THE HAGUE CHOICE OF COURT CONVENTION: MAGNUM OPUS OR MUCH ADO ABOUT NOTHING?

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A. Introduction

It is a truism to note that in the past 50 years there has been an enormous expansion in international commerce and communications and that with such expansion there has been a proportionate increase in the volume and intensity of transnational disputes. The growth in such disputes has led to greater contact and conflict between legal systems. Rules of private international law which arose only rarely in the business of most national courts are now examined and applied regularly.

The problem of multijurisdictional adjudication where a single transaction spawns applications for relief in a number of countries pursuant to a number of different laws is becoming commonplace. Such a development has cast particular light on the rules for establishing jurisdiction in national courts and also the principles governing recognition and enforcement of judgments of foreign courts. Once greater attention and scrutiny was placed on the national rules of jurisdiction and enforcement of judgments, it is not surprising that disparities and inconsistencies of approach were uncovered.

Typically, European defendants would complain of excessive exercise of jurisdiction by US courts, while US plaintiffs would bemoan the fact that European (and other national) courts were inconsistent and unreliable in recognising US judgments. While such a situation had long existed, the sheer volume of recent transnational disputes made a solution more pressing.

The other development which had masked the problem of disparate national jurisdictional and judgment rules was the increased use and popularity of international commercial arbitration beginning in the 1980s. Once advisers realised that they could refer transnational business disputes to a private, neutral panel of their choice whose awards would be recognised by national courts in the vast majority of cases, the problems of transnational litigation could be often ignored.

Yet, international commercial arbitration has not been without its critics or its disadvantages, in particular cost in the large institutional arbitrations. This fact,

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combined with the problem that a number of transnational disputes could not be submitted to arbitration (eg personal injury, consumer and employment cases) meant that the need for a globally uniform system of jurisdiction and judgment rules remained acute.

Paul Beaumont in his article in this issue[1] traces the at times tortuous history of the Hague Conference negotiations and how the Hague Convention on Choice of Court Agreements ("the Convention") emerged from what had originally been envisaged as a much larger project. Other contributors to this colloquium have made detailed considerations of particular provisions or subject matter in the Hague Convention. My task, by contrast, is to examine the Convention from a more holistic and forward-looking perspective. Specifically, the question I will address is whether the Convention will be regarded as a great achievement in the history of multilateral reform of private international law, or instead will it be seen as a narrow document which allows too much scope for the intrusion of national interests at the expense of harmonisation?

In addressing this dichotomy, the Hague Convention will be examined from two main perspectives: firstly the likely impact of its principal provisions in Australian law, and secondly the response to the Hague Convention among governments, practitioners and scholars in other potential contracting states.

B. The Impact of the Hague Convention on Australian Law

In a paper written in 2004,[2] which formed part of the Australian Government delegation brief in the Hague Convention negotiations, I argued that the Draft Convention (as it then was) would make little change to Australian law. Consequently, practitioners had little to fear by its adoption but also perhaps little to be overwhelmed about either.

Since the final 2005 version of the Convention made only limited changes to the 2004 Draft, the comments made in relation to the latter text remain generally apposite. Since other contributors to this colloquium are dealing with the substantive law aspects of the Convention in detail, my discussion will be confined to a few salient points.

1. Coverage of the Convention

The scope of the Convention is provided in Article 1(1), which states that it applies "in international cases to exclusive choice of court agreements concluded in civil or commercial matters". The term "international" is broadly defined for

[1] P Beaumont, "Hague Choice of Court Agreement Convention 2005: Background, Negotiations, Analysis and Current Status" (2009) 5 *Journal of Private International Law* 117.

[2] R Garnett, "The Internationalisation of Australian Jurisdiction and Judgments Law" (2004) 25 *Australian Bar Review* 205.

both jurisdiction[3] and recognition and enforcement[4] purposes. Article 2(1) excludes from the Convention agreements entered into between consumers or between a consumer and a business, and agreements relating to individual or collective contracts of employment. A consumer is defined as "a natural person acting primarily for personal, family or household purposes". Article 2 then contains a very long list of further exclusions, some of which are uncontroversial such as family law matters,[5] wills and succession,[6] and rights in immovable property,[7] but others which are more contentious such as antitrust (competition),[8] the validity of decisions of legal persons, including corporations[9] and carriage of goods by sea.[10]

Intellectual property, by contrast, is an area where the drafters of the Convention sought to be more expansive. What is excluded from the Convention is any action having as its object: (i) the validity of intellectual property rights other than copyright or related rights; or (ii) the infringement of such rights except where infringement proceedings are brought for breach of a contract between the parties relating to such rights.

Where, however the validity of registrable rights arises only as a "preliminary question" to resolving a breach of contract suit, then such an action falls within the scope of the Convention.[11] This last inclusion may be significant in cases, for example, where a licensor is suing for breach of a contractual licence of patent rights and the licensee raises as an issue in its defence the validity of the patent. The mere raising of the validity issue does not place the breach of licence suit outside the Convention. Article 10(3) of the Convention, however, provides that a ruling on the preliminary question of validity cannot be recognised or enforced under the Convention.

From an Australian law perspective, the approach taken to intellectual property under the Convention would make a positive change to the law by enhancing the capacity of Australian courts to recognise foreign intellectual property rights. Currently, under Australian law, choice-of-court agreements in both contractual licences of intellectual property and agreements for protection of trade secrets would be enforceable where the actions in question related to rights under the contract. An Australian court would, however, have no subject matter jurisdiction to adjudicate an action relating to the validity of any foreign

3 Art 1(2).
4 Art 1(3).
5 Art 2(2)(b) and (c).
6 Art 2(2)(d).
7 Art 2(2)(l).
8 Art 2(2)(h). For criticism of this exclusion, see J Talpis and N Krnjevic, "The Hague Convention on Choice of Court Agreements of June 30 2005: the Elephant that Gave Birth to a Mouse" (2006) 13 *Southwestern Journal of Law and Trade in the Americas* 1, 14.
9 Art 2(2)(m).
10 Art 2(2)(f).
11 Art 2(3).

intellectual property rights, registrable or otherwise.[12] Such a restriction may currently make it difficult to adjudicate an action for breach of licence, where validity is raised, even as "a preliminary question".[13]

Non-exclusive choice-of-court agreements are also excluded under the Convention, a point particularly lamented by one scholar given "their importance in commercial contract drafting".[14] To some extent, however, this exclusion is mitigated by the fact that the Convention presumes agreements to be exclusive unless the parties have expressly provided otherwise[15] and that contracting states may make a declaration that they will recognise and enforce judgments given by courts of other contracting states designated in a non-exclusive choice-of-court agreement.[16]

Overall though, from an Australian perspective, the Convention is narrow in scope given the wide range of excluded subject matter, although the provisions on intellectual property will increase the range of cases in that area in which choice-of-court agreements can be enforced under Australian law.

2. Jurisdiction under the Convention

In the area of jurisdiction, adoption of the Hague Convention provisions would reduce to some extent the capacity of Australian courts to evade foreign choice-of-court clauses by discretionary devices under national law.

First, as noted above, the Convention is limited in its coverage to "exclusive" choice-of-court agreements with a presumption in favour of exclusivity.[17] While US[18] and Canadian[19] writers have suggested that this provision reverses the current position under those countries' laws where choice-of-court agreements are presumed to be non-exclusive (and is therefore valuable for this reason), that is not the case in Australia. Recent Australian decisions have tended to favour an exclusive characterisation unless the parties have conspicuously avoided language of obligation.[20]

[12] *Potter v Broken Hill Proprietary Co Ltd* (1906) 3 CLR 479.

[13] It is suggested that the Convention achieves this result, despite its claiming not to affect domestic rules on subject matter jurisdiction (Art 5(3)(a)).

[14] A Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008), 529.

[15] Art 3(b).

[16] Art 22.

[17] Art 3(b).

[18] V Nanda, "International Academy of Commercial and Consumer Law Changing Law for Changing Times, 13th Biennial Meeting: The Landmark 2005 Hague Convention on Choice of Court Agreements" (2007) 42 *Texas International Law Journal* 773, 779.

[19] H Fairley and J Archibald, "The Hague Convention on Choice of Court Agreements: Strengthening Compliance with International Commercial Agreements and Ex-Ante Dispute Resolution Clauses? After The Hague: Some Thoughts on the Impact on Canadian Law of the Convention on Choice of Court Agreements" (2006) 12 *ILSA Journal of International and Comparative Law* 417, 429.

[20] See eg *FAI Insurance Co Ltd v Ocean Marine Mutual Protection & Indemnity Association Ltd* (1997) 41 NSWLR 117.

Secondly, the requirements under Article 5 of the Hague Convention that a court of a contracting state designated in an exclusive agreement shall have jurisdiction and shall exercise jurisdiction to decide a dispute also makes little change to Australian law. While Australian courts technically have a discretion not to enforce choice-of-court agreements designating the forum court, in no case has this in fact occurred. Indeed, non-exclusive forum agreements have often been treated as equivalent to *exclusive* clauses and enforced with the same degree of vigour.[21]

Thirdly, and most importantly, a comment should be made about Article 6 of the Hague Convention which provides that a court in a contracting state must decline jurisdiction when confronted by an exclusive choice-of-court agreement designating the courts of another contracting state.

Historically, Australian courts have had a mixed record in enforcing foreign exclusive choice-of-court agreements. In particular, there were a number of cases where courts allowed plaintiffs to sue in Australia where the weight of convenience favoured trial in Australia (due to the presence of evidence and witnesses there) or where the plaintiff would suffer a serious disadvantage or injustice if the matter proceeded to trial in the foreign country by the party being likely to "lose" rights under Australian statutory law (which would be available in the Australian forum).[22]

A number of writers, particularly from civil law countries, have praised the drafting of Article 6 by declaring that the doctrine of *forum non conveniens* has no role to play in the court's decision to exercise or decline jurisdiction.[23] While it is true that general discretionary factors of convenience based on the residence of the parties and the place of evidence may not normally be relied upon by plaintiffs to avoid foreign choice-of-court agreements,[24] the width of the exceptions in Article 6 may allow scope for arguments based on differences in applicable law to be made.

Under Article 6(a) the defence of invalidity of the choice-of-court clause is properly limited to invalidity under the law of the state of the chosen court. Such a provision will prevent parties from relying on mandatory statutes of the forum to invalidate a choice-of-forum clause, an argument that has been successful in some Australian cases.[25]

A key question, however, is whether such an argument may be raised under

[21] See eg *Woolworths v McMillan* (unreported, NSWSC, Rogers J, 29 February 1988, BC8802174).

[22] For a fuller discussion, see R Garnett, "The Enforcement of Jurisdiction Clauses in Australia" (1998) 21 *University of New South Wales Law Journal* 1.

[23] C Thiele, "The Hague Convention on Choice of Court Agreements: Was it Worth the Effort?", in E Gottschalk, R Michaels, G Rühl and J von Hein (eds), *Conflict of Laws in a Globalised World* (New York, Cambridge University Press, 2007), 63, 75.

[24] T Hartley and M Dogauchi, *Explanatory Report on the Convention of 30 June 2005 on Choice of Court Agreements* (2007), 46 [143] available at http://www.hcch.net/index_en.php?act=publications.details&pid=3959 .

[25] See eg *Akai Pty Ltd v The People's Insurance Co* (1996) 188 CLR 418.

Article 6(c), which provides that an agreement need not be enforced where it "would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised".

While mandatory statutes of the forum are a well-recognised part of public policy in private international law, the Explanatory Report appears to suggest that invalidity under a mandatory statute will amount to neither "manifest injustice" nor a "manifest [violation of] public policy". Specifically, the report states that it is not sufficient for a seised court to disregard a foreign choice-of-court agreement "because it would not be binding under domestic law" or "because the chosen court might violate, in *some technical way*, a mandatory rule of the State of the Court seised".[26]

It is not clear, however, whether the effect of these provisions is to exclude the operation of *all* mandatory laws of the forum – what happens, for example, if the statute unequivocally strikes down the choice-of-court agreement? Is that a mere "technical" violation or is it so much part of deeply held local interests or values that it must be respected?

A possible example of such a law is section 11(2) of the Carriage of Goods by Sea Act 1991 (Cth) which (in)famously invalidates any agreement which "preclude[s] or limit[s] the jurisdiction of Australian courts in respect of bills of lading or other sea carriage documents" relating to inbound or outbound carriage of goods with Australia. Although carriage of goods is excluded from the Convention, and so the problem with this particular enactment will not arise, if similarly emphatic language of exclusion were found in another statute, Australian courts may feel compelled to apply it.

The status of another, broader public policy argument which has been used by Australian courts to defeat foreign choice-of-court clauses in the past also remains unclear if such proceedings took place under the Convention. The argument here again relies on mandatory statutes of the forum but in a more expansive way: specifically, the plaintiff seeking to sue in Australia argues that it would be denied justice if the case were adjudicated in the designated foreign court because the law to be applied there would be highly disadvantageous to its interests and may even deprive it of a cause of action.

The best example of this situation is where a plaintiff pleads a breach of section 52 of the Trade Practices Act 1974 (Cth) in an Australian action and argues that the effect of the foreign choice-of-court clause being enforced would be to preclude such relief since the foreign court under its choice-of-law rules would not admit such an action. While the present author has decried the tendency of Australian courts to accept such an argument on the basis that it undermines and undervalues foreign choice-of-court agreements,[27] there is now

[26] *Explanatory Report*, *supra* n 24, 48 [153] (emphasis added).

[27] Garnett, *supra* n 22. See also, to similar effect, M Keyes, *Jurisdiction in International Litigation* (Sydney, Federation Press, 2005), 94 and M Keyes, "Jurisdiction under the Hague Choice of Courts

clear and consistent authority in support of this view.[28] Interestingly, this very wide view of public policy contrasts markedly with the more restrained approach taken by Australian courts when the defence has been raised to resist enforcement of a foreign judgment.[29]

Again it is not clear whether such an argument is entirely precluded by the Hague Convention. The Explanatory Report mentions that "'manifest injustice' would cover the exceptional case where one of the parties would not get a fair trial in the foreign state, perhaps because of bias or corruption, or where there were reasons specific to that party that would preclude him or her from bringing or defending proceedings in the chosen court". While "the standard" for manifest injustice "is intended to be high", an Australian court may well consider a plaintiff's loss of rights under a significant Australian statute without equivalent under the law of the country of the designated court to be a sufficiently compelling consideration.

Significantly, two leading commentators on the Convention[30] admit that "substantive injustice", such as when "the court seised might object to the content of specific provisions of the law that the court chosen would apply", may fall within the exception in Article 6(c).

Finally, it is also important to note that whatever attitude Australian courts take to choice-of-court clauses under the Convention, Australian parties can reasonably expect courts of *other* contracting states to be generally willing to respect such clauses. The Convention should therefore provide greater certainty to Australian enterprises engaging in international business transactions with businesses from other contracting states.

3. Recognition and Enforcement of Foreign Judgments under the Convention

The final provisions of the Convention which will be examined in this brief overview are Articles 8 and 9 dealing with recognition and enforcement of foreign judgments. There is nothing controversial about the impact of these provisions in Australian law and, as I argued in the 2004 article, all the changes made by the Convention are beneficial, in particular, the scope for enforcement of non-monetary judgments, such as injunctions.[31] Australian parties will also

Convention: Its Likely Impact on Australian Practice" (2009) 5 *Journal of Private International Law*, forthcoming.

[28] *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 188 CLR 418; *Commonwealth Bank of Australia v White* [1999] 2 VR 681; *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd* [2007] ATPR 42-166; [2007] FCA 881 at [43]; *Quinlan v Safe International Forsäkrings AB* (2006) 14 ANZ Ins Cas 61-693; [2005] FCA 1362 at [49]; *Hume Computers Pty Ltd v Exact International BV* [2006] FCA 1440 at [21]–[26].

[29] *Stern v National Australia Bank* [1999] FCA 1421 at [133]–[147].

[30] RA Brand and P Herrup, *The 2005 Hague Convention on Choice of Court Agreements Commentary and Documents* (New York, Cambridge University Press, 2008), 93.

[31] See definition of "judgment" in Art 4(1) of the Convention.

have the security of knowing that any judgment in their favour given by a "chosen" court, against a business from another contracting state, will most likely be enforced in other contracting states.

The more fundamental problem, however, with the recognition and enforcement provisions is their limited scope: specifically, that recognition and enforcement is confined to a judgment of a contracting state designated in an exclusive choice-of-court agreement. To an extent, this outcome may be an inescapable consequence of the Convention being limited to exclusive choice-of-court agreements, but it does reduce the utility and reach of the Convention. While it is true that Article 22 of the Convention does provide further capacity for enlargement of the Convention's reach by allowing contracting states to declare that they will recognise and enforce judgments based on *non-exclusive* choice-of-court agreements, this provision will only apply where both the state of origin and the state addressed have made such a declaration, which may limit its practical utility.

4. Assessment

In summary, the purpose of this brief comparison of some of the key Convention provisions with existing Australian law is to assess whether the Convention enhances the status and enforceability of choice-of-court agreements in Australia. If so, then that fact provides a powerful argument in favour of the utility and effectiveness of the Convention. But, as discussed above, there is no clear verdict on this issue.

While in the case of the jurisdictional provisions the drafters have made an admirable effort made to reduce discretion in the enforcement of choice-of-court agreements, the possible width of the exceptions under Article 6 may still allow some of the opportunistic discretionary arguments based on applicable law discussed above to operate. If such arguments were permitted in proceedings under the Convention, then its value as an instrument of harmonisation would be reduced since it would allow excessive intrusion of national law and the consequent weakening of choice-of-court agreements.

Secondly, in the case of recognition and enforcement, the provisions are likely to be highly effective in protecting judgments of courts designated in choice-of-forum agreements but the limited coverage does little for harmonisation.

Overall, then, if viewed solely from the perspective of impact upon and enhancement of Australian law, the Convention's achievement may be modest. Yet as noted above, the Convention will provide greater certainty to Australian parties dealing with businesses in other contracting states that their choice-of-court clauses and judgments from "chosen" courts will be respected. Nevertheless, it must not be forgotten that the Convention is a multilateral instrument and its true effectiveness and utility must also be considered from a global perspective. Specifically, what is the consensus among governments, practitioners

and scholars outside Australia as to the value and utility of the Hague Convention?

C. The International Reaction to the Hague Convention

A first point to note is that although the drafting of the Hague Convention was completed in June 2005 only one nation state – Mexico – has so far acceded to it. The inaction of other governments could perhaps be explained by their desire to wait until the "great economic powers" (most notably the US and the EU) have made a firm decision on adoption before taking a clear position themselves. This, as will be seen, has only just happened at the beginning of 2009 (the US signed on 19 January 2009). In addition, it is possible that many nation states may have chosen to defer any decision on joining the Convention until after the Explanatory Report had been published (which occurred in May 2007). The Australian and Hong Kong governments are currently undertaking internal inquiries to determine if they should ratify the Convention with questionnaires sent to members of the profession and other bodies.

1. The ABA and General US Response

It is important to note that the American Bar Association (ABA) House of Delegates in August 2006 adopted a recommendation by its International Law Section which "urges the US government promptly to sign, ratify and implement the Hague Convention on Choice of Court Agreements".[32] The US signed the Convention in January 2009. In its recommendation the ABA said that it had conducted a survey of US practitioners: over 98 per cent responded that a choice-of-court convention "would be useful for their practice" and "over 70% indicated that a convention would make them more willing to designate litigation instead of arbitration in their contracts".[33]

The ABA noted that adoption of the Convention would support the primary US goal at the Hague negotiations, ie to secure greater enforceability of US judgments abroad,[34] and, for this reason, also recommended that the US opt in to Article 22 which allows for recognition of judgments based on non-exclusive choice-of-court agreements. The ABA also supported the Convention because it "has the potential to offer increased certainty for consensual commercial transactions"[35] and "is also a means of dispute resolution, providing a viable alternative to arbitration".[36]

[32] The recommendation is available at www.abanet.org/intlaw/policy/investment/hcca0806.pdf.
[33] *Ibid*, 2.
[34] *Ibid*, 4.
[35] *Ibid*, 2.
[36] *Ibid*, 5.

The ABA's conclusions are not surprising and mirror the views of the majority of US scholarly opinion that the Hague Convention should be implemented without modification.[37] The arguments relied upon by such scholars closely track those posited by the ABA and fall into three main groups.

First, the Convention will increase certainty and lower risk for US parties in international commercial transactions, both at the transaction planning and dispute resolution stages, as parties will be able to assume more readily that their choice-of-court agreements and resulting judgments will be enforced (at least in Member States).

Secondly, although the Convention is narrow in scope and contains significant exclusions, any multilateral instrument in the area of jurisdiction and judgments is preferable to the predominantly unilateralist status quo, as any harmonisation of law, by definition, brings greater predictability and certainty. Moreover, the accomplishment of the Convention should pave the way and provide momentum for further multilateral instruments in the area of jurisdiction and enforcement of foreign judgments.[38]

Thirdly, the adoption of the Convention will redress the current imbalance in favour of international commercial arbitration as the preferred dispute-resolution method for cross-border business transactions.

This last argument recalls the view expressed in the Explanatory Report that the Convention would become the litigation equivalent of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention").[39] While the first two arguments in support of the Hague Convention are uncontroversial (although rather speculative) the third point, regarding the status of litigation relative to international arbitration, requires further examination.

[37] See eg Brand and Herrup, *supra* n 30; L Teitz, "The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration" (2005) 53 *American Journal of Comparative Law* 543; "Note: Recent International Agreement" (2006) 119 *Harvard Law Review* 931; Nanda, *supra* n 18; M Berlin, "Note and Comment: The Hague Convention on Choice of Court Agreements: Creating An International Framework for Recognizing Foreign Judgments" (2006) 3 *Brigham Young University International Law and Management Review* 43.

[38] Teitz, *supra* n 37, 544; "Note: Recent International Agreement", *supra* n 37, 934. Canadian scholars have expressed similar views, see Fairley and Archibald, *supra* n 19, 427 and V Black, "The Hague Choice of Court Convention and the Common Law" in *Uniform Law Conference of Canada Civil Section* (2007) 3 available at www.ulcc.ca/en/poam2/Hague_Choice_of_Court_Convention_Common_Law_En.pdf.

Likewise is the opinion of a distinguished Swiss commentator, see A Bucher, "La Convention de La Haye sur les accords d'élection de for" (2006) 16 *Revue suisse de droit international et européen* 29, 61. Two other US commentators (M Adler and M Zarychta, "The Hague Convention on Choice of Court Agreements: The United States Joins the Judgment Enforcement Band" (2006) 27 *Northwestern Journal of International Law and Business* 1) make this point (at 37) despite arguing elsewhere in their article that the narrowness of the Convention has left the US in the position of having "hop[ed] to build a skyscraper . . . but succeeded in constructing at most, a low hut" (at 2).

[39] *Explanatory Report*, *supra* n 24, 21[1].

2. The Arbitration Analogy

It is now often asserted that international commercial arbitration is the most popular method for resolving international business disputes. Much credit for this situation must be given to the New York Convention, which provides a near universally[40] accepted framework for the recognition and enforcement of foreign arbitration agreements and awards. The aim of the New York Convention is to drastically limit the grounds under national law by which an arbitration agreement or award may be denied enforcement, and the decisions of national courts have generally been faithful to this intention.

In Australia, for example, the decision in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [41] emphasises that a foreign arbitration agreement falling under the New York Convention will be interpreted as embracing all the parties' claims in a dispute as far as possible, including claims under Australian statute. The recent decision of the House of Lords in the *Fiona Trust* case[42] also strongly supports the enforcement of arbitration agreements under the New York Convention.

So, if the New York Convention was indeed the model which the drafters of the Hague Convention hoped to emulate, it would have been a worthy example to follow. The Hague Convention, however, fails to replicate the New York Convention in at least three very significant ways. First, there is a wider range of excluded subject matter under Article 2 compared to international arbitration (eg matters relating to antitrust,[43] the validity of decisions of corporations[44] and contracts for the carriage of goods by sea[45] may generally be submitted to arbitration); secondly, in the potentially wider defences to enforcement of agreements (particularly the "manifest injustice" ground); and thirdly, in the scope for

[40] One hundred and forty-two nation states were parties to the New York Convention as of 25 September 2008; see www.uncitral.org.

[41] (2006) 157 FCR 45.

[42] *Fiona Trust and Holding Corp v Privalov* [2007] UKHL 40.

[43] *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 473 US 614 (1985).

[44] Eg, statutory oppression and derivative actions by shareholders against directors are now considered "arbitrable" provided that the relief sought does not include the winding up of a company. See *ACD Tridon v Tridon Australia* [2002] NSWSC 896 [193]–[194] and especially P Herzfeld, "Prudent Anticipation? The Arbitration of Public Company Shareholder Disputes" (2008) 24 *Arbitration International* 297, 315–26. Much, however, depends upon the precise meaning of the expression "the validity of decisions of [a company's] organs" in Art 2(2)(m) of the Hague Convention. In a very recent decision, *Hassett v South Eastern Health Board* (C-372/07, judgment of 2 October 2008), the European Court of Justice held that a claim by a party, that a decision of a company's organ infringed the party's rights under the company's articles of association, did not concern the validity of a decision of the organ under Art 22(2) of the Brussels Regulation. If a similarly narrow view of Art 2(2)(m) is taken, then the difference between what is arbitrable and what falls within the scope of the Convention may be small. I am indebted to Paul Beaumont for this reference.

[45] While under Australian law a foreign arbitration clause in a sea carriage document is null and void (see *Carriage of Goods By Sea Act* 1991 (Cth) s 11(2)) this is not the position in other countries. See eg the United States: *Vimar Seguros y Reaseguros SA v M/V Sky Reefer* 515 US 528 (1995).

Member States to remove certain areas from the Convention by declaration under Article 21.[46] Taken together, these elements mark a strong departure from the New York Convention and hence cast some doubt on both the drafters' and the supporters' claims that the Hague Convention is the litigation counterpart to New York.[47]

Secondly, even if the Hague Convention were considered an effective reproduction of the New York Convention in the litigation context, this fact alone may not be sufficient to arrest the drift of parties to international arbitration. While the prospect of easier enforceability of arbitration agreements and awards has been a major reason for arbitration's popularity over litigation in cross-border disputes, this is not the only factor.

Another very important reason for choosing international arbitration over litigation is *neutrality*. In any cross-border dispute, where the parties are normally resident in different countries, the home courts of one party will obviously be more familiar to that person in terms of language and practices used and sometimes will even be perceived as biased against the foreign party, especially where the government which appointed the court is a litigant.[48] For this reason, the courts of either party are rarely chosen for dispute resolution. Choice of a third country's courts is also comparatively rare given the again understandable reluctance of parties to submit themselves to mutually unfamiliar court procedures.

In international commercial arbitration, by contrast, it is common to designate the "seat" of arbitration in a neutral third country, bearing the nationality or residence of neither party and to select a person either as sole arbitrator or chair of a three-person tribunal who also is from a third country. The seat will often have a great tradition of judicial and logistic support for arbitration as well as arbitral institutions with effective and internationally recognised procedural rules which have been employed in many disputes involving foreign parties. The contrast with the procedural rules and practices of many national courts which are primarily designed for local, not transnational disputes is clear.[49]

Another often cited advantage in favour of arbitration is *procedural flexibility*, specifically the power of the parties to adapt and customise their procedural

[46] See further discussion of Art 21 *infra*. Note that the number and scope of reservations to the New York Convention by contracting states has generally been limited. It is hoped that contracting states to the Hague Convention adopt a similarly restrained approach in making declarations under Art 21 although some commentators are predicting (and advocating) a wide exclusion of subject matter from the Convention – see eg Woodward, *infra* n 71.

[47] Two commentators assert that "the attempt [in the Hague Convention] to parallel the New York Convention has been sabotaged" because of the presence of wide exceptions (Talpis and Krnjevic, *supra* n 8, 35).

[48] A Redfern and M Hunter, *The Law and Practice of International Commercial Arbitration* (London, Sweet & Maxwell, 4th edn, 2004), 26, 31; C Brower, "Developments in International Commercial Law: The Global Court – The Internationalization of Commercial Adjudication and Arbitration" (1997) 26 *University of Baltimore Law Review* 9, 11.

[49] Redfern and Hunter, *supra* n 48, 31. See also W Craig, "Some Trends and Developments in the Law and Practice of International Commercial Arbitration" (1995) 30 *Texas International Law Journal* 1, 2.

rules to the particular dispute at hand and to select their own tribunal.[50] Many national arbitration laws (eg the 1985 UNCITRAL Model Law on International Commercial Arbitration) and the rules of most arbitral institutions are based on the principle of party autonomy and control over the process,[51] and consequently allow great variations in procedure. For example, it is possible to conduct an international arbitration on a documents-only basis, to dispense with discovery, the rules of evidence or sophisticated pleadings or to choose an arbitrator for his or her expertise in an industry or other technical area rather than legal background.

Privacy and confidentiality of the arbitral process are also regarded as important advantages relative to litigation as commercial parties normally prefer to keep their business and industrial practices and trade secrets away from public scrutiny.[52]

Of course, there can be disadvantages of international arbitration relative to litigation, with cost often being a major one, given that the tribunal and the administering institution (if there is one) have to be paid, unlike in litigation. So, in cases where the quantum in dispute is relatively low and the legal and factual issues are not complex, litigation in a respected national court may be an attractive option.[53] Yet, any suggestion that the Hague Convention will lead to the displacement of international arbitration by litigation seems far fetched.[54] First, as demonstrated above, the Hague Convention is not as close in content to the New York Convention as has been suggested and secondly, international arbitration offers advantages to parties other than the greater enforceability of agreements and awards, in particular the process itself.

3. The European Union Position

The European Commission has also very recently issued a proposal for a Council decision recommending that the Community "sign" the Hague Choice of Court Convention.[55] The Commission supports the Convention on the

[50] Redfern and Hunter, *supra* n 48, 28. See also Queen Mary College, University of London and PricewaterhouseCoopers, *International arbitration: Corporate attitudes and practices* (survey of inhouse counsel 2006) 2, 6 and M Bond, "A Geography of International Arbitration" (2005) 21 *Arbitration International* 99, 101-2.

[51] J Lew, "Achieving the Dream: Autonomous Arbitration" (2006) 22 *Arbitration International* 179, 196; P Bernardini, "The Role of the International Arbitrator" (2004) 20 *Arbitration International* 113, 115.

[52] Queen Mary College and PricewaterhouseCoopers, *supra* n 50, 2, 6.

[53] Brand and Herrup, *supra* n 30, 23-24.

[54] To be fair, not all supporters of the Hague Convention make such an expansive claim. Brand and Herrup argue merely that the increased certainty for choice-of-court agreements provided by the Hague Convention will enable parties to make a more "balanced choice" between international arbitration and litigation (*ibid*, 217.)

[55] European Commission, *Proposal for a Council Decision on the Signing by the European Community of the Convention on Choice of Court Agreements* Brussels 5.9.2008 COM(2008) 538 final. The EU Council

ground that it is designed to "offer greater certainty and predictability for parties involved in business-to-business agreements and international litigation by creating an optional worldwide alternative to the existing arbitration system".[56] Further, adoption of the Convention by the Community "would reduce legal uncertainty for EU companies trading outside the EU by ensuring that choice of court agreements and judgments by courts designated in such agreements were recognised by other contracting states".[57] Thirdly, adoption of the Convention "would complement realisation of the aims underlying Community rules on recognition and enforcement of judgments", in particular under the Brussels Regulation,[58] "by creating a harmonised set of rules within the Community in respect of third countries".[59]

Two points in particular should be noted here. First, the European Commission repeats the rationale for acceptance of the Convention referred to in the ABA Report, that it will enhance the status of litigation as an alternative to international arbitration in cross-border commercial disputes. The questionable accuracy of this prediction was examined above.

Secondly, a specific European interest in the Hague Convention is that its provisions are consistent with the current EU rules on jurisdiction and judgments as contained in the Brussels Regulation and Lugano Convention. Hence, the Convention offers an opportunity for the Community to export the EU rules to the rest of the world by applying them to non-EU third parties. In this way, the Brussels–Lugano "jurisdictional area" will be expanded outside Europe, at least in the field of choice-of-court agreements.

Of greater concern, however, are the further suggestions included in the Commission's Proposal. Specifically, according to an Impact Assessment prepared by the Commission,

> "it might be necessary for the Community to make a declaration under Article 21 of the Convention and thereby exclude from its scope matters relating to insurance contracts where the policyholder is domiciled in the EU and the risk or insured event, item or property is related exclusively to the EU and copyright and related rights where the validity of these rights is linked to a Member State."[60]

Before considering the effect of these possible proposals a comment should be made about Article 21 of the Convention. This provision enables a contracting state with a "strong interest in not applying this Convention to a specific

has approved a Decision to sign the Convention and will do so in Spring 2009. It leaves the decision on whether or not to have any Art 21 declarations to the ratification stage (see Beaumont, *supra* n 1).

56 Explanatory Memorandum to the Proposal, *ibid*, para 1.

57 *Ibid*, para 2.

58 Council Regulation (EC) 44/2001 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L12, 1

59 *Ibid*, para 5.

60 *Ibid*, para 14.

matter . . . [to] declare that it will not apply the Convention to that matter". Article 21 therefore allows contracting states "a seemingly unlimited power to . . . contract out of"[61] the Convention.

The first suggestion for a declaration under Article 21, concerning insurance, would reduce the scope of operation of the Convention in the following way. There is scope for conflict in insurance matters between the jurisdictional principles in the Brussels Regulation and the Convention[62] as there are a number of insurance contracts covered by the Convention but within the Regulation's prohibition on choice-of-court agreements.[63]

Article 26(6) of the Convention resolves conflicts between the Convention and rules adopted by a Regional Economic Integration Organisation where such an Organisation is a party to the Convention. Under this provision, where none of the parties is resident in a contracting state that is not a Member State of the Organisation, the rules of the Organisation (such as the Brussels Regulation) will prevail. But where one of the parties is resident in a contracting state that is not a Member State of the Organisation, the Convention will prevail.

So, for example, where one of the parties to a contract of insurance (eg the insurer) is resident in a contracting state to the Hague Convention (eg Canada) which is not a member of the European Union, the rules of the Convention will apply.[64] But, if the European Commission now recommends that the Community make a declaration under Article 21 not to apply the Convention in cases where the policyholder is domiciled in the EU, this will mean that the Canadian insurer would lose the benefit of, for example, an English choice-of-court agreement it had with a Dutch insured. In such a case, instead of the English court accepting jurisdiction under the Convention it would have to decline jurisdiction under the Regulation, since the choice-of-court agreement would be invalid.

The suggested copyright exclusion is also troubling. First of all, it is not clear what is meant by the expression "where the validity of these rights is linked to a Member State". Presumably such an expression would include cases where the validity of a copyright granted under the law of an EU Member State was challenged but also possibly cases where an EU-domiciled party holds copyright under the law(s) of a non-EU Member State and the validity of this right is placed in question.

The consequence of either interpretation (particularly the latter) would be to remove another category of subject matter from the Convention, although the practical effect will depend upon the number of cases involving choice-of-court clauses where the validity of copyright is raised as more than a preliminary question.

61 Fairley and Archibald, *supra* n 19, 430. Art 21 is examined by Beaumont, *supra* n 1.
62 *Explanatory Report*, *supra* n 24, 78 [302].
63 Brussels Regulation Art 13.
64 *Explanatory Report*, *supra* n 24, 79 [304].

4. The View of European Scholars

European commentators have expressed rather mixed views on the utility and value of the Convention. Two scholars,[65] both of whom were closely connected with the negotiation of the Convention are, not surprisingly, strongly supportive. While conceding that choice-of-court agreements are already "widely recognised"[66] in some countries with the result that the Convention's contribution will be "modest" in those places, this culture of recognition is not present in all nation states.

Other writers, however, have been less effusive. A common complaint has been the narrowness of the Convention and the width of the exceptions, although different views have been expressed as to the desirability of granting courts discretion. One English commentator[67] has bemoaned the rigidity of the Convention, especially in its requiring that choice-of-court agreements be enforced, regardless of the impact on third parties.[68] By contrast, a civil law writer[69] rejects any scope for court discretion in the text at all, even the apparently sensible power given to a court to enforce a judgment regardless of whether the grounds of non-recognition are available.[70]

5. Article 21: A Trojan Horse?

A more general matter of concern in the European Commission proposal is the intention to use the declaration procedure in Article 21 as a mechanism of excluding matters from the Hague Convention. If other nation states also see this method as a useful vehicle for protecting their national interests, the subject matter of what is already a reasonably narrow instrument could be further limited with serious damage done to the utility of the Convention.

The risk of Article 21 becoming a "Trojan horse" with the potential to reduce the Convention to a hollow shell is heightened when some of the US academic commentary on the Convention is examined. While the bulk of American scholarly opinion, as noted above, has been supportive, other writers have strongly questioned whether the US should accept the Convention in its current form. The theme running through these articles is that the Convention is fundamentally inconsistent with the approach taken to choice-of-court clauses in a

[65] T Hartley, "The Hague Choice-of-Court Convention" (2006*) European Law Review* 414; A Schulz, "The Hague Convention on Choice of Court Agreements" [2005] *Yearbook of Private International Law* 1.

[66] Hartley, *ibid*, 424.

[67] Briggs, *supra* n 14, 529, 531.

[68] See discussion at *supra* section 2.2.

[69] Thiele, *supra* n 23, 81.

[70] The text of Art 9 provides that "Recognition or enforcement *may* be refused if . . ." (emphasis added).

significant number of US states and so must be amended by US declaration under Article 21 to reflect this reality.

The leading US scholar advocating this view is Woodward,[71] who argues that there are two types of contract under the law of a number of US states in which foreign choice-of-court clauses are not currently recognised.

The first category is franchise contracts where some US states do not allow the parties to choose a forum different from that of the franchisee's place of residence. In effect, these US states treat franchisees as persons of weaker bargaining power who should be protected from jurisdictional choices imposed on them by (presumptively) more powerful franchisors. The only concession to or recognition of this unbalanced bargaining power principle under the Convention comes from the exclusion of consumers and employees. Since the term "consumer", however, is narrowly defined in the Convention as "a natural person acting primarily for personal, family or household purposes",[72] a person engaged in *any* business operation would likely be subject to the Convention provisions – including franchisees.[73]

The other category of contracts in which some US states will not recognise choice-of-court agreements is "mass market" agreements. While franchise agreements are reasonably capable of identification, "mass market" contracts are a much more nebulous category. In essence, such a contract involves a buyer acquiring a mass distributed contract or service such as an internet or utility connection. In a number of US states there is now a clear line of authority that where buyer and seller reside in different jurisdictions, arbitration or choice-of-court provisions designating the state or country of the seller will not be enforced, especially where the buyer would be deprived of class action relief in the forum.[74]

The most glaring such case is where the plaintiff buyer has suffered a small loss which would not be worth suing for in an individual suit in another state or country's court. The aggregate total of such individual claims, however, may be very large and so unless a class action mechanism is available to plaintiffs, the defendant service provider escapes liability entirely.[75]

Outside the class action context, other "mass market" agreements can exist, eg in intellectual property licences. Some US commentators have argued that such licences can be unconscionable when their standard terms are sought to be

[71] W Woodward, "Symposium Article: Saving the Hague Choice of Court Convention" (2008) 29 *University of Pennsylvania Law Review* 657. See also K Bruce, "The Hague Convention on Choice-of-Court Agreements: Is the Public Policy Exception Helping Click-Away the Security of Non-Negotiated Agreements?" (2007) 32 *Brooklyn Journal of International Law* 1103 and A Kerns, "The Hague Convention and Exclusive Choice of Court Agreements: An Imperfect Match" (2006) 20 *Temple International and Comparative Law Journal* 509.

[72] Hague Convention, Art 2(1)(a).

[73] Woodward, *supra* n 71, 680.

[74] *Ibid*, 685–9.

[75] *Ibid*, 685.

enforced against a small business library or non-profit organisation which had no opportunity to freely negotiate the terms.[76] Again, in such a case, it is argued, a choice-of-court agreement in favour of the licensor's court should not be recognised.

The response made to the problem of "mass market" contracts during the Convention negotiations was to say that the "manifest injustice" or "public policy" exceptions to Article 6 could cover egregious cases of abuse of bargaining power. As noted under section 2 above, the Explanatory Report regarded "manifest injustice" as embracing "reasons specific to that party that would preclude him or her from bringing or defending proceedings in the chosen court" which would arguably include the present issue.

The problem, however, according to writers such as Woodward, is that the manifest injustice/public policy exceptions operate only to reject one-off exceptional cases, whereas the issue here is that whole classes of contracts should be excluded.[77] Hence, the only way in which a blanket exclusion can be achieved is by means of a declaration under Article 21.

Moreover, it is rather amazingly argued that the making of such a declaration by the US to exclude franchise and mass market contracts is necessary to ensure the success of the Convention.[78] Such an approach is, it is argued, likely to be seen by other nation states as a less hypocritical and more transparent position than simply ratifying the Convention without modification and leaving the enforcement of such agreements to the US courts. Pursuing a declaration approach will give other nation states advance knowledge of the US position regarding franchise and mass market agreements rather than such countries' discovering this after the event when their choice-of-court agreements are not enforced in the US. Moreover, other nation states will interpret such a gesture as an example of American commitment and "leadership"[79] in relation to the Convention, which will inspire them to ratify the Convention in great numbers.

The logic of this argument is far from convincing. Surely it could be contended instead that if the US makes a declaration as proposed with respect to franchise and mass market contracts, then the effect may well be to *deter* other nation states from becoming parties to the Convention. Other countries, instead of interpreting such a declaration by the US as evidence of good faith, transparency and commitment to the Convention, are likely to see it as a post-negotiation attempt by the US to redraw the Convention in line with its own interests. Such a reaction would be understandable given the considerable amount of time spent

[76] Bruce, *supra* n 71, 1106–8. It should not be thought that this is a majority view, however. Other scholars have welcomed the broad coverage of intellectual property in the Convention – see Nanda, *supra* n 18, 783–4 and Talpis and Krnjevic, *supra* n 8, 32.

[77] Woodward, *supra* n 71, 707–8.

[78] *Ibid*, 718.

[79] *Ibid*, 663.

in the negotiations on the issue and the clear consensus to include such agreements within the scope of the Convention.

Consequently to say that the making of a declaration by the US under Article 21 in respect of franchise and mass market contracts would be interpreted as an act of leadership which would assist in the "recruitment" of other nations to the Convention seems fanciful. Indeed, other nation states are likely to see a Convention with the proposed US declaration as having less value than before because a significant category of agreements has been removed from what is already a narrow instrument. Moreover, other countries may be inspired by the US example to make Article 21 declarations of their own covering an ever-increasing range and variety of subject matter – as was suggested in the European Commission Impact Assessment.

Significantly, it has been suggested that China "may make some declarations in order to preserve features of its domestic law",[80] most notably to preserve Chinese exclusive jurisdiction over Chinese–foreign joint ventures.[81] In addition, it is likely that Canada will use Article 21 to exclude claims arising from asbestos injuries since this was the reason why it was "instrumental" in having Article 21 included in the text.[82] One can only hope that this transnational enthusiasm for Article 21 declarations does not lead to the Convention's "death by a thousand exemptions".[83]

The view that an expansive use of Article 21 by the United States may deter other countries' participation in the Convention is reinforced by the perception among some commentators that the United States "needs" the Convention more than other nation states given its historically liberal approach to recognition and enforcement of foreign judgments compared to elsewhere.[84]

Supporters[85] of Article 21 note that it also has a reciprocal effect in that other contracting states are not obliged to recognise a choice-of-court agreement or judgment of the country that made the declaration in relation to the subject matter of the declaration. It is also noted that a declaration under Article 21 does not "mandate non-enforcement" of choice-of-court agreements on the designated matter, but "merely removes from courts the obligation under the Convention to enforce"[86] such agreements.

Yet, such distinctions are likely to be small consolation to nation states which campaigned strongly for the inclusion of such agreements in the Convention. If

[80] Guangjian Tu, "The Hague Choice of Court Convention: A Chinese Perspective" (2007) 55 *American Journal of Comparative Law* 347, 365.

[81] *Ibid*, 354, 365.

[82] Black, *supra* n 38, 41.

[83] Litigation Convention Needs Private Backing, IBA Daily News, 28 September 2005, 13 (quoting Catherine Kessedjian) as cited in Adler and Zarychta, *supra* n 38, 37.

[84] Teitz, *supra* n 37, 548; Adler and Zarychta, *ibid*, 7.

[85] See eg Woodward, *supra* n 71, 707–8, 716, Brand and Herrup, *supra* n 30, 19 and Nanda, *supra* n 18, 780.

[86] Woodward, *ibid*, 712.

US courts will not enforce foreign choice-of-court agreements in franchise or mass market contracts or judgments derived from them, then it matters little that other countries' courts can, especially given the dominance of the US in international trade and commerce. Indeed, and probably for this reason, scholars outside the US have welcomed the inclusion of such agreements in the Convention[87] with one writer hoping that the US would not exempt them by declaration.[88]

D. Conclusion

The aim of this paper has been to assess whether the Hague Choice of Court Convention is likely to be considered as a great monument in the harmonisation of jurisdiction and judgments law or whether its impact will be regarded as negligible. Given the length of the negotiations leading up to the Convention, the expectation was that a more far-reaching and expansive treaty would be achieved. Yet equally, given the at times fraught and polarised nature of the negotiations, it is perhaps extraordinary that any agreement was reached at all.

While the text is limited in its scope and has potentially wide exceptions and opportunities for evasion (especially Article 21), the Convention could still prove to be a valuable and effective instrument in injecting greater certainty and reliability into international contracts and litigation. What is required to achieve this outcome is that governments and courts of nation states put aside their parochial, domestic interests in favour of the goal of multilateral harmonisation. It will be only then that the Convention may truly come to be seen as the counterpart to the New York Convention on arbitral agreements and awards.

[87] Talpis and Krnjevic, *supra* n 8, 7.
[88] Thiele, *supra* n 23, 87.