

# Hague Convention on Choice of Court Agreements: Impact and Opportunity

By Thomas C.M. Turner & Frederick A. Acomb



On October 1, 2015, the Hague Convention on Choice of Court Agreements entered into force, binding each ratifying country – to date Mexico and all of the members of the European Union, except Denmark.<sup>1</sup> The United States and Singapore have each signed the Convention, though neither has yet ratified it.<sup>2</sup>

The purpose of the Convention is to increase the enforceability of forum selection clauses,<sup>3</sup> in which parties to international commercial contracts agree that their disputes will be decided by the courts of a specific jurisdiction.<sup>4</sup> While the United States has not yet ratified the Convention, the effects of the treaty nevertheless are likely to be felt by U.S. companies that participate in global commerce, especially those with assets in ratifying countries due to the advantages offered by the Convention and the dynamic and interconnected nature of modern global commerce. As a consequence of the Convention, when United States companies that participate in global commerce are negotiating with companies headquartered in ratifying countries, those companies located in ratifying nations will be more likely than before to insist on dispute resolution clauses calling for the parties to resolve their disputes in the courts of a ratifying country in order to benefit from the Convention. Although courts in the U.S. would not be bound by the parties' choice of forum, the courts of every ratifying country would be bound by it.

## The Mechanics of the Convention

The Convention seeks to increase the enforceability of forum selection clauses and compel cross-border enforcement of final judgments, effectively accomplishing for forum selection clauses what the New York Convention on Foreign Arbitral Awards<sup>5</sup> achieved for international arbitration agreements.<sup>6</sup> The Convention endeavors to do this in three ways: (1) by requiring that the contractually selected court hear disputes arising from cross-border commercial contracts;<sup>7</sup> (2) by demanding that other courts decline to hear those disputes;<sup>8</sup> and (3) by requiring that the final judgment of the court selected by the parties be recognized and enforced by the courts of other ratifying countries.<sup>9</sup>

The Convention limits its scope in several important ways. For example, the Convention is limited to exclusive forum selection clauses – that is clauses limiting the resolution of disputes to a single jurisdiction.<sup>10</sup> This limitation is tempered by the fact that the Convention provides a presumption that a

forum selection clause is exclusive unless otherwise expressly stated.<sup>11</sup> Moreover, ratifying countries may elect to extend the scope of the Convention to non-exclusive clauses.<sup>12</sup>

The Convention also applies only to civil and commercial international agreements between non-state parties,<sup>13</sup> and excludes a number of subject matter areas including intellectual property, insolvency, family law, and most tort claims.<sup>14</sup> The Convention does apply to out-of-court settlements<sup>15</sup> but does not apply to interim measures of protection, such as temporary restraining orders<sup>16</sup> or preliminary injunctive relief.<sup>17</sup>

The Convention further includes a number of bases for declining to enforce judgments, including judgments in cases containing procedural defects,<sup>18</sup> cases implicating domestic public policy,<sup>19</sup> awards that include exemplary or punitive damages,<sup>20</sup> and cases lacking a sufficient nexus between the forum country and the contracting parties.<sup>21</sup>

## Potential Benefits of the Convention

The Convention offers a number of important advantages. It promises private parties negotiating forum selection clauses greater certainty that their choice will be respected and implemented,<sup>22</sup> and assures disputants that final judgments will be enforced in the courts of ratifying countries without the need to re-litigate, substantially streamlining the process of enforcing judgments.<sup>23</sup>

Ratifying countries also stand to benefit from the Convention. The courts of ratifying countries presumably will be more desirable to contracting parties due to the easy reciprocal enforcement of judgments. This increased desirability will likely expand the influence of the law of that country in international commerce.<sup>24</sup>

Finally, for some time, the lack of certainty in respect to the international enforceability of forum selection clauses has resulted in the prevalence of arbitration, rather than litigation, in international dispute resolution. If ratified by a sufficient number of jurisdictions, the Convention promises to bring litigation into parity with arbitration in terms of enforceability, but without the costs of paying arbitrators and arbitral



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institutions.<sup>25</sup> The parity between litigation and arbitration will especially benefit small and medium sized businesses that would prefer not to pay arbitrators and arbitral institutions.<sup>26</sup> Ratifying countries will also likely benefit as nations have an interest in ensuring the fair treatment of their citizens in dispute resolution proceedings.

### Status in the United States

Since signing the Convention in January 2009, the United States has made little progress towards ratification and implementation. This is due, in part, to the complications of enforcing the Convention in the U.S. legal system.<sup>27</sup>

If ratified, one of three methods would likely be used to implement the Convention. First, Congress could introduce legislation implementing the Convention. Many have expressed concern, however, that such a scheme would infringe on powers traditionally reserved to the states.<sup>28</sup> Second, the Uniform Law Commission could promulgate a model statute to be adopted by the legislature of each state. This method risks non-uniform adoption and therefore complex implementation, undermining one of the key rationales for the Convention – certainty that the courts of ratifying nations will enforce forum selection clauses. Finally, a compromise scheme of “cooperative federalism” could be employed, utilizing federal legislation while permitting states to opt out in favor of a complimentary uniform act.<sup>29</sup> This method may, however, cause confusion as to when the federal legislation, as opposed to state rules, would control.<sup>30</sup> The United States Department of State has proposed implementing legislation utilizing the “cooperative federalism” approach.<sup>31</sup> Although imperfect, this solution is most likely to win bipartisan support and move the United States towards ratification and implementation of the Convention.

### The Impact of the Convention

The impact of the Convention is blunted significantly by the fact that only the courts of ratifying countries – to date, most of the E.U. plus Mexico – are bound by it. Nevertheless, a party need not be a citizen of a ratifying country to feel the impact of the Convention. This is especially true for United States companies participating in international business with assets or interests in one or more ratifying countries. As a result of the Convention, when these U.S. businesses negotiate with companies headquartered in ratifying countries the latter will be more likely to insist on dispute resolution clauses calling for the parties to resolve their disputes in their home courts. This is because judgments issued by the courts of ratifying countries would be more easily enforced in the courts of other ratifying countries. Although United States courts would not be bound by the parties’ choice of forum or compelled to enforce final judgments issued by the selected court, the courts of every ratifying country would be.

Of course, if the United States were to ratify the Convention and adopt implementing legislation, the Convention would have a much greater impact in the U.S. The Convention would likely yield significant advantages. 🌐

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### Endnotes

- 1 Press Release, European Council, *Hague Convention on Choice of Court Agreements: Approval on Behalf of the EU* (June 11, 2015), available at [www.consilium.europa.eu/en/press/press-releases/2015/06/11-hague-convention/](http://www.consilium.europa.eu/en/press/press-releases/2015/06/11-hague-convention/) (hereinafter EU Press Release).
- 2 Hague Convention on Private International Law, *Status Table* (last update June 19, 2015), available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>.
- 3 Forum selection clauses are also sometimes known as jurisdiction clauses or choice-of-court agreements.
- 4 The Convention applies only to “choice of court agreements” and not to choice-of-law agreements. Convention, Art. 3.
- 5 New York Arbitration Convention, *The New York Convention*, available at [www.newyorkconvention.org/](http://www.newyorkconvention.org/). The New York Convention provides that the courts of ratifying nations must recognize and enforce arbitration agreements and awards in connection with international commercial contracts.
- 6 Peter D. Trooboff, *Proposed principles for United States Implementation of the New Hague Convention on Choice of Court Agreements*, 42 N.Y.U. J. Int’l L. & Pol. 237, 237 (2009).
- 7 Convention, Art. 5.
- 8 Convention, Art. 6.
- 9 Convention, Art. 8.
- 10 Convention, Art. 1; David Waldron, Audrey Dwyer and Adam Wallin, *Hague Convention Choice of Court Agreements to Take Effect in October* (Morgan Lewis LawFlash) July 13, 2015, at 1; Daniel H. Laguardia, Stefan Falge and Helena Franceschi, *The Hague Convention on Choice of Court Agreements: A Discussion of Foreign and Domestic Points*, 80 U.S.L.W. 1803, 1803 (2012). The preference in the Convention for exclusive forum selection

- clauses is contrary to prevailing United States law. Trooboff, at 243.
- 11 Laguarda, at 1804.
  - 12 Convention, Art. 22.
  - 13 Convention, Art. 1 and Art. 20.
  - 14 *Ibid.*
  - 15 Convention, Art. 12.
  - 16 Convention, Art. 7.
  - 17 Convention, Art. 10.
  - 18 Convention, Art. 9(a)-(d).
  - 19 Convention, Art. 9(e) and Art. 21..
  - 20 Convention, Art. 10.
  - 21 Convention, Art. 19.
  - 22 Laguardia at 1803.
  - 23 William J. Woodward Jr., *Saving the Hague Convention*, 29 J. Int'l L 657, 659 (2008); Waldron at 3.
  - 24 Ted Folkman, *COCA Update*, Letters Blogatory (February 11, 2016), <https://lettersblogatory.com/2016/02/11/coca-update/>.
  - 25 Michael D. Goldhaber, *The Global Lawyer: A Lack of Judgment*, Am. Law., July 8, 2015; and Trooboff at 241-242.
  - 26 Trooboff at 241-242; Goldhaber at 2.
  - 27 Alexander Kamel, Note, *Cooperative Federalism: A Viable Option for Implementing the Hague Convention on Choice of Court Agreements*, 102 Geo. L. J. 1821, 1823 (2014); Goldhaber at 2; Woodward at 659; and United States Department of State, *Memorandum of the Legal Adviser Regarding United States Implementation of the Hague Convention on Choice of Court Agreements*, available at [www.state.gov/s/l/releases/2013/206657.htm](http://www.state.gov/s/l/releases/2013/206657.htm). Article 28 of the Convention anticipates the potential complication of implementing the Convention in countries having more than one legal system and provides that such countries may elect to adopt the Convention in less than all of its territories.
  - 28 Kamel at 1823, Laguardia at 1807, Woodward at 659-59.
  - 29 Laguardia, at 1805-09.
  - 30 See generally, Theodore J. Folkman, *Hague Convention on Choice of Court Agreement Comes into Effect*, Int'l Disp. Resol. News, Winter 2016, at 1, 1 (Winter 2016).
  - 31 Memorandum of Legal Adviser at 1-2.

## A Global Approach to Mastery of Food Laws and Regulations

By Mark Meyer

The Michigan State University College of Law's Global Food Law Program – the first and only to offer a master's degree in global food law – is designed to educate anyone who would like to better understand the complexities of food law and regulation.

And it's not just for lawyers.

Our graduates are leaders in their organizations. They are the go-to resources for legal and regulatory advice in the United States and around the world, at companies such as Berrilla, Country Fresh, Kellogg's, Nestlé, PepsiCo and Sara Lee Foods. Their diverse educational backgrounds have instilled a common desire to embrace food industry challenges related to laws and regulations. Hence, the program offers two tracks: a master of laws for practicing lawyers and a master of jurisprudence for those without law degrees.

Many of the students began their careers as scientists, nutritionists, researchers, and upper level managers, and hold degrees in food science, food safety, nutrition and microbiology – to name a few. The Global Food Law Program, which is completely online, allows students to maintain a work-life balance without putting their careers on hold.

Taking an online degree program is a very different experience than being physically present on a university campus. Convenience and flexibility replace the typical face-to-face learning experience. You can take classes in your office or on your couch, at noon or at 3 a.m.

Discussions and communications take place through e-mail and Internet exchanges. Students in the online Global

Food Law program are encouraged to join the group Facebook page and to otherwise get to know other students, faculty, and staff. No matter where you are in the world, once you join our program you are a Spartan and a member of our law college community. Although your physical presence on our campus will never be required, you are always welcome to visit us on campus in East Lansing.



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After enrolling in the program, students work with advisors each semester to enroll in an online course (or courses), choosing from a menu of available options provided by the MSU College of Law and the MSU Institute for Food Laws and Regulations. Students selecting courses made available by the Institute will enroll in those courses through the College of Law, and all billing is done through the College of Law.

As with most law school classes on campus, you should plan for three to four hours of homework each week for each credit you take in the fall or spring terms. Summer courses are condensed into seven weeks, so you should expect more hours of homework during summer term.

Courses are typically taught in a series of sections or "modules." Each module covers a specific topic or issue. Once a module is posted, it will remain online for the entire semester. However, professors may not actively check past modules for discussion items and questions, and most professors will