, on traditional grounds of fraud, denial of natural justice and public policy.[18]

The foregoing rules are intended to promote certainty, ease of application and predictability in international trade through the enforcement of private party agreements on choice of court (i.e. forum), thereby increasing the likelihood of consistency of reciprocal enforcement of foreign judgments amongst Contracting States.

Interestingly, Article 11 of the Convention allows refusal of recognition and enforcement of a judgment "if, and only to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered." In contrast, in the Supreme Court of Canada decision in *Beals v. Saldanha*, Justice Major for the majority, held that:

> "The public policy defence is not meant to bar enforcement of a judgment rendered by a foreign court with a real and substantial connection to the cause of action for the sole reason that the claim in that foreign jurisdiction would not yield comparable damages in Canada."[19]

Conclusion

Currently, 65 States, including Canada, are Members of the Hague Conference on Private International Law. If a sufficient number of Members ratify the Hague Choice of Court Convention, then it will create greater certainty for Canadian businesses involved in international transactions by offering a viable alternative to arbitration as a method of dispute resolution. At a minimum, functional reciprocity between Contracting States is more likely to be achieved through this multilateral treaty, which codifies the private international law principles of comity, good faith and order and fairness, espoused by most common law courts, including the Supreme Court of Canada.[20]

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[1] The text of the *Hague Choice of Court Convention,* including preliminary documents and legislative history, is available at: http://www.hcch.net/indexen.php?act=conventionstext&cid=98%20

[2] *Hague Choice of Court Convention,* Preamble.

[3] *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* [the "New York Convention"] concluded at New York, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38. See, **International Commercial Arbitration Act, R.S.O. 1990, c. I.9** (as am.), and Schedule appended thereto.

[4] *Supra,* note 1, Art. 4: the Convention applies to international litigation, but not to international arbitration proceedings, which are governed by the New York Convention.

[5] *Supra*, note 1, Preamble.

[6] *Id.,* Article 3 *c)* states that "an exclusive choice of court agreement must be concluded or documented –

> *i)* in writing; or
> *ii)* by any other means of communication which renders information accessible so as to be usable for subsequent reference…";

[7] The United Nations Commission on International Trade Law (UNCITRAL) concluded its 38th session in Vienna Austria on July 15th, 2005 by adopting a *Draft Convention on the Use of Electronic Communications in International Contracting*, which will address issues of contract formation, jurisdiction and recognition and enforcement of contracts negotiated electronically. According to the UNCITRAL web-site:

> "The draft Convention will be submitted to the U.N. General Assembly for final adoption at its 60th annual session, which will begin at the Fall of 2005, in New York. The revised official text of the draft Convention, incorporating the changes agreed at the session, will be released as an annex to UNCITRAL's report to the General Assembly (document A/60/17), which is currently being edited and translated. The final report is expected to be published in September 2005." see http://www.uncitral.org/uncitral/en/index.html

[8] *Id.* Art. 3(d)

[9] *Id.* Art. 1(2)

[10] *Id.* Art.2.(2)

[11] *Id*, Art. 3

[12] *Id.* Art. 5

[13] *Id.* Art. 6

[14] *Id.* Art. 8

[15] *Id.* Art. 22

[16] For a discussion of the principles for recognition and enforcement of foreign judgments in Ontario, including a review of the Supreme Court of Canada's landmark decisions in *Morguard Investments Ltd. v. deSavoye,* and *Beals v. Saldanha,* see, Antonin I. Pribetic "Strangers in a Strange Land": Transnational Litigation, Foreign Judgment Recognition, and Enforcement in Ontario, 13 *Journal of Transnational Law & Policy*, Vol. 2, 347-391 (2004).

(available at http://www.law.fsu.edu/journals/transnational/backissues/issue13_2.php)

[17] *Id*. Art. 6.

[18] *Id*. Art. 9. Additionally, the chosen court may refuse on grounds of invalidity, incapacity or in circumstances where enforcement would result in inconsistent judgments between Contracting States.

[19] *Beals v. Saldanha* [2003] 3 S.C.R. 416 at 453 (S.C.C.) per Major, J. (McLachlin C.J., Gonthier, Bastarache, Arbour and Deschamps JJ. concurring)

[20] *Moran v. Pyle National (Canada) Ltd,* [1975] 1 S.C.R. 393, (S.C.C.); *Morguard Investments Ltd. v. De Savoye,* [1990] 3 S.C.R. 1077; *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon* [1994] 3 S.C.R. 1022, (1994) 120 D.L.R. (4th) 289 (S.C.C.); *Hunt v. T & N plc,* [1993] 109 D.L.R.4th 16 (S.C.C.)