New York state of mind

© iStockphoto/Anna_Sarna

Will the Hague Convention be to court litigation what the New York Convention has been to arbitration, asks Jan-Jaap Baer

When it comes to doing business internationally, there are two important and related disputes risks that parties typically address upfront in their contracts:

- Forum risk—in what forum will any dispute be resolved?
- Enforcement risk—will you get a court judgment or arbitral award which "travels" well, allowing swift and easy access to the rewards of your victory?

In both areas arbitration currently has benefits over court litigation. This is due to the successful 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards (the New York Convention) which ensures that:

- arbitration agreements are widely recognised, whereas choice of court agreements are not always respected under divergent national rules, particularly where cases are brought before a court other than that chosen by the parties;
- arbitral awards are generally easier to enforce than court judgments, as most countries are party to the New York Convention but there is no real equivalent for court judgments.

The relative ease with which court judgments can be enforced internationally varies. For example, English court judgments are currently relatively straightforward to enforce in the EU given the existence of common rules which try to make that process as simple as possible. Beyond the EU, particularly with Commonwealth countries, the UK may have reciprocal enforcement treaties which could be relied on. At worst, where there is no reciprocal arrangement (such as in the case of the US, China and Japan) the winning party may effectively need to issue fresh proceedings in the relevant country to enforce the English court judgment. That may give the losing side a second bite of the cherry and add significantly to the time and cost of drawing a line under the dispute.

Enter the 2005 Hague Convention on Choice of Court Agreements (the Hague Convention), which is designed to address concerns about forum risk and enforcement risk and which ultimately aims to promote choice of court clauses. Recently this international treaty has been gathering momentum. The great hope of its architects is that it will be to court litigation what the New York Convention has been to arbitration—and as successful.

The Hague Convention

The Hague Convention aims to provide greater legal certainty and predictability by providing uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil and commercial matters.

To give greater certainty on which national court must hear a dispute, the Hague Convention provides that the court chosen in the jurisdiction clause must hear the case (Art 5) and that any court not chosen in the jurisdiction clause must in principle decline to hear the case (Art 6).

To give more certainty to the enforceability of foreign court judgments, Art 8 provides that any judgment given by the court chosen in the jurisdiction clause must be recognised and enforced in other Convention states, except where a ground for refusal set out in Art 9 applies.

The Hague Convention applies to choice of court agreements concluded after its entry into force for the state of the chosen court, being 1 October 2015 in the case of the UK.

Below are set out certain key features of the Hague Convention. Arguably some of these may act as a brake on its success relative to the New York Convention, although that will need to be assessed in the fullness of time.

Scope

The Hague Convention excludes consumer and employment contracts and certain specified subject matters (Art 2). This is generally because of the existence of more specific international instruments, and national, regional or international rules that claim exclusive jurisdiction for some of these matters.

Although the New York Convention on its face does not limit its scope in this way, various states have limited their application of the New York Convention, for example, so that it applies in commercial matters only. In addition, each state has its own body of arbitration laws, which may prescribe categories of matters that are non-arbitrable under domestic law. These restrictions will vary from state to state and are not recorded in any central register. So while the Hague Convention appears to be narrower in scope than the New York Convention, its restrictions may come to be more consistent than those applying to arbitrations.

Exclusive jurisdiction

Importantly, the Hague Convention only applies to exclusive jurisdiction clauses (Art 1). Choice of court agreements are deemed to be exclusive unless the parties have specified otherwise (Art 3).

This restriction will limit the number of disputes the Hague Convention might catch, in circumstances where many international transactions are subject to non-exclusive jurisdiction clauses

or, particularly in the finance world, asymmetric jurisdiction clauses (ie which bind one party to a particular court but allow the other party to issue proceedings before any competent court). While there is no express mention of asymmetric jurisdiction clauses, the explanatory report to the Hague Convention indicates that these clauses would not be considered exclusive for the purposes of the Hague Convention.

A contracting state may declare that it will recognise and enforce judgments given by courts designated in a non-exclusive choice of court agreement (Art 22). Query how many states will find this attractive, as some may be reluctant to enforce judgments of foreign courts to which their nationals did not voluntarily submit.

Exceptions

There are limited exceptions to the main provisions of the Hague Convention described above. These are not always analogous to the corresponding provisions in the New York Convention, although there are a number of parallels. Depending on how the Hague Convention is construed by courts, it may be slightly easier for a party to avoid being bound by choice of court agreements, and by judgments produced under these agreements, as compared with arbitration agreements and arbitral awards.

That said, the intention appears to have been to create consistency where possible. There is also a substantial body of precedent in arbitration law which may be of assistance as national courts come to apply similar rules in the Hague Convention.

Art 21

The Hague Convention has an exclusion which is important and potentially wide-ranging (and absent from the New York Convention). Art 21 provides that where a state has a strong interest in not applying the Hague Convention to a "specific matter" it may declare that it will not apply the Hague Convention to that matter. This is obviously very broad. The only apparent limitation on this right is that the declaration should not be broader than necessary and the specific matter excluded must be clearly and precisely defined.

The effect of such a declaration is that with regard to the specific matter the Hague Convention does not apply: (i) in the state that made the declaration; or (ii) in other contracting states, where an exclusive choice of court agreement designated the courts of the state that made the declaration.

For example, the EU has declared that it will not apply the Hague Convention to insurance disputes, save in limited circumstances. The consistent application of the Hague Convention will partly depend on states not making too many of these declarations.

Momentum of the Hague Convention

The Hague Convention was concluded in 2005. Mexico was the first country to sign and then in 2007 ratify it. Since 1 October 2015 it has applied to EU member states except Denmark. From 1 October 2016 it has also applied to Singapore.

It is difficult to predict which countries will next adhere to the Hague Convention (leaving aside the impact of Brexit, discussed below). The US and Ukraine have signed but not ratified the Hague Convention. The Hague Convention actually originated from attempts by the US and the EU to co-ordinate recognition and enforcement of judgments as between themselves, so it will be interesting to see how it develops, particularly as to date the US has never ratified any convention or treaty that requires recognition and enforcement of non-US court judgments.

There are also reports of various other countries which are actively considering the Hague Convention, including Russia, Canada, Australia, New Zealand and Argentina.

Impact of the Hague Convention

At the moment, the obvious practical reality is that the Hague Convention has only had limited uptake and therefore effect. But the ratification by the EU, a major trading bloc, was a major step forward and Singapore's ratification is a further sign of continuing momentum. It is difficult to gauge how many other states will sign and/or ratify and how quickly, but it is not unreasonable to think that other major states will in due course sign up. Once there is critical mass, remaining states may not want to be left behind.

If the Hague Convention does properly take off, it will in principle level the enforceability playing field a little between litigation and arbitration insofar as it will make choice of court agreements more predictable and will enhance the effectiveness of international enforcement of court judgments. In that sense it can make litigation more appealing as compared to arbitration. Although the Hague Convention is in some respects less robust than the New York Convention, particularly as regards Art 21, nevertheless the enforcement benefits of the Hague Convention will have to be taken into account when it comes to considering the various advantages and disadvantages of litigation versus arbitration. That said, although it may chip away at enforceability, the Hague Convention obviously does not impact on other typical features (often labelled advantages) of arbitration such as confidentiality, neutrality and finality.

The Hague Convention & Brexit

The Hague Convention was ratified by the EU on behalf of all member states except Denmark. In the UK, the Hague Convention has been brought into effect by a statutory instrument. However, the Hague Convention does not apply between contracting EU member states, and issues of jurisdiction and recognition of judgments in civil and commercial matters continue to be governed within the EU by the recast Brussels Regulation.

It is important to note that on the occurrence of Brexit, the recast Brussels Regulation will, unless alternative measures are agreed, cease to be applicable in the UK. The UK will therefore need to sign and ratify the Hague Convention in its own right in order to ensure that it retains the ability to benefit from the Hague Convention regime. Importantly, it would be able to do so without meeting any qualifying conditions or being dependent on EU or EU member state consent. In the absence of any agreement between the UK and the remaining EU member states for a replacement of the recast Brussels Regulation, signing up to the Hague Convention will be an important step in ensuring as between the UK and the EU the continued effectiveness of exclusive English court jurisdiction clauses and the continued enforceability of English court judgments.

The Hague Convention would enter into force in the UK on the first day of the month following the expiration of three months after the deposit of the UK's instrument of ratification (Arts 27 and 31). The Hague Convention would then apply to agreements concluded after it had entered into force.

In conclusion, beyond the potential trajectory of the Hague Convention as replicating for choice of court agreements the success of the New York Convention, it is in any event likely to attract greater coverage in months and years to come as a material part of the UK's post-Brexit jurisdiction and enforcement regime. **NLJ**

Jan-Jaap Baer is a dispute resolution partner at Travers Smith LLP (*jan-jaap.baer@traverssmith.com*; *www.traverssmith.com*)