The Hague Convention on Choice of Court Agreements

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The Hague Convention on Choice of Court Agreements might achieve for litigation what the New York Convention managed for arbitration. The Hague Convention on Choice of Court Agreements (30 June 2005) entered into force October 1, 2015.

Some observers say that the pro-arbitration trend in international commercial transactions could shift in favor of litigation as a result of the coming into force last year of a treaty that makes it easier to enforce choice-of-court agreements (or 'forum selection clauses') and foreign court judgments. The Hague Convention on Choice of Court Agreements aims to create a system of recognition of court decisions with the same level of predictability and enforceability as arbitral awards under the New York Convention.

Could the Hague Convention on Choice of Court Agreements achieve for litigation what the New York Convention has secured for arbitration?

The New York Convention v the Hague Convention

The 1958 New York Convention has been in force for more than 55 years, in which time it has secured 156 ratifications and seen the publication of influential academic materials and a growing body of case law from across jurisdictions, enabling a degree of common interpretation of the meaning of its 16 articles.

The New York Convention lays down two fundamental provisions. The first provides that 'each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any difference'. The second states that 'each Contracting State shall recognize arbitral awards as binding and enforce them'. In practice, this means that when the parties agree to resolve their dispute through arbitration, they know that the subsequent award will be almost universally enforceable. Where any party elects to ignore the arbitration agreement or avoid the consequences of the award, the affected party can also submit a request to the tribunal of the contracting state to refer the parties to arbitration and/or enforce the award (articles 2 and 3). The Hague Convention on Choice of Court Agreements contains similar provisions regarding the recognition of choice of court agreements and the resulting judgments from such courts.

The Hague Convention on Choice of Court Agreements has to date been ratified only by Mexico and the European Union (excluding Denmark). It contains 34 articles, so one cannot presume the same level of understanding as now exists around the New York Convention (which contains half as many articles). However, the Hague Convention on Choice of Court Agreements was created by the Hague Conference on Private International Law – an organization founded in 1893 and which, in 2015, had 79 countries and the European Union as members – so is clearly an important instrument to be factored into strategic planning for international disputes.

Client resource

2015 Litigation Trends: annual survey

Norton Rose Fulbright's 2015 survey polled more than 800 corporate counsel representing companies across 26 countries on disputes-related issues and concerns. Around 25 per cent of the individuals polled believe that the number of legal disputes their company will face in the next 12 months will increase. 'Given the choice, nearly half of respondents prefer to use arbitration as a means of resolving disputes, with one-quarter preferring litigation and about the same proportion saying 'it depends'.'

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